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CORRECTIONS.

PAGE.

In abstract of Bridgeford, Trustee v. Owen, &c., *found* in third line from last should be *fund* 116

Insert *her* after first *by* in second line of page 155

Were not sureties should be *were sureties* in seventh line of third paragraph of syllabus 451

One should be *are* in last line of page 509

Appellee's should be *appellant's* in last line of first paragraph of syllabus 622

See, on page 728, the modification of opinion in Ches., O. & S. W. R. R. Co. v. Heath's adm'r 649

"32" should be "92" in first line of syllabus 836

Insert *the defendant* after *yet* in eighth line of syllabus, and strike out second *he* in ninth line 889

Had no notice should be *had notice* in fourth line of third paragraph of syllabus 958

ERRORS IN VOLUME 86, KENTUCKY REPORTS.

In line 18, page 629, *was* instead of *were* should follow *which*.

In line 14, page 634, *excluded* should be *included*.

In line 16, page 364, insert *not* after second *was*.

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KENTUCKY COURT OF APPEALS.

SIZEMORE V. COMMONWEALTH.

(*Filed Dec.* 17, 1887—*Not to be reported.*)

Evidence—Accomplice—It is not the mere fact that a person is charged with a crime in connection with another that makes him an accomplice within the meaning of section 241 of the Criminal Code. In order to make him an accomplice it is necessary that his criminal participation in the crime charged should be shown by the evidence.

Walter S. Harkins for appellant.

P. W. Hardin for appellee.

Appeal from Floyd Criminal Court.

Opinion of the court by Judge Bennett.

The appellant was tried and convicted in the Floyd Circuit Court of the crime of murdering Abner Little, and his punishment was fixed at confinement in the State penitentiary for life. From the judgment of the lower court overruling his motion for a new trial he has appealed to this court.

The appellant was jointly indicted with William and Noah Johnson and others. The Commonwealth's attorney, before the trial of the appellant, dismissed the indictment against William and Noah Johnson. The Commonwealth's attorney, during the trial of the appellant, introduced William and Noah Johnson as witnesses against him. The testimony of these two witnesses doubtless had much to do with convicting the appellant. The appellant contends that these two witnesses were accomplices, and that the lower court should have instructed the jury under sec. 241 of the Criminal Code, which provides: "A conviction can not be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof."

It is not the mere fact that a person is charged with a crime in connection with another person that makes him an accomplice. In

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order to make him an accomplice it is necessary that his criminal participation in the crime charged should be shown by the evidence. The evidence in this case is conclusive that these two witnesses were not criminal participants in the murder of Abner Little; that they were summoned by the appellant to assist in the arrest of Abner Little and others who were charged with crime; that they were told by the appellant that he had the authority to make the arrest; that he threatened to have them fined and imprisoned if they refused to obey his summons; that they believed he did have the authority to make the arrest, and to summons them to assist in making it, and to have them fined and imprisoned in case they refused to obey the summons; that thus believing, they went with him to the place of the killing for the purpose of assisting in making the arrest, but did not participate in the difficulty that resulted in the killing of Little. We think, therefore, that the lower court did not err in refusing to instruct the jury as requested.

The indictment charged the appellant and others as principals in the killing of Little; also as aiders and abettors; also as conspirators. The proof shows that Little was ambushed and shot down by some persons; that the attack upon Little was pre-arranged by these persons and the appellant; that while he was not with the crowd that did the killing, he was near enough to aid them if necessary; that he had no authority to arrest Little.

The lower court clearly, fully and properly instructed the jury upon the law of principals, aiders, abettors and conspirators, and properly overruled the instructions asked for by the appellant.

The judgment is affirmed.

PRESTON, &c. v. BRECKINRIDGE, &c.

(*Filed Jan.* 31, 1888.)

1. *Judicial sales—Defective title*—Where a purchaser at judicial sale obtains the title which the court, by its decree, proposed to sell, he can not claim an abatement of the purchase price because the court is not able to make him a clear title to a part of the land.

A decree for the sale of land contained this recital: "The sale shall pass to the purchaser all the title of George Nicholas and of those claiming under him who are parties to this suit or purchasers *pendente lite*." The purchaser claims an abatement of the purchase price because the court can not make him a clear title to a part of the land which is, and for many years has been, held adversely, but it is not contended that, barring this adverse holding, the title would not be in George Nicholas' devisees or those parties to the suit who claimed under Nicholas or *pendente lite* purchasers. The land to which the purchases obtained a clear title is worth much more than they agreed to give for the whole. Not long after the purchasers raised the question that a part of the land was adversely held, the plaintiffs offered in open court to have the sale set aside and the bond cancelled, and to take that part of the land, the title to which was undisputed, for their debt, interest and cost, but this offer the purchasers rejected, insisting upon holding the land and having an abatement of the purchase price. *Held*—That the purchasers can not complain, as they obtained all that the court proposed to sell them. Moreover, the offer of the plaintiffs to have the sale set aside and to take the land for their debt, which was rejected, and the fact that the land obtained by the purchasers is worth much more than they bid for the whole, constitute a strong equity in behalf of the plaintiffs.

2. *Same—Champerty*—Our statute which provides that all sales of land held adversely shall be void does not apply to judicial sales.

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3. *Same—Sale bonds—Limitation*—Where the court, at the instance of the purchasers at a judicial sale, and against the objections of the plaintiffs, ordered a stay of execution on the sale bond until an investigation as to the title to the land and the report of the commissioner thereon could be made, the time intervening between the issual of the order and the report of the commissioner should be deducted in determining whether or not the right to issue execution is barred by the fifteen years' statute of limitation.

4. *Same*—The fact that the commissioner took one bond for the aggregate amount of the purchase money, when the land was sold by the decree of the court in separate parcels, did not invalidate the bond as a statutory bond, as this arrangement was preferred by the purchasers and the court approved the bond as taken.

5. *Same—Judgment*—The fact that the judgment recites that the court reserves the power of putting the purchaser in possession of the land sold adds nothing to the judgment, as the court possessed that power independently of the express reservation of it in the judgment.

6. *Revivor—Estoppel*—An administrator, the plaintiff in an action, having resigned pending the action, his successor set up by petition the resignation of his predecessor and his own appointment, and the administrator was henceforward treated as plaintiff by the court as well as all parties to the litigation, including the purchasers at a sale made under decree in the action, although he was not by formal order substituted by the court as plaintiff. *Held*—That the purchasers can not now be heard to complain that he was not formally substituted as plaintiff.

Wm. Lindsay, Brown, Humphrey & Davie and Wm. Preston for appellants.

M. C. Johnson, J. D. Hunt and John T. Shelby for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Bennett.

On the 6th day of August, 1795, John Breckinridge and George Nicholas purchased of John Lee one-half of Joseph Blackwell's land entry, which contained 19,062½ acres. The half of the entry thus purchased by Breckinridge and Nicholas was surveyed, and the survey was assigned to them, upon which a patent was issued to them for 9,531¼ acres. Breckinridge and Nicholas agreed to pay John Lee ten pounds for each hundred acres of said land, the title to which should prove to be indisputable.

On the 1st of March, 1798, Breckinridge sold to Nicholas and W. Beal his half of so much of said survey as was within a circle of three miles of the forge of the iron works company on Slate creek. In consideration of this conveyance Nicholas and Beal agreed with Breckinridge to pay to John Lee the purchase price of the land sold them by Breckinridge. There were 4,155¼ acres of land within this circle, of which Nicholas owned three-fourths and Beal one-fourth. Outside of the circle there were 5,376 acres of land which Breckinridge and Nicholas owned in equal parts.

Lee, Breckinridge and Nicholas having died, and no part of the purchase money having been paid, Lee's executors brought suit at law against Breckinridge's administrators for the whole purchase money of the 9,531¼ acres.

On the 12th day of September, 1811, after Lee's action was commenced, Breckinridge's administrators brought their action in equity against Lee's executors, Nicholas' executors and devisees, W. Beal and others. The purposes of this action were, first, to compel Lee's executors to exhibit an indisputable title to said land;

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second, to compel Nicholas' executors and W. Beal and others to pay the entire purchase money for all the land within said circle; third, to compel Nicholas' executors to pay one-half of the purchase money for the 9,375¼ acres lying outside of the circle; and to enforce the lien on the whole 9,531¼ acres for the purchase money.

Lee's executors obtained a judgment against Breckinridge's administrators for the whole of the purchase money; but it was not until 1829 that they succeeded in collecting it from them.

In 1858 Breckinridge's administrators succeeding in obtaining judgment, enforcing their lien for the purchase money, which they had been compelled to pay to Lee's executors, upon the 9,531¼ acres of land.

Robert Wickliffe, a purchaser, *pendete lite*, and Nicholas' representatives and others, appealed the case to this court. During the pendency of the appeal Robert Wickliffe died, and the case was revived in the name of his executors. This court decided the case in 1866.

It was held by this court that Breckinridge and Nicholas by their purchase acquired an indisputable title to the 9,531¼ acres of land; that Lee retained a lien upon the 9,531¼ acres of land for his purchase money; that Breckinridge's administrators having paid the whole purchase money to Lee's executors, they were entitled to be substituted to Lee's lien upon the land, except the one-half of the 5,376 acres lying outside of the circle, which half Breckinridge did not sell to Nicholas and Beal. Therefore, the judgment of the lower court was affirmed, in so far as it adjudged a lien upon all the land within the circle, and decreed a sale of it for the whole purchase money of that portion of the land; and in so far as it adjudged a lien upon Nicholas' half of the 5,376 acres lying outside of the circle. But the case was reversed upon the sole ground that the lower court should have executed the lien on Nicholas' half of the land lying outside of the circle before proceeding to subject other property in the hands of Nicholas' representatives to the discharge of this lien. It was also decided that Robert Wickliffe was a mere *pendente lite* purchaser, which purchase was subordinate to the rights of the administrators of Breckinridge. For a full history of the case see Robert Wickliffe's ex'rs v. Breckinridge's adm'rs, 1 Bush, 427.

The circuit court, in strict accordance with the mandate of this court, on the 26th of July, 1867, decreed a sale of all the land within the circle and one-half of that lying without the circle.

The commissioner, pursuant to the directions of the decree, on the 14th of October, 1867, sold the land in separate parcels on a credit of twelve months. The appellants purchased the same at a sum sufficient to pay the debts, including interest and costs, against it. The appellants, on the day of the purchase, executed bond for the purchase price, which bond became due on the 14th day of October, 1868. The sale, together with the bond, was duly reported to court, and the sale was confirmed on the 2d of November, 1867.

The appellants being satisfied with the title to all the land lying within the circle, they paid, after the maturity of the bond, the purchase money, including the interest thereon, for all the land lying within the circle. But after the confirmation of the sale, and about the time of the maturity of the bond, they filed a petition in the case in which they alleged that the land lying outside of the circle, which was sold by the commissioner as Nicholas' moiety, was at the time of sale and confirmation held in adverse possession by various persons other than claimants under Nicholas, who were

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parties to the suit, and *pendente lite* purchasers. They asked the court to put them in possession of this land before compelling them to pay the balance of the purchase money.

Several amendments, responses and orders were made between that time and the February term of court, 1884. Such of these proceedings as we deem necessary to be noticed will be noticed hereafter.

At the February term, 1884, the appellee commenced proceedings for an order to enforce payment for the sale bond, either by execution or by an order of attachment. The appellants resisted the proceedings upon the ground, among others which will be noticed hereafter, that at the time of the judgment, sale and confirmation, and for a long time before, the land outside of the circle was in the adverse possession of various persons other than *pendente lite* purchasers and claimants under Nicholas, who were parties to the suit; that the judgment and sale of this land were, therefore, void; and that the sale, to the extent of this land, should be set aside, and their bond cancelled.

Upon the hearing of these defenses the lower court disregarded them, and awarded execution for the unpaid balance of the purchase money. The appellants have appealed to this court.

While the parcels of land within and without the circle were sold separately, yet this was done merely for the purpose of classifying the land; both boundaries were liable for the same debt, which was secured by the same lien; the same persons purchased both boundaries, and executed one bond for the aggregate amount of the purchase money.

It is conceded that the land to which the appellants got a good and clear title is worth much more than the appellants agreed to give for the whole land. It also appears that the appellee, not long after the appellants raised the question as to the land in controversy being in adverse possession, offered, in open court, to have the sale set aside and the appellants' bond cancelled, and to take that part of the land, the title to which was undisputed, for their debt, interest and costs. This offer the appellants refused, claiming that they were entitled to a specific performance of the contract of purchase as to all the land to which they could get a good title, and to an abatement of the contract price for the portion of land to which the court could not make them a good title.

What interest in the land did the court sell, and what interest did the appellants purchase?

The judgment answers both of these questions. It says: "The sale shall pass to the purchaser all the title of George Nicholas, and of those claiming under him who are parties to this suit or purchasers *pendente lite* in the 5,376 acres of land, it being the moiety of said George Nicholas, and of those claiming under him, that is hereby sold."

It is clear that George Nicholas, at the time the suit in 1811 was commenced, had a clear title to this land, the only encumbrance thereon being Lee's lien. It is clear that at said time there was no adverse holding of this land by others than *pendente lite* purchasers. If any persons other than *pendente lite* purchasers have made an adverse entry upon the land since 1811, the time of such adverse entry does not appear. The allegations are, that at the time of the judgment and sale, and for a long time prior thereto, such adverse holding did exist. Also, it is not contended that, barring this adverse holding, the title to said land would not be in Nicholas' devisees, or

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those parties to the suit who claimed under Nicholas, or *pendente lite* purchasers.

The court offered to sell, and did sell, the title of George Nicholas and of those claiming under him who were parties to the suit, and *pendente lite* purchasers. The title of these, and none other, the court sold. It did not propose to hazard a sale of any other title. Whatever title these parties had was sold. If outside intervening interferences had ousted the title of these parties and established a title in others, the court says by convincing implication, if not in so many words, it did not mean to sell that title. Of this unmistakable language of the court the purchasers were notified before they purchased.

As it is not shown the title to this land had been changed into other hands so as to defeat any title that the court might make, by reason of the conduct of the persons claiming under Nicholas who were parties to the suit, or by *pendente lite* purchasers, the appellants got at the sale all that the court proposed to sell them. Further, observe how guarded the language is, for the court limits the sale to the title of Nicholas and his devisees and those who are parties to the suit claiming under Nicholas, and *pendente lite* purchasers, but denies itself the right to sell the title that any other person might have acquired from Nicholas or from other sources, thus requiring the purchaser to look out for titles or adverse interests from such other sources.

In addition to these considerations a strong equity confronts the appellants. The land that they actually acquired by their purchase is worth much more than they agreed to give for the whole. The appellees offered to set aside the sale, cancel their bond, and take the land, the title to which was undisputable, for their debt, interest and costs. This offer the appellants rejected, and insisted on holding this land and receiving an abatement of the purchase price for the balance of the land, thus causing a clear loss to the appellee and leaving him without remedy, while the appellants' purchase, already enormously profitable, would be increased to the extent of thousands of dollars by receiving an abatement of the price of the disputed land.

For the foregoing considerations we can not concur in the appellants' contention.

But it is insisted that the judgment and sale, in so far as any of the land at the time was held by adverse possession, were void, as contravening the statute against champertous sales of land.

The statute of 1824 provided in substance that all sales of land in the adverse possession of another, whether by executed or executory contract, should be void. The Revised Statutes contained substantially the same provision, with the addition of "including sales under execution." The General Statutes contain substantially the same provision as that of the Revised Statutes.

Champerty, by the common law, consisted in a person's upholding a controversy, he having no rightful interest therein under a contract to have a part of the property or subject in dispute. The statutes, *supra*, therefore, were not merely declaratory of the common law, but they made new and additional provision.

The statute of 1824 was silent upon the subject of execution and judicial sales. This court construed that statute as not applying to execution and judicial sales. The distinction between an execution and judicial sale—the former being a ministerial and the latter a judicial act—was doubtless well known to the profession and the law makers. So when the Revised Statutes were enacted the provision against champerty was made to "include sales under execu-

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tion," but not judicial sales. So, also, the same provision is incorporated in the General Statutes.

As just intimated, the act of 1824 was intended to apply to voluntary sales and transfers of title. It was thought best, for the peace and repose of society, that persons should not stir up strife, contention and animosities by selling or transferring land in the adverse possession of another, but when a person's land was sold by judicial sale he could not be said to have sold it. Its sale might be against his will. The court ordered the sale, and the court, by its commissioner, made the sale. The court was not required to institute a search in order to find out whether or not any other person held the adverse possession of the land. The person and his title were before the court, and the court having jurisdiction of both, and seeing that the title was in the person, and that another party before the court had the right to have the title sold, no further inquiry was necessary. Saunders' heirs v. Groves, 2 J. J. Marshall, 408; Little & Tungate v. Bishop & McCann, 9 B. Mon., 240; Drinkwater v. Drinkwater, 4 Mass., 354; Willard v. Nason, adm'r, &c., 5 Mass., 241; 14 Ala., 350; Cook v. Travis, 20 N. Y., 400; McGill v. Doe, 9 Ind., 306; Stevens v. Hauser, 39 N. Y., 302; Dubois & Longer v. Marshall, 3 Dana, 337.

Thus stood the law down to the time of adopting the Revised Statutes. The provision of that statute relative to champerty reenacted the statute of 1824 upon that subject, except sales under execution were included in the Revised Statutes.

Also the General Statutes have the same provision in reference to executions. We conclude that these two statutes were adopted with reference to the construction that had been given the act of 1824, and that the provisions in these two statutes were intended to have the same meaning as the act of 1824, as interpreted by this court, except in so far as a change was expressly made by "including sales under execution." The reason why sales under execution were excluded is readily seen when it is considered that the officer making the sale is a ministerial officer, whose duty it is to investigate for himself not only whether the execution defendant has title to the land, but whether it is adversely held. This latter fact is not required of the chancellor, hence the statute does not embrace judicial sales.

It is also contended that by the failure to issue execution on the sale bond for more than fifteen years after the maturity of the bond the right to issue the execution was barred.

This position would be well taken but for the fact that the circuit court, at its December term, 1868, at the instance of the appellants and against the objections of the appellees, ordered a stay of execution on the sale bond until the investigation of the title to the land in dispute and the report of the commissioner thereon could be made. The commissioner made no report until 1871. This order, made at the instance of the appellants, was certainly a valid and binding order, which prevented the appellees from issuing execution on the bond; and the order having been taken at the instance of the appellants, it is certainly not right for them to be allowed to take advantage of the delay caused by it in order to escape from the payment of the bond. Deducting the time intervening between the issual of the order and the report of the commissioner, the statute of fifteen years does not apply.

Robert T. Breckinridge, at the time the judgment was rendered and the sale of the land thereunder, was the administrator of John Breckinridge, but he resigned, and the appellee, W. C. P. Breckinridge, was, on the 8th day of January, 1868, appointed administrator instead of Robert T. Breckinridge. Shortly afterwards he, by peti-

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tion, set up the fact of the resignation of Robert T. Breckinridge and his appointment. Robert T. and W. C. P. Breckinridge also presented another petition.

These petitions were filed in the case, and W. C. P. Breckinridge was henceforward treated as plaintiff in the case, although he was not by former order substituted by the court as plaintiff.

But the case having for years progressed in his name, and he having been treated as plaintiff in the case by both court and appellants, they, the appellants, can not be heard to complain now. Besides, the court did, in 1883, by former order, substitute W. C. P. Breckinridge as plaintiff in the case.

The land was sold by the decree of court in separate parcels. But the commissioner took one bond for the aggregate amount of the purchase money. This arrangement was preferred by the appellants, and the court approved the bond as taken. This arrangement did not invalidate the bond as a statutory bond.

The judgment recites that the court reserves the power of putting the purchaser in possession of the land sold. It has already been indicated what title was sold. And this part of the judgment has reference to that land. Besides, the reservation of the power adds nothing to the judgment, because the court possessed the power independently of the express reservation of it in the judgment.

We find no error in the record prejudicial to the rights of the appellants.

The judgment is affirmed.

HUMPHREY V. NORRIS, &c.

(*Filed March* 15, 1888—*Not to be reported.*)

Vendor and vendee—Rescission—H. and M. owned a lot jointly, which they united in mortgaging to N. to secure a debt of M. To discharge the mortgage debt they united in a conveyance of the land to N. H. brings this action against M. and N. to have the conveyance set aside so far as he is concerned, alleging that N. induced him to unite in the conveyance by promising to convey to him another lot near by at an agreed price, and that N. has failed to comply with this promise, which plaintiff alleges was fraudulently made. H. also seeks to recover damages of N. for failing to convey. *Held*—

1. There can be no rescission because M. not only does not join in the action to rescind, but opposes a rescission.

2. Plaintiff can not recover damages because, nothing else appearing, it must be presumed he was to pay cash for the lot N. agreed to convey, and he does not tender the purchase price. His allegation that he is "ready, willing and able" to pay is not sufficient.

Harrison & Belden for appellant.

Samuel Avritt for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

The appellant and ——— Meekly were the joint owners of a lot of ground in the town of Lebanon, Ky. They mortgaged this lot to the appellee, Norris, to secure a debt of one thousand dollars that Meekly owed the appellee. Thereafter the appellant and Meekly

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conveyed this lot to the appellee. The consideration for the conveyance as expressed in the deed is seven hundred dollars, credited on said mortgage debt. Pursuant to the conveyance the appellee, Norris, took possession of the property and erected thereon a hotel building. Afterwards the appellant instituted his action in equity against the appellee, Norris, and Meekly, in which he alleged that the appellee, Norris, induced him to join in the conveyance of said lot by verbally promising to convey to him another lot close by at the price of six hundred dollars; that relying on this promise he joined in said conveyance; that the appellee refused to comply with his promise; that the promise was made with the fraudulent intent to induce the appellant to join in said conveyance, and by which he was induced to join therein. The appellant sought upon this ground to have said conveyance, as far as he was concerned, set aside. He also alleged that the said lot conveyed to the appellee was in an eligible part of the town for carrying on the business of blacksmithing and carriage making, in which business he was engaged on said lot at the time of the conveyance, and that the lot the appellee promised to sell him was in an equally eligible location for said business, and that there was no other place to be had in the town as eligible. He, therefore, sought to recover damages of the appellee for his failure to convey said lot.

The appellant is neither entitled to a rescission of the contract nor to damages for two insuperable reasons:

First. The rescission of the contract can not be had because the conveyance of the lot was by the joint deed of the appellant and Meekly for the purpose of discharging a joint mortgage on the lot to secure the debt of the latter: and Meekly not only does not join in the action to rescind but is opposed to it. This of itself is sufficient to defeat the right of the appellant to rescind the contract.

Second. The appellant does not allege whether or not he was to pay cash down for the lot that the appellee promised to sell him. In the absence of such an allegation it must be presumed that the terms of payment were cash down. This being so, he could not compel the appellee to convey him the property without tendering him the contract price of the lot. He fails to allege or prove that he did this. Therefore, his action must fail. The allegations that he was ready, willing and able to pay for the lot are not sufficient: they are not equivalent to a tender of the price agreed to be paid for the lot.

The judgment of the lower court is affirmed.

FITZPATRICK, &c. v. BOARD OF TRUSTEES OF MT. STERLING PUBLIC GRADED SCHOOL, &c.

(*Filed March* 22, 1888.)

1. *Taxation—Change of taxing district*—The Legislature has the power to impose a tax upon a particular county or district for common school purposes without submitting the question to the voters to be directly affected thereby, and, therefore, where a statute has been enacted providing for such a submission the Legislature may thereafter suspend, modify or repeal the statute, whether it has or not been voted on, provided vested rights be not thereby affected, nor contracts impaired.

By an act of the Legislature, passed in 1884, a common school district was created in Montgomery county, embracing the city of Mt. Sterling and

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described territory outside the corporate limits. This act provided for a tax upon the property of the district, but further provided that this tax should not be assessed and collected until the act had been ratified by a majority of the voters in the district. A vote resulted in favor of the tax, and the tax was assessed in 1885. In 1886 an act was passed so amending the act of 1884 as to restrict the district created thereby to the corporate limits of the city of Mt. Sterling. This amendatory act provided that it should not affect the validity of the vote theretofore taken, and that pupils residing outside the city limits should have the right to attend the school for one year in consideration of the tax levied in 1885. This action was instituted by taxpayers, both within and without the city limits, to enjoin the collection of the tax levied in 1885 upon the property of the district originally defined. Being required to elect by which class of taxpayers the action should be prosecuted, the election was made to prosecute in the names of the city taxpayers. *Held*—That although the tax was voted for under the act of 1884 upon the faith of the fact that the burden was to be borne by those without as well as those within the city limits, the Legislature had the right to change the district, as was done by the act of 1886, and as to those outside the city limits (although not necessary to be determined) the Legislature had the power to impose the tax for 1885 in consideration of the benefits conferred; with the *adequacy* of the consideration the court has nothing to do.

2. *The order requiring plaintiffs to elect* net being appealed from is not before the court for review.

3. *Curative statute*—Although there may have been irregularities in the election of trustees under the act of 1884, the Legislature had the power to cure the defect, as seems to have been its intention to do by the act of 1886.

4. *Pleading*—An averment that the acting trustees were not properly elected and had no authority to act as such was but a conclusion of law, and was properly stricken out.

J. H. Hazelrigg for appellants.

H. L. Stone for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

By an act to establish a system of graded schools in the city of Mt. Sterling, approved April 15, 1884, a common school district, No. 1, was created, to embrace the city and described territory outside the corporate limits. It was provided that the public school affairs for white children within the district should thereafter be under the control of five trustees, to constitute, when elected by the white qualified voters, a corporate body, styled "The Board of Trustees of Mt. Sterling Public Graded Schools." Among other powers conferred by the act upon that board was authority to assess, levy and collect an annual *ad valorem* tax upon the property of white persons in the district, not exceeding fifty cents upon each one hundred dollars' worth of property, and a capitation tax, not exceeding two dollars, from each qualified white voter; and also to issue and sell bonds of the district, not exceeding in amount twelve thousand dollars, the proceeds thereof to be applied to purchasing ground, erecting buildings thereon, and necessary expenses in conducting public schools, &c. But it was provided that such taxes should not be assessed and collected, nor the bonds issued, until after the proposition to do so had been submitted to the white qualified voters of the district, and voted for at the election by a majority of those voting thereon.

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April 28, 1886, an act was passed so amending the act of April 15, 1884, as by section 1 to exclude that part of district No. 1 outside the corporate limits of the city of Mt. Sterling, and make said limits the boundary of the district. Sec. 3 of that act is as follows: "The pupils residing outside the city limits and the district, as formed by this act, but inside the district as formed by the act of 1884, * * * shall be entitled to attend the school contemplated by this act for the term of one scholastic year in consideration of the payment by said district of the tax of thirty cents on each one hundred dollars and the poll tax levied in the year 1885, provided said pupils attend said school the first year after its organization and commencement." By sec. 4 it is made the duty of the board of trustees to set aside a portion of the annual taxes to constitute a sinking fund to pay off the bonds of said district, to be thereafter issued by said board. And sec. 7 is as follows: "That the provisions of this amendment, in providing for said sinking fund, shall apply to any taxes assessed, levied or collected, or that may hereafter be assessed, levied or collected, and to any bonds of said district that may be issued, which are authorized by any election of the qualified voters heretofore held in said district, as well as to any taxes or bonds that may be authorized by any such election hereafter held therein. This act shall not affect the right of said board of trustees to collect the *ad valorem* and capitation tax assessed and levied for the year 1885 on the taxpayers and property within said district, as defined by said act of 1884; and this act shall not in any manner affect the validity of the vote of the qualified voters of said common school district heretofore taken on the proposition to levy and collect an *ad valorem* and capitation tax, and to issue and sell the bonds of said district; and the said board shall have the power to assess and collect an annual tax of thirty cents on each one hundred dollars' worth of taxable property * * * within said district, as defined by sec. 1 of this act, for the period of fifteen years, commencing with the year 1885, and a capitation tax on each qualified white voter therein for the same period, and to issue and sell the bonds of said district, as bounded by the limits described by sec. 1 of this act," &c.

This action was instituted August 30, 1886, by citizens and taxpayers of the district, as defined by the act of 1884, though some of them reside outside the corporate limits of Mt. Sterling, against the board of trustees and J. H. Burroughs, tax collector, to enjoin the collection of tax assessed in 1885 upon the property of the district, as defined by the act of 1884.

Upon motion of the defendants the lower court made an order requiring plaintiffs to elect whether they would prosecute the action in the names of those of them who resided within the corporate limits of the city of Mt. Sterling, or in the names of those residing outside said limits, though within the district as described in the original act, and, without waiving exception to the ruling of the court, the election was made to prosecute in the names of the former. Whether that order was or not proper is not necessary to determine, inasmuch as it has not been appealed from and is not now before us for decision. Besides, a decision of the question of the right of those who reside within the corporate limits of Mt. Sterling to the relief asked for will incidently involve a consideration of the rights of those who reside outside.

The allegation in the original petition, in substance, that the persons mentioned as defendants were never properly elected trustees under either act, and had no authority to act as such, is not definite or specific enough to raise an issue of fact, being no more than the

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statement of a conclusion of law, and consequently it was not error for the court to strike it out.

Taking to be true the averment in the petition that the tax was voted for under the act of 1884, upon the faith the burden was to be borne by those residing in the district outside as well as by those inside the limits of Mt. Sterling, and the further statement that a majority of voters of the school district, as it now stands, has never been cast at an election in favor of the imposition of any tax for school purposes, the question arises whether the tax for 1885 can be legally collected.

We think the act of April 28, 1886, was intended, and by fair construction does, in fact cure whatever irregularities there may have been in the election held under the original act upon the proposition to tax the district for the purposes named in it, and for choosing the trustees as thereby provided. And as it is well settled legislative power exists and may be exercised in such case, the tax must be regarded as valid as if the provisions of the original act had been literally complied with, and the trustees as duly elected. See Cooley on Con. Lim., 416, and authorities cited. Such being the case, the question becomes narrowed to the simple inquiry whether the Legislature had the power, by the act of 1886, to cut off a portion of the district as it existed when the election was held, leaving the burden of taxation upon those residing in the district thus contracted in area and the authority of the board of trustees to act therein unimpaired.

Legislative power to divide existing counties and districts, organized for common school or other purposes within counties, and to create new ones at will, has been exercised in this State from the beginning without qnestion. And as a necessary consequence Legislative power must, at the same time, exist to make provision in regard to property rights acquired, and debts and liabilities incurred by the county or district, as it existed previous to the division of territory.

As said in the case of Laramie County v. Albany County, 2 Otto (92 U. S.), 307, where the question was elaborately considered and the authorities reviewed: "It is everywhere acknowledged that the Legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable." And when no provision is made for an apportionment of the property and debts "the rule is, that the old corporation owns all the public property within her own limits, and is responsible for all debts contracted by her before the act of separation was passed."

Although the question whether a tax shall be imposed upon a particular county or district for common school purposes may with propriety be, and generally is, submitted to voters to be directly affected thereby, it is not indispensable to the validity of such taxation that it should be done, for the Legislature has the power to impose such taxes without a submission, and may unquestionably, at any time thereafter, suspend, modify or repeal the statute authorizing it, whether it has or has or not been voted on, provided vested rights be not thereby affected, nor contracts impaired.

As the question before us is, therefore, purely legislative, and involves no constitutional right of the taxpayers in the district as it exists under the act of 1886, the court has no power to suspend or interfere with the collection of taxes authorized by that act. It is true the entire burden, in virtue of the act, falls upon them, but they are compensated by having the exclusive enjoyment of schools established and supported by the taxes they pay; whether fully and

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adequately compensated or not, it is the province of the Legislature, not the judiciary, to determine. It seems those who reside in the original district outside of Mt. Sterling are required, by the act of 1886, to pay taxes assessed for the year 1885, and pupils in that territory were given the right to attend the district school for one scholastic year.

As, according to the views we have already expressed, there can be no question of the power of the Legislature to impose that burden in consideration of the benefit conferred, there is nothing more involved, so far as that class of taxpayers is concerned, than a calculation of gain and loss, with which the court has nothing to do.

Perceiving no error of law in any of the rulings of the lower court the judgment must be affirmed.

Judge Holt not sitting.

BRUMFIELD V. UNION INSURANCE CO.

(*Filed March* 22, 1888.)

Insurance—Notice of additional insurance—Where an insurance agent accepts the application of the insured with the understanding that he is to *divide* his insurance by taking a policy in another company, this is a waiver of notice of the additional insurance which the policy requires the insured to give, the policy not providing how the notice shall be given, and the property being worth more than the insurance in both companies.

J. M. Bigger for appellant.

Henry Burnett for appellee.

Appeal from McCracken Common Pleas Court.

Opinion of the court by Judge Holt.

The appellant, G. H. Brumfield, on January 12, 1884, applied to the local agent of the appellee, the Union Insurance Company, for an insurance of $800 upon his house in Paducah, Kentucky. It was agreed to, the general adjusting agent of the company being then present. For reasons unnecessary to be stated the policy was not made out and delivered to the appellant for a couple of days thereafter, but was dated as of the day of the application, and was, therefore, an insurance upon the property for one year from that time.

The policy, among many other conditions, provides: "The assured by the acceptance of this policy hereby covenants and agrees * * * * to notify the company if, at the making of this insurance, or at any time during its continuance there shall be any other insurance applying to the property herein described, or any part thereof, whether the same be valid or not.

"This policy shall become *void and of no effect* by the failure or neglect of the assured to comply with its terms, conditions or covenants."

The appellant had, on January 11, 1884, applied to the agent of several other insurance companies for a policy in some one of them for $700 upon the same house. It was also agreed to, but the premium was not paid or the policy delivered to the appellant for several days thereafter, and not until he had received the one issued by the appellee. It is admitted that the property was worth more than the amount of both policies. In this action upon the one issued by the

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appellee, it seeks to avoid the contract upon the ground of want of notice to it by the appellant of another insurance.

Such a provision as the one above cited is common in policies of fire insurance. It is a reasonable and proper one; and, as such, has been and should be upheld by the judiciary. Its object is to guard against over insurance, which tends not only to create indifference upon the part of the insured in caring for his property, but affords inducement to fraud. A prudent risk is never taken to the extent of the full value of the property. The owner is, therefore, interested in its preservation, and likely to be vigilant to avert loss. The interest of the community requires that this should be so, because it is interested in the welfare and responsibility of a business which now so largely protects its enterprise and capital. Public policy, therefore, as well as the proper protection of the underwriter, requires the enforcement of a forfeiture clause like this one. It rests with him, however, to insist upon it. The words "void and of no effect," when so used in a policy, are to be construed as equivalent to *voidable, or to be treated as void* by the insurer at his own exclusive option. If this were not so, then the act of one party in violation of the contract would render it void as to both. The insurer may, therefore, by either conduct or agreement, waive his right to exemption from liability upon this account. In this instance the insured claims that this was done. He avers:

"At the time he applied to the agent of defendant for the policy sued on, he said to said agent that he intended to divide his insurance on this property, and asked defendant's agent for a policy of $800. * * * * Said agent failed to call plaintiff's attention to the clause in said policy in regard to forfeiture by reason of other insurance, now relied on." He also says in substance that the agent told him in response, that it was all right, and that he would make out the policy for him in a few days; that he did so, and delivered it to him; that he never read the conditions in the policy (which were in fine print), nor did the agent call his attention to them; and that the latter was familiar with the property and knew its value. Issue was joined upon these matters and a trial had by a jury.

At the close of the testimony the court, at the instance of the appellee, instructed the jury peremptorily to find for it, and of this the appellant now complains. There is evidence tending to prove notice of the character above stated. It is true that the testimony is quite conflicting upon this point. The appellant testifies that he informed the agent at the time of the application that he intended to divide his insurance and keep the property insured in two companies because he thought it was safer to do so. The agent contradicts this, and is to some extent supported by the testimony of the adjusting agent. It is not for us, however, as this record stands, to weigh the evidence and even intimate, much less determine its relative strength. If the notice, if given, as claimed by the appellant, would have been sufficient in law and productive of a waiver of the right of the company to thereafter insist upon a forfeiture, then, as there was some evidence conducing to show that it was given, the jury should have been allowed to pass upon the question.

The policy does not provide how or when the notice of other insurance shall be given, save it must, of course, be before a loss; nor does it indicate how specific it shall be. Courts are prompt to seize hold of any circumstance indicating an election to waive a forfeiture, or any agreement to do so, upon which the party has relied and acted. Any agreement, declaration or conduct upon the part of an insurance company, which is reasonably calculated to and does

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create a *bona fide* belief upon the part of the insured that a certain course of action upon his part will not lead to a forfeiture of his contract, will, and in reason ought, to estop the company from insisting upon it, although the express letter of the contract may provide for it. The leaning of the courts in such a case is properly to the insured. The great mass of persons with whom insurance companies deal are, unlike their agents, not familiar with such matters. If A applies to B, an insurance agent, for a policy for a certain sum upon his house, worth more than twice the sum named, informing him at the time that he intends to divide his insurance upon the building and put it in two companies, giving, as the reason, that he considers it safer to do so, and the agent tells him in substance that it is all right, and delivers the policy to him without calling his attention to the forfeiture clause requiring notice in case of other insurance, most certainly the company should not be allowed, after a loss, to insist upon a forfeiture, because the insured did exactly what he told the agent he was about to do when the insurance was effected, and which the agent, by his conduct, then informed him he could do. Insurance Co. v. Eggleston, 96 U. S., 572. In this instance the insurance applied for was, as the agent knew, less than half the value of the property. A prudent owner would be apt to place other insurance upon it. The agent might well have so inferred; but he was expressly informed of such intention, the reason therefor being given. The appellant appears to have acted in good faith. He says he did not inform the appellee's agent in what particular company other insurance would be taken because he did not then know where the other agent, to whom the other application had been made, would place it among his companies.

Here the notice of other insurance did not, by the terms of the policy, have to be given, or appear in any particular way. The waiver of the right to forfeit the policy, by reason of it, did not have to be indorsed upon the policy, as was the case in Baer v. The Phœnix Insurance Company, 4 Bush, 242; and Stevenson v. Phœnix Insurance Company, 78 Ky., 150. It is urged, however, that by the terms of the contract the notice was not to be given until other insurance had in fact been effected.

The object in requiring the notice is that the insurer may act thereon, and determine whether he will cancel his contract on account of the taking of other insurance. If, however, when the contract is made, he is informed that the insurance is to be divided with another company, and he assents to this, either by agreement or conduct, why the need of subsequent notice? He has already acquiesced in advance instead of waiting for the act to be done and then acquiescing in it. The purpose of the insured is declared and known to the insurer when he takes the risk. He acquiesces in it when the contract is made, and by his conduct says to the other party to it that there shall be no forfeiture by reason of its execution.

If in such a case he may, after a loss has occurred, still insist upon a forfeiture, then he is given an undue advantage, and an opportunity for imposition upon the innocent and uninformed, who have been lulled into security by his own conduct.

According to the appellant's testimony the agent of the appellee knew that the insured intended to divide his insurance by taking out another policy in another company, and accepted his application with this understanding. The value of the property was known, and the amount of the additional risk was fixed. The entire insurance was to be *divided* between the two companies; and it appears that the second policy did not in fact equal the first. If all this be

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true, then the appellee waived its right to forfeit the contract by reason of the additional insurance.

The question should have been submitted to the jury under proper instructions, and the judgment is reversed and cause remanded for a new trial in conformity to this opinion.

WRIGHT v. JOHNSON.

(*Filed March* 24, 1888—*Not to be reported.*)

Vendor's lien—B. contracted by letter to sell land to S. The notes therefor were signed by S. and J., who verbally agreed between themselves to purchase and own the land jointly. After they had made a partial payment upon the land, J. sold his interest to S., taking the note of S. for the purchase price. S. having paid the balance of the purchase money, B. executed to him a deed to the land, and soon thereafter W. had an execution against S. levied upon the land, and at the sale became the purchaser, having notice at the time he purchased of the existence of the note executed by S. to J. In this action J. asserts a lien upon the land for the payment of that note. *Held*—That no lien was created or exists upon the land for the payment of the note. B. contracted with S. alone, and no lien was reserved or directed to be reserved, in the deed in favor of J., and no mention made of the note of S. held by J.

G. W. Williams & Son for appellant.

R. Y. Bush for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Lewis.

R. Y. Bush, in a letter addressed to Richard Sapp, proposed to sell to him a tract of land for the consideration stated in it, and to convey the title to him upon payment of the purchase price, provided the blank notes therefor accompanying the letter were signed by Sapp and returned within ten days. The notes were signed by Sapp and appellee Johnson, who it appears had verbally agreed between themselves to purchase and own the land jointly, and they took possession and occupied and cultivated it together for about one year, and made a partial payment to Bush, when Johnson sold his interest to Sapp for $150, taking his note therefor, and removed from the State. In 1884 Sapp, having paid the balance of the purchase money, Bush executed, acknowledged and lodged for record a deed to him for the land, and soon thereafter appellant Wright caused an execution in his favor against Sapp to be levied on it. And notwithstanding he had notice of the existence of the notes given to Johnson, caused it to be sold, becoming himself the purchaser. Soon thereafter Johnson instituted this action to set aside the deed to Bush, so far as it conveys his alleged undivided half interest to Sapp, or for judgment that he has a lien on the land for payment of the note executed to him by Sapp. The note is alleged to have been lost or mislaid, and is not filed.

The obstacle in the way of the relief sought by Johnson is that there did not exist an enforceable lien on the land in his favor, and consequently Wright, as creditor of Sapp, was not at all affected by the notice given after the levy of his execution of the existence of the note for $150. Bush was not bound by the letter which was

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treated as his covenant, to either convey any part of the land to Johnson, or to reserve in the deed a lien in his favor for the $150. For although he says in his deposition he was informed of the existence of the note when he made the deed, he was not required by Sapp, with whom alone he had contracted to convey, to make any reservation in the deed in favor of Johnson, or any mention of the note, and did not do so. The contract between Sapp and Johnson was by parol, there being no written memorandum whatever of a sale of an interest in the land by the former to the latter. It seems to us as the record stands the note given by Sapp to Johnson should be regarded as simply evidence of a debt for the amount which it calls for, and that no lien was created or exists upon the land for its payment, and for its collection Johnson must look to Sapp and not to the land.

Judgment reversed.

ADKINS, &c. v. WHALIN.

(*Filed March* 29, 1888.)

Champerty—While a sale by one tenant in common to his co-tenant of his undivided interest in the land is not champertous, that rule has no application in this case.

All of several tenants in common, except V., sold their interest in the land to a stranger to the title, who sold the *whole* land, including V.'s interest, to another stranger to the title, and the latter entered upon the land in his own right and was holding the actual, adverse possession of the *whole* tract when V. sold his interest to A., who was also a stranger to the title. *Held*—

1. That the sale to A. was champertous, and, therefore, void.

2. Although V. by his deed to A. conveyed only one-eighth interest, when in fact he owned one-seventh, yet as V. and A. by this action sought to have one-seventh allotted to A., alleging that the interest was described in the deed as one-eigth by mistake, V. was not entitled to have the difference between one-seventh and one-eighth allotted to him.

Wm. Wand for appellants.

James & Helm and E. W. Hines for appellee.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, V. A. Borah, as one of the children and as administrator of George M. Borah, deceased, filed his petition in the Butler Circuit Court for the purpose of settling the estate of said decedent and having his land sold to pay his indebtedness. One hundred and fifty acres of a tract of three hundred acres of land belonging to said deceased was sold for said purpose. The widow and children, except the appellant Borah, of the deceased remained in the possession of the remaining portion of said tract. The appellant Borah having wasted some of the assets of his decedent's estate, he in 1856, and after the sale of said one hundred and fifty acres of land, moved to the State of Wisconsin, where he has remained ever since. In 1869 all of the children then living of George M. Borah, except the appellant, V. A. Borah, conveyed with the consent of their mother by title bond all their interest in the remaining one hundred and fifty acres of land to their brothers, C. C. and G. F. Borah. Afterwards G. F. Borah sold his half of

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said land to C. C. Borah. Afterwards, to wit, on the 5th day of October, 1873, C. C. Borah, together with the other children of George M. Borah, then living, except the appellant Borah, conveyed by deed seven-eighths of said land to G. H. Borah (not one of the heirs). He, in 1873, conveyed by deed the whole of the 150 acres of land to the appellee, J. H. Whalin. He immediately took the actual, adverse possession of the whole tract of land, claiming it as his own. In 1874, while the appellee was in the actual possession of the tract of land, claiming the whole of it adversely to all the world, the appellant, Borah, conveyed by deed one-eighth of it to the appellant, Adkins.

In 1885 the appellants, Borah and Adkins, filed their joint petition in the Butler Circuit Court against the appellee for the purpose of having the said tract of land divided in the proportion of one-seventh to the appellant, Adkins, and six-sevenths to the appellee. They alleged in their petition that the appellant, Borah, in fact sold to the appellant, Adkins, one-seventh of said land, but by mistake the deed called for one-eighth only. Among other defenses the appellee relied on that of champerty. If this defense is available it is unnecessary to notice the others.

The appellants contend that as the appellant Borah and his brothers and sisters held the land in joint tenancy, the sale by the brothers and sisters of their interest to a stranger, and his sale of the whole tract to another stranger could not invest the latter with such an adverse possession of V. A. Borah's interest in the land as to defeat his vendee's right to maintain an action to have the land divided and the interest of V. A. Borah restored to his vendee.

This court, in the case of Russell, &c. v. Doyle, &c., 8 Ky. Law Reporter. 366, decided that a sale by one tenant in common to his co-tenant of his undivided interest in land, which was held adversely, was not champertous, for the reason that each joint tenant or tenant in common owns an interest in the entire tract of land, and the sale by the one of his interest to the other introduces no stranger to the title, but simply increases his interest in the whole. But the case at bar is not like that case. For the brothers and sisters of V. A. Borah sold their interest in said land to a stranger to the title, and he sold the whole land, including V. A. Borah's interest, to another stranger to the title; and the latter, pursuant to said purchase, entered upon the land in his own right and was holding the actual, adverse possession of the whole tract at the time the appellant, V. A. Borah, sold his interest to the appellant, Adkins, who was also a stranger to the title.

The policy of the statute against champerty is to prevent litigation by prohibiting the sale of land, adversely held, to a stranger to the title. Tested by this rule the appellant, Adkins, having, as a stranger to the title, purchased V. A. Borah's interest in the land, while the appellee was in the adverse possession of it, he having also purchased as a stranger to the title, the appellants' purchase was clearly champertous, and, therefore, void.

But it is contended that, as V. A. Borah's deed conveyed to the appellant, Adkins, only one-eighth interest in said land, and, as V. A. Borah owned one-seventh interest therein, the difference should have been allotted to him. It is a sufficient answer to this proposition to say that the appellants, Adkins and Borah, allege, in their petition that Borah in fact sold to Adkins one-seventh interest in said land, and that the recital in the deed should have been one-seventh instead of one-eighth interest, and they ask that one-seventh interest be allotted to Adkins. As the court, therefore, was called

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upon to correct the deed and to effectuate a champertous sale of Borah's entire interest in the land, the dismissal of the appellants' petition as to Borah's entire interest was proper.

The judgment of the lower court is affirmed.

STONE, COMMITTEE, &c. v. CROMIE.

(*Filed April* 3, 1888.)

1. *Appeals—Jurisdiction*—Where an appeal granted by the lower court has been taken to the Superior Court, and the record discloses the fact that this court, and not the Superior Court, has jurisdiction of the appeal, the appeal will be treated as if it had been pending in this court from the time the record was filed with the clerk of this court, who is also, by virtue of his office, the clerk of the Superior Court, and any orders made by the Superior Court will be treated as a nullity.

2. *Same*—This court will take jurisdiction, although the order granting appeal recites that the appeal was asked and granted to "the *Supreme* Court." It is evident that the *Superior* Court was intended, but even if not, the appeal is now pending in what is to the lower court, as far as appeals are concerned, the *Supreme* Court.

3. *Fraud in sale of lunatic's estate*—In this action by the committee of a lunatic to set aside a sale of the lunatic's estate made under a decree obtained by a former committee, the undue haste attending the sale, and the hurried subsequent proceedings relating to it, readily create suspicion, and the sacrifice of the property and the helplessness of the lunatic demand that the sale shall be vacated unless supported by entire fairness and good faith.

Appellee had loaned to the former committee a bond which the latter had pledged for his individual benefit. The committee agreed with appellee that if he would buy the lunatic's property, he (the committee) would use enough of the proceeds to redeem the bond and return it. A decree for the sale of the property was obtained, and appellee became the purchaser. *Held*—That this was *at least* a constructive fraud, to which the purchaser was a party, and he can not, therefore, be allowed to retain the benefit of his bargain. He will be allowed a lien upon the property for so much of the proceeds as were used in discharging the liabilities of the lunatic, with interest, being first charged, however, with the value of the use of the property.

A. P. Humphrey and Rodman & Brown for appellants.

Chas. H. Gibson for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

J. B. Cochran, as the committee of Gustave Trunk, procured a decree on June 27, 1879, in the Louisville Chancery Court, to sell a lot of land belonging to the lunatic. In the proceeding he executed bond in conformity to section 493 of the Civil Code, with W. N. Huling and D. M. Rodman as his sureties. The judgment reserved the potential right of the lunatic's wife in the property; directed its sale upon six, twelve and eighteen months' time, with interest from day of sale, and that the committee, as he collected the purchase money, should pay out of it first the cost of the suit and of another action brought by the former committee, and then apply the balance of it to the lunatic's indebtedness to the Eastern Ken-

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tucky Lunatic Asylum, where he was confined, and to his future support in that institution. It was not a party to the proceeding. The property was sold on July 7, 1879, and purchased by the appellee, Isaac Cromie, at $1,900. It was then worth at least $3,500. The sale was at once reported to the court, and on July 10, 1879, an order was entered reciting that all the parties in interest waived all exceptions to the sale; that it was confirmed; that thereupon Cromie paid into court the entire purchase money, which the committee was allowed to withdraw, and the committee was directed to execute a deed to the purchaser. All this was evidently done with dispatch, and not upon the usual motion day of the court. The committee executed the deed in conformity to the order two days thereafter. Cochran, as committee, appears to have paid to the asylum $226.10 on its claim, and probably paid the costs named in the judgment. In April, 1881, he was removed and appellant Stone was appointed the committee. During the same month the asylum, joining with it as a co-plaintiff the lunatic, by a next friend, brought suit in the Jefferson Common Pleas Court against the sureties, Huling and Rodman, to recover from them and have applied upon its claim the money for which the lot had been sold, less the costs of the suits ordered to be paid by Cochran, and the amount it had received from him. The committee, Stone, was also made a defendant, and it was averred that he had refused to sue the sureties.

Several defenses were presented, among them being one to the effect that in June, 1881, the then committee had brought an action in the Louisville Chancery Court to set aside the sale to the appellee, Cromie, upon various grounds, one being that the sale was the result of a fraudulent combination between the then committee and the purchaser, and that it was then pending. The suit so named is the one we are now considering. The action by the asylum was transferred to the chancery court, where the two cases were ordered to be "heard together." This was in effect an order of consolidation, and should be so regarded. It was properly made because of the connection between the two actions, the one depending upon the result in the other. The court rendered a joint judgment in accordance with a written opinion, disposing of both actions, but the caption only gives the style of what, for convenience sake, we will call the asylum suit. It refused to vacate the sale, and allowed the asylum, as against the sureties of Cochran, $1,545.60, being the portion of the purchase money of the lot that Cochran, in its opinion, had failed to account for; but it also found that Cochran had in effect used $800 of the purchase money to repay his individual debt to Cromie; that this had been done by agreement between them, and was in legal contemplation a fraud; and it, therefore, held that Cromie had in fact paid but $1,100 of the $1,900 of purchase money, and rendered a judgment against him in favor of the new committee for $800, with a lien upon the lot for its payment; and further provided that upon the payment by the sureties of the judgment against them that they should be entitled to the benefit of the $800 judgment against Cromie. The sureties appealed from the judgment in favor of the asylum against them, and Stone, as committee, took this appeal because the judgment did not vacate the sale. It was granted in the lower court, and the order recites that it was asked and granted to "the *Supreme* Court." It is now urged that as there is no such appellate tribunal in this State there is, therefore, no appeal pending. This objection is quite technical. Evidently the word "Supreme" was intended for "Superior," and was a cler-

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ical mistake; but in any event if the appeal be now pending in this court, it is in what is to the lower court, so far as appeals are concerned, the supreme court.

The statement for the appeal in the asylum case was made out for this court; it was brought here and reversed on January 10, 1885, this court, in substance, holding that where the creditor of a lunatic is suing to recover from the sureties of a committee the purchase money, the latter has obtained by a sale of the lunatic's property, and the sucessor of the defaulting trustee is suing to set aside the sale as fraudulent, the latter has the right to choose the remedy. Trunk's Com. v. Eastern Ky. Lunatic Asylum, &c., 6 KY. LAW REP., 521.

In some way, probably by mistake, the statement for the appeal in this case was made out for the Superior Court, while the schedule, in directing what portions of the record should be copied, provided that no part of it that had been copied in the transcript of the asylum case should be again copied. This doubtless arose from the supposition of the attorney that both appeals would (as would have been proper) be in the same appellate court. As the petition in this action, the opinion and judgment of the court had been copied in the transcript of the other case, it resulted in their not being copied into the one for this appeal.

The clerk of this court is, however, *ex officio* the clerk of the Superior Court, and both transcripts were filed in this office. It is proper, therefore, as the appeal was granted by the lower court to treat this as having been a pending appeal in this court ever since the record was filed, if the jurisdiction did not belong to the Superior Court. The transcript was filed in the clerk's office within the proper time after the granting of the appeal below. On November 26, 1884, a motion was made in the Superior Court to transfer the case to this court, where the asylum suit was then pending. It embraced a request, which was entered upon the order book but not indorsed upon the record, to consider upon the motion the transcript in the asylum case. The motion was overruled because the transcript contained neither the judgment nor the petition upon which it had been rendered; and the court was, therefore, of the opinion that it could not say that this court had jurisdiction. The other pleadings copied into the transcript did show, however, that it was an action involving the title to real estate, and that the Superior Court, therefore, had no jurisdiction of the appeal. Subsequently a properly certified copy of the petition was filed as a part of the record, and the want of jurisdiction in the Superior Court was then apparent beyond question. The appellant then renewed his motion to transfer the case to this court, while the appellee, Cromie, moved to dismiss the appeal. The former order refusing the transfer was merely interlocutory, but the motion to dismiss prevailed. An appeal to this court by the Superior Court was thereafter refused; and the appellant then appeared in this court and moved to docket the appeal as a pending one in it. The motion was properly sustained.

The act creating the Superior Court provides that if an appeal be taken to it, when this court has jurisdiction, the case shall not be dismissed, but *shall* be transferred to this court. It was apparent that the Superior Court had no jurisdiction of the appeal. It had no power, therefore, in the case save to relinquish the control of the record, to which it had no right, by an order of transfer. Any other order in it was *coram non judice*. In such a case we are loth to hold that upon the refusal to transfer a party must go to the

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unnecessary cost and trouble of dismissing his appeal and taking a new one. Indeed, time may have barred his right to do so; and whether so or not, in a case where the appeal has been granted by the lower court, and the record discloses that the Superior Court has no jurisdiction, it is to be regarded as a pending appeal in this court, where it properly belongs, from the time the record is filed with the clerk of this court, who is also, by virtue of his office, the clerk of the Superior Court. This being so, it was proper to order it placed upon the docket of this court; and the entire transcript of both cases being now before us, under the rule of practice that where a part of a record is already on file in the appellate court this much of it need not be again copied, but shall, if placed with the new record, be considered as a part of it. We will now pass to the consideration of the merits of the case.

It is apparent that the complaint of the committee is meritorious and well founded. The undue haste attending the sale of the lunatic's property and the hurried subsequent proceedings relating to it readily create suspicion. The sacrifice of the property and the helplessness of the unfortunate owner demand that the sale shall be vacated, unless it be supported by entire fairness and good faith.

The appellee, Cromie, had loaned to the then committee a railroad bond, which he had pledged for his individual benefit. The appellee was clamoring for its return. The committee agreed with him that if he would buy the lunatic's property he (the committee) would use enough of the proceeds to redeem the bond and return it to the appellee. This was in effect the payment of a loan made by the appellee to Cochran. It was an illegal and improper use of the lunatic's estate. It was at least a fraud in legal contemplation, if not in fact. The purchaser was the beneficiary of, and a party to, it. Under such circumstances he can not be allowed to retain the benefit of his thrifty bargain. It is the peculiar province of a court of equity to protect the innocent and helpless from such transactions; it delights to do so; and it would be recreant in duty to the highest degree if it neglected such a sacred trust. It appears that a portion of the money paid by the appellee to Cochran was in fact expended for the benefit of the lunatic or in discharge of his liabilities. How much was so used does not certainly appear. It is shown, however, that some of it was paid to the asylum, and probably a portion of it in discharge of costs, as directed by the judgment of sale. To the extent that the estate of the lunatic was thus benefited the appellee should be allowed, with interest from the time of the payment of that much of the purchase money to the trustee. He should, however, account for the value of the use of the lot since he obtained possession of it, and if, upon the ascertainment of these matters by the lower court, through its commissioner or otherwise as it may deem proper, the estate of the lunatic falls in debt to the appellee, a lien will be allowed him therefor upon the lot purchased by him, and its enforcement ordered in the event of nonpayment.

Having entered into an unlawful combination with the trustee, Cochran, the apellee must look to him for any purchase money paid to him and which was not in fact paid out for the benefit of the lunatic. The sale of the lot to the appellee will be set aside, and the deed to him therefor cancelled.

The judgment is reversed and cause is remanded to the lower court for further proceedings in conformity to this opinion.

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ROUSSEAU v. LAMBERT.

(*Filed April* 5, 1888—*Not to be reported.*)

1. *Reforming deed for mistake*—Where, by mistake, a part of the land sold and intended to be conveyed has been omitted from a deed and the mistake is clearly made out by proof entirely satisfactory, a court of equity may reform the deed so as to make it conform to the precise intent of the parties.

In this case both parties to a deed supposed that the grantor had acquired by *will* the entire interest sold and intended to be conveyed, and it was so described, whereas he had acquired a part of that interest by a deed from the testator prior to his death. The mistake is clearly made out by satisfactory proof. *Held*—That the chancellor properly reform the deed so as to make it include the interest which the grantor had acquired by deed.

2. *Pleading*—While it is not *in terms* stated in the petition that the plaintiff actually purchased and the defendant agreed to convey his interest acquired by *deed*, yet, as the language used substantially and fully conveys the idea, it would be a perversion of its plain meaning to hold that the petition is defective on that account.

3. *Action to obtain title*—As this is not an action to quiet title to property, but rather to obtain the title admitted to be in defendant, the objection that plaintiff does not allege that he has the possession can not avail the defendant.

W. P. D. Bush, Montgomery Merritt and S. B. & R. D. Vance for appellant.

Wm. Lindsay, Yeaman & Lockett and Clay & Banks for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

In 1855 Joel Lambert conveyed to his wife for life, and after her death to their children or the descendants of them, certain tracts and lots of land therein described lying near to and in the city of Henderson. In 1876 Joel and Polly Lambert united in a deed by which they attempted to convey the fee simple title of the same real estate to S. H. Lambert in trust and upon condition he immediately reconveyed the same to Joel Lambert. And afterwards, on the same day, such conveyance was made or attempted to be made by S. H. to Joel Lambert. In July, 1879, the will of Joel Lambert, who died a short time previously, was admitted to record, by which he devised his entire estate, which, besides that conveyed in 1855, was considerable in value, to his wife for life, and to his three living children and the descendants of the four then dead. October 28, 1879, appellant Rousseau, who, as the only child of a deceased daughter of Joel Lambert, was entitled to one seventh of the estate devised, as well as that conveyed by the deed of 1855, sold to S. H. Lambert, for the consideration of $4,000, as the latter contends, his entire interest, though by the terms of the deed only that acquired under the will was really conveyed. This action was instituted in 1883 by S. H. Lambert to reform the deed made to him by Rousseau so that it include and pass the title of the latter to one-seventh of the property conveyed by the deed of 1855. And judgment having been rendered by the lower court in accordance with the prayer of the petition, Rousseau appeals.

This is not an action to quiet title to property, but rather to obtain the title admitted to be in the defendant, and consequently the ob-

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jection that the plaintiff does not allege he has possession does not avail appellant.

It is not in terms stated in the petition that the plaintiff actually purchased and the defendant agreed to convey his interest in the property acquired by the deed of 1855, but the language substantially and fully conveys that idea. After a recital in the petition of the conveyances and will just referred to of the interest of the defendant in the estate of his grandfather, Joel Lambert, and of the purchase of that interest by the plaintiff, follows this averment: "The plaintiff states that when he purchased of the defendant his interest in the estate of said Joel Lambert, and when the plaintiff accepted the said deed of the 28th of October, 1879, both he and the defendant believed that the said Joel Lambert was at the time of his death the owner of the fee of all the property described and conveyed by said deed of 26th of October, 1855, and the subsequent deeds of June 7th, 1876, herein before referred to and filed, and it was the purpose and intention of the said defendant to convey to the plaintiff, by the deed of 28th of October, 1879, any and all interest which he might have in the property described in said deed of 26th of October, 1855, * * * and that it was by the mistake and oversight of the draughtsman of the said deed from the defendant to the plaintiff that the defendant's interest in the property described in said deed of 26th of October, 1855, was omitted to be specifically named and conveyed to the plaintiff." We think it would be not only extremely hypercritical, but an actual perversion of the plain meaning of the language used, to decide the petition defective because it fails to allege the interest of the defendant under the deed of 1855 was sold and intended to be conveyed.

The property actually sold is distinctly identified and described in the petition, and the mistake, with equal certainty set forth, arose from the fact that both parties to the deed erroneously believed at the time Rousseau acquired the interest intended to be conveyed, entirely under the will of his grandfather. Whether he so acquired it wholly or only in part under the will there was no question about his then owning it, nor do we think, giving a fair construction to the petition, can there be any question about it having fully stated in it that his entire interest was sold for the price of $4,000 and intended to be conveyed by that deed.

The evidence in this case we regard as entirely satisfactory, if not conclusive, that appellant did sell, and that it was the purpose of both parties to the deed his interest in the property acquired in 1855, as well as that devised to him, should be conveyed by the deed to appellee. Not only do several witnesses testify appellant informed them he had sold and conveyed his entire interest, but the person who wrote the deed states the property described in the deed of 1855 was at the time mentioned and agreed to be a part of what was sold, and was not specifically described as appellee desired should be done, because appellant and the draftsman, both being lawyers, said it was not necessary, as they then believed the deed of 1876 re-invested Joel Lambert with the title.

As said in Worley v. Tuggle, 4 Bush, 168: "Whatever may be said as to the danger of admitting parol or extraneous evidence to contradict, alter or add to written instruments, it is now settled by such an overwhelming current of authority, both in the American States and England, that this may be done where through mistake, oversight or fraud, the written memorial does not truly set out the contract, as scarcely to be regarded longer an open question."

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The inhibition of the statute against bringing a suit to charge a person upon a contract for the sale of real estate unless the contract be in writing and signed by the party to be charged, etc., should not, nor is it now by this court regarded as denying the right of a court of equity, when a mistake is made out by proof entirely satisfactory so as to reform the contract so as to make it conformable to the precise intent of the parties. Noel's Ex'or v. Gill, 8 Ky. Law Rep., 229.

In our opinion the evidence in this case is such as to justify and require the deed to be reformed so as to pass the title of appellant in the property acquired by the deed of 1855 to appellee, otherwise he will hold what he sold, was paid for, and both parties intended should be conveyed by the deed.

Judgment affirmed.

Russell, Sheriff, &c. v. Carlisle & Litsey, &c.

(*Filed April* 5, 1888—*Not to be reported.*)

1. *State Board of Equalization*—The act creating the State Board of Equalization is not unconstitutional.

2. *Same*—The provision of the statute requiring that the board shall consider "personal property" authorizes them to act upon the assessment of "stores" in the various counties by way of equalizing them.

3. *Same*—The board is invested with large discretionary powers, and may equalize from its own knowledge. It may act with or without outside evidence.

4. *Taxation—Injunction*—Individual grievances founded merely upon opinion that property has been assessed too high furnishes no ground for enjoining the collection of the State's revenue.

Sam T. Spalding for appellants.

Rountree & Lisle for appelles.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The State Board for the equalization of taxes, created by the act of May 10, 1884, at its session for the year 1886, raised the assessed value of personal property of Marion county fifty-six per cent. The appellees are merchants of that county, and have enjoined the collection of the State taxes upon this raised value of their stores. They aver in their petition that they, in 1886, under oath listed this property at its cash value as of the first day of April of that year with the county assessor. This is denied by the answer, and as the action was dismissed upon demurrer to the last-named pleading, it is to be taken, perhaps as *pro confesso*, that it was not listed at its cash value. We do not regard this as material, however, because perfect and exact equality in taxation is impossible. Individual hardships necessarily arise which can not be altogether obviated.

The constitutionality of the act creating the State Board of Equalization is now beyond question. It was settled in the late case of Spalding, Collector v. Hill, 9 Ky. Law Rep., 852; and upon reconsideration we see no reason for not adhering to it. The construction of the law, and not its policy, is for judicial consideration. The act in question does not divest the county assessor, who is an officer recognized by the Constitution, of any of his powers. His duty is primary;

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his action not final. He values the property and this Board equalizes the valuation.

Boards of Supervisors for towns and counties have always existed in our State without question as to their legality. They are Boards of Equalization upon a limited scale, and are to the taxpayers of the towns and counties what this Board is to the different counties of the State, only the law has invested them with greater powers.

It is urged, however, that neither the letter nor the spirit of the law creating the State Board authorizes it to act upon the assessments of stores in the various counties by way of equalizing them; and that the Legislature did not intend to embrace "stores" when it used the words "personal property," and that in equalizing assessments for 1886 it failed to take as a separate class the number and value of the stores in the different counties, or any of them, and by comparison between the assessed value and a fixed value arrive at a per cent. to be added or deducted as to each county to eqaualize the assessment.

We fail to see any good reason why stores were not intended to be embraced in the equalization of personal property to be made by the Board. They are unlike money, because it is the standard of value. They have no absolute fixed worth. The county assessor must value them, and he is not bound to accept the statement of the taxpayer in this respect. A considerable portion of the wealth of the State is thus invested; their value, like that of most kinds of property, is a matter of opinion, and if its consideration can not enter into the question of equalization, then it seems to us there can be none, and the matter is at an end. Stores are personal property, with no certain value fixed upon them by law or the agreement of parties, and the reason for not equalizing money and notes do not apply to them.

The act creating the Board expressly says in general terms that it shall consider "*personal property*."

Sections seven, eight and ten provide: "Said board in equalizing the valuation of property as listed and assessed in different counties shall consider the following classes of property separately, viz: *Personal Property, Lands and Town and City Lots;* and upon such consideration determine such rates of addition to or deduction from the assessed valuation of each of said classes of property in each county, or to or from the aggregate assessed value of each of said classes in the State as may be deemed by the board to be eqitable and just, such rates being in all cases even.

"In equalizing the value of personal property between the several counties said board shall obtain from the aggregate footings of the number and value of each; and the value of the several kinds of enumerated property in each county shall be obtained at those values, and the value of enumerated property thus obtained, as compared with the assessed value of such property in each county, shall be taken by said board to obtain a rate per cent., to be added to or deducted from the total assessed value of personal property in each county: *Provided*, That whenever, in the opinion of the Board it is necessary to a more just and equitable equalization of personal property, that a rate per cent. be added to or deducted from the value thus obtained in any one or more of the counties, said board shall have the right to so do, but the rate per cent. hereinbefore required shall first be obtained to form the basis upon which the equalization of personal property shall be made.

"When said board shall have separately considered the several classes of property as hereinbefore required the result shall be com-

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bined into one table, and the same shall be examined, compared and *perfected* in such manner as said Board shall deem best to accomplish a just equalization of assessments throughout the State, preserving, however, the principle of separate rates for each class of property."

It is manifest that the Legislature intended to invest the board with large discretionary powers. It has the right to equalize from its own knowledge. It may act with or without outside evidence. It is only limited by the purpose and spirit of the law. Indeed it is the meaning of the law and not the letter that must govern. Considering its object and its entire provisions, and regarding the very necessity of the case, it could not have been intended that "stores" should not fall within the property to be considered by the Board in arriving at the object intended. Perhaps it was found impossible, owing to want of uniformity in value, to compare them like other personal property. If so, then regarding the spirit and purpose of the law and all of its provisions, they had the right to perfect the equalization according to their best judgment.

The last section above cited provides that after the different classes of property have been considered and a result reached it shall be "*perfected*" in such manner as they may deem best to reach a just equalization. The report of the board shows, however, that in adding to or deducting a per cent. to the value of the personal property of each county it added in each instance and as to each county to that value the assessed value of its stores as returned by the assessor. The same rule applied to each county. We fail to see, therefore, how any inequality can result. It is true that in some cases property may thereby be assessed too high, but no system of taxation entirely free from such hardships can be devised; and if individual grievances, either supposed or real, founded merely upon opinion that property has been assessed too high, can furnish ground to stop by suit the collection of the State's revenue, then the public interest will necessarily suffer because there will be no end of complaint, delay and litigation.

Judgment reversed, with directions to sustain the demurrer to the petition and dismiss the action.

FUNK v. WALTER.

(*Filed April* 7 1888.)

Homestead—Rents and improvements—Interest and taxes—Appellee having been wrongfully deprived by appellant of the use and possession of her son's homestead. which she had purchased, she was entitled to a reasonable rent for the time during which appellant had possession, less the taxes and reasonable improvements. But as she was allowed to recover the value of the homestead instead of the homestead itself, she was entitled to interest thereon in lieu of rent, and the appellant was not entitled to deduct therefrom the taxes that accrued on the homestead during the time he had possession, for the reason that the use of the homestead is presumed to be equivalent to the interest and taxes on its value.

Thos. B. Fairleigh for appellant.

Kohn & Barker for appellee.

Appeal from Louisville Chancery Court.

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Opinion of the court by Judge Bennett.

By virtue of an execution that issued from the Federal Court for the district of Kentucky, the house and lot in controversy was sold by the U. S. Marshal, and the appellant becoming the purchaser at said sale the appellee was ejected from the possession of the house and lot, and appellant was put in possession of it. Afterwards the appellee instituted an action in the Louisville Chancery Court to recover the value of her dower in said property and the value of her son's homestead therein, which she had purchased from him. The chancellor allowed the appellee the value of both dower and homestead. But this court upon appeal reversed the judgment of the chancellor upon the ground that the appellee was not entitled to both dower and homestead, and remanded the case, with directions to allow her either dower or homestead at her election. Upon the return of the case it was referred to the master commissioner to take proof and report the value of the appellee's dower and homestead. The commissioner reported the value of each. This report upon the exceptions of the appellant, upon the ground that he had no notice of the time of the sitting of the commissioner, was set aside, and the case was again referred to the commissioner. He made another report which was in all respects the same as the former report. In this report the commissioner fixed the value of the appellee's homestead which she purchased from her son at one thousand dollars, and the appellant having been in possession of the property ever since May 1st, 1875, the commissioner allowed the appellant six per cent. per annum on the same from that date. The appellant filed an answer in which he pleaded as an offset an indebtedness on the part of appellee for the taxes on said property due the city and State for the years that he had held the property in possession, also $32.54, the taxes due on said property prior to his taking possession of it, all of which he had paid; also the sum of $75.15 which he recovered against the appellee as costs in this court. The appellant also filed exceptions to the second report of the commissioner. Neither the answer nor exceptions controvert the fact that the appellee's homestead in said property was worth one thousand dollars.

Upon the final hearing the chancellor confirmed the commissioner's report allowing the appellee one thousand dollars as the value of her homestead purchased from her son, and six per cent. interest thereon per annum from the 1st day of May, 1875. The chancellor also overruled the appellant's exceptions to the report, and refused to allow him any of his offsets, except $32.54, the sum due for taxes prior to his taking possession of the property, and $75.15, the sum that he recovered as costs in this court against the appellee. Whether the chancellor did right in not allowing the appellant the taxes that accrued on the homestead after he took possession of it is the only question to be determined.

The ejection of the appellee from the homestead was wrongful, and the appellant's possession of it was without right. The appellee was entitled to the exclusive use and possession of the homestead, and it would have been her duty to pay the taxes on it and keep it in reasonable repair. Therefore, for the wrongful deprivation of the use and possession she was entitled to a reasonable rent, less the taxes and reasonable improvements. But as she was allowed to recover the value of the homestead she was entitled to the interest thereon in lieu of rent, but the appellant was not entitled to deduct therefrom the taxes that accrued on the homestead during the time that he held possession of it, for the reason that the use of the home-

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stead is presumed to be equivalent to the interest and taxes on its value. The reasonableness of this presumption is made manifest by this case, for the annual rental value of the homestead during the time that the appellee was wrongfully deprived of the possession of it was greater than the annual interest on the value of the homestead and the taxes thereon. See Thompson on Homestead and Exemptions, sec. 725.

The judgment of the lower court is affirmed.

EVANS v. COMMONWEALTH.

(*Filed April* 7, 1888—*Not to be reported.*)

1. *Constitutional law—Special privileges—Drifting unrafted logs*—The statute which provides for the punishment of any person who shall turn logs loose "on the Licking river *below* Salyersville," for the purpose of floating the same down said river unrafted, is not unconstitutional. The Legislature may prevent the floating of loose logs upon a navigable stream in such a way as to destroy its use to the public for the purposes of navigation, and the act in question in this case does not confer a special privilege upon those who live *above* the town of Salyersville. The statute applies alike to all persons who violate its provisions, whether they live above or below the town of Salyersville, and there is a violation of the act when the logs are floated below that point, although they may have been placed in the river above it.

2. *Same*—Prior to the time at which this law took effect loose logs were placed by the owners near the bed of the Licking river at a point above the town of Salyersville. They were afterwards swept away by a flood and drifted down the river below Salyersville, lodging at different points. Appellant, an employe of the owners, in searching for them, found them thus lodged and rolled them into the river, some at one point and some at another. *Held*—That, considering the object intended to be accomplished by the statute, appellant is not subject to punishment under its provisions.

Wood & Day for appellant.

M. M. Redwine for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Chief Justice Pryor.

An act passed in May, 1886, to be in force on the first day of December, 1886, provided: "That hereafter it shall be unlawful for any person or persons to turn adrift on the Licking river below Salyersville, in Magoffin county, any loose saw-logs for the purpose of floating or drifting the same down said river loose and unrafted. Any person violating the provisions of this act shall be fined not less than two hundred nor more than five hundred dollars, or imprisoned in the county jail not less than thirty nor more than sixty days," &c.

The appellant, Turner Evans, was indicted for violating the provisions of this statute, and a fine of two hundred dollars imposed as the punishment. He maintains that the act is unconstitutional because it permits those who live above Salyersville to float logs unrafted down the river and denies that right to those living below the town, and that such partial legislation can not be sanctioned. We do not construe the act in question as giving to those living

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above the town of Salyersville special privileges; but, on the contrary, while logs may be floated in the river above the place designated, if these logs should reach that part of the river where it is unlawful to float them unrafted, it would be as much a violation of the law as if they had been placed in that condition in the river below the town.

This river is a navigable stream, at least to Salyersville, and perhaps beyond, and while all persons have an equal right to a reasonable use of such streams as they have in a public highway, the Legislature may determine the manner in which this reasonable use may be exercised, and prevent by legislation the obstruction of a navigable stream by floating loose logs upon it in such a way as to destroy its use to the public for the purposes of navigation; and we see no reason for holding this legislation as in violation of the original law.

It seems to us, however, that from the evidence in this case the fine ought not to have been imposed. These logs, as the testimony clearly shows, were cut and hauled in or near the bed of this river at a point above Salyersville prior to the time at which this law took effect; and by reason of a rise in the river these logs, belonging to Atkinson & Co., were swept away by the flood, and drifted down the river below Salyersville, lodging at various drift-piles, some of them found now and then near the river shore. The appellant, an employe of the owners, together with others, in searching for their logs that were marked and easily distinguished, found them in this condition, and would roll them into the river, some at one point and some at another. The act in question was intended to prevent transporting logs to market on the bosom of this stream by those who, in marketing their timber, saw proper to cover the stream with their loose logs, and in that way appropriate the river at certain seasons of the year to their own use. In order to prevent this the Legislature saw proper to impose a penalty for placing such logs adrift and unrafted in the river, whether few or many, by those whose intention was to transfer them to market in that condition. In this case the logs were where the owners had the right to place them, and by the sudden rise in the river, and with no agency on the part of the owners or the employes, the logs were scattered for miles down the river, and when found lodged would be rolled in the river that they might be floated down and rafted or even marketed. The reason of the law and the object sought to be accomplished must be considered, and it could not have been intended that the accidental severing of a few logs from the raft as it passed below Salyersville, or its destruction by winds and storms or high water, should result in making the owners liable to a heavy penalty, and also prevent them from gathering their logs up from the various drift-piles and floating them in the river for the purpose of securing or saving the remnant of what has perhaps cost much labor. The court below should have given the instruction No. 1 asked by the defendant, which is virtually saying that under the facts of the case the penalty ought not to be imposed.

Judgment reversed and remanded for a new trial consistent with this opinion.

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HILL V. PHILLIPS' ADM'R, &c.

(*Filed April* 3, 1888.)

1. *Submission to jury of legal issues in equitable action*—When the equitable issues in an equitable action properly commenced as such depend upon the decision of the legal issues, the latter clause of section 12 of the Code does not prevent a transfer of the legal issues to the ordinary docket in order that they may be tried first. That provision has reference to the determination of such equitable issues as may settle the rights of the parties.

In this action to recover the value of legal services and to enforce a lien on land therefor the court properly transferred the issue as to the value of the services to the ordinary docket to be tried by a jury.

2. *Same*—In a case of purely equitable cognizance the chancellor has the discretionary power to direct an issue of fact to be tried by a jury, and their verdict is generally treated by the chancellor as conclusive between the parties; but it is not necessarily so, as the chancellor simply seeks the advice of the jury to aid him in coming to a correct conclusion. But this principle does not apply where there is a distinct legal issue made in an equitable action. In such a case, either party having a right to the verdict of a jury, the verdict, as in ordinary jury trials, is conclusive between the parties unless the court, upon a motion for a new trial, is satisfied that it is palpably against the weight of the evidence.

H. W. Rives for appellant.

Rountree & Lisle for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Bennett.

D. W. Phillips having died leaving an estate worth about one hundred and forty thousand dollars, and the probate of his will having been resisted there arose a protracted and ably contested litigation over the probate of said will, which litigation was finally terminated on appeal by this court. After the termination of the litigation the appellant, one of the leading attorneys of the appellees—the successful parties in said litigation—presented his account for ten thousand dollars for his services as attorney. The appellees paid five thousand dollars of the account, but refused to pay the balance because, in their opinion, it was excessive. Thereupon the appellant instituted this action in equity in the Marion Circuit Court against the appellees to recover the said sum of five thousand dollars, and to enforce his lien as attorney on the estate involved in the will contest.

The appellees answered, denying that the appellant's services were worth exceeding five thousand dollars, which they had paid.

The case was transferred to the Bullitt Circuit Court. That court, over the objections of the appellant but at the instance of the appellees, transferred the issue made by the pleadings as to the value of appellant's services as attorney to the ordinary docket, to be tried by a jury. The jury trial resulted in a verdict of two thousand dollars for the appellant. The circuit court having overruled the appellant's motions to set aside the order transferring the issue to the ordinary docket and the verdict of the jury, and to render judgment for him for the full amount claimed, notwithstanding the verdict of the jury, he has appealed to this court.

Section 12 of the Civil Code provides: "In an equitable action, properly commenced as such, either party may by motion have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial; but either party

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may require every equitable issue to be disposed of before such transfer."

The latter clause of the section *supra* has reference to such equitable issues as must be determined in the case, the determination of which may settle the rights of the parties. But if the equitable issues depend upon the decision of the legal issues then the latter clause of said section does not prevent a transfer of the legal issues to the ordinary docket in order that they may be tried first. To illustrate, suppose the vendee of a tract of land should set up as a defense to an action in equity by the vendor to enforce his lien on the land for the unpaid purchase money that the land was covered by an adverse, paramount title, and he seeks a rescission and damages for improvements, etc. In such a case the equitable issue is whether there shall be a rescission; the legal issue is that of damages, etc. It will be seen at once that the legal issue depends upon the decision of the equitable issue. If the equitable issue is determined against the defendant his right to damages is settled against him. Or if the issue is settled in his favor in whole or in part, then the legal issue may be transferred to the ordinary docket to be tried by a jury. On the other hand, if a mortgagor should defend an action by his mortgagee to enforce his lien upon the ground that he had paid the debt in such a case the mortgagee's right to enforce his lien would depend upon the existence of the debt, and that fact being a legal issue the case should, upon the motion of either party, be transferred to the ordinary docket to be tried by a jury.

These illustrations serve to explain the meaning of the section of the Code which we are considering, the meaning of which is that if the equitable issues must be tried in order to determine the rights of the parties, then the legal issues depending upon the result of the equitable issues should not be transferred to the ordinary docket until the equitable issues are tried.

But if the equitable issues depend upon the result of the legal issues, then the latter should be transferred upon motion to the ordinary docket, to be first tried by a jury.

In the case at bar the appellant's lien, if any be had, depended upon the result of the legal issue as to the value of his services. The appellees contended that he had been paid the full value of his services. The issue was one of fact, which was to be determined by common law principles. Either party had the right to have the issue settled by a jury. Therefore, the circuit court did right in transferring the issue to the ordinary docket to be tried by a jury. Meek v. McCall, 80 Ky., 375. [4 KY LAW REP., 255.]

In a case of purely equitable cognizance the chancellor has the discretionary power to direct an issue of fact to be tried by a jury; and their verdict is, generally speaking, treated by the chancellor as conclusive between the parties; but it is not necessarily conclusive for the reason that the chancellor simply seeks the advice of the jury to aid him in coming to a correct conclusion on a mooted question of fact. But this principle does not apply where there is a distinct legal issue made in an equitable action for the reason that the 12th section of the Code gives either party the right to have such issue tried by a jury, and their verdict, as in ordinary jury trials, is conclusive between the parties unless the court, upon a motion for a new trial, is satisfied that it is palpably against the weight of evidence.

While the appellant's contention as to the value of his services was supported by strong evidence, yet there was evidence equally as creditable and positive before the jury that sustained their conclusion as to the value of the appellant's services.

The judgment is affirmed.

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KENTUCKY SUPERIOR COURT.

TALBOTT V. STEMMONS' ADM'R.

(*Filed April* 4, 1888.)

1. *Contracts—Consideration*—A valuable consideration is either a benefit to the promissor or a detriment to the promissee. An inconvenience merely is a detriment, as is also the waiver or surrender of a legal right, or the doing of an act not one's duty, even though it may be a benefit to him.

2. *Same*—While A's promise to pay B a certain sum in consideration that B refrain from immoral practices in the future is without consideration, as it could not possibly be a detriment to forbear leading a vicious life, yet the court does not feel authorized to declare that chewing tobacco or smoking cigars is immoral or hurtful.

3. *Same—Pleading*—If a pleader alleges the doing, or forbearing of an act which it was not his duty to do or forbear, and which is *potentially* a benefit to the promissor or a detriment to the promisee, it is sufficient on demurrer; if it *may* be a benefit or detriment the court can not, as a matter of law, say there is no consideration. That can be said only when it is "demonstrable" that there was no benefit or detriment.

This action was brought on the following promise in writing: "I do promise and bind myself to give my grandson, Albert R. Talbott, $500 at my death if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death." The writing was signed by the grandmother; the plaintiff alleged her death, his performance, a demand of the administrator, and a refusal to pay. *Held*—That there *may* have been a detriment to the plaintiff in that the disuse of tobacco *may* have involved a temporary loss of capacity to do what otherwise could have been done, and these *may* have been a benefit to the grandmother in that she *may* have been enabled to derive greater enjoyment from the society of the plaintiff. It is, therefore, not demonstrated that there was neither benefit to the grandmother nor a detriment to plaintiff, and the petition is good.

4. *Same*—Consanguinity sufficient to uphold an executed contract will not render a promise to pay money enforceable.

J. H. Brent for appellant.

Lockhart & Lyng for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Bowden.

This action was brought on the following promise in writing:

"April 26, 1880, I do promise and bind myself to give my grandson, Albert R. Talbott, $500 at my death if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death."

The writing was signed by the grandmother; the plaintiff alleged her death, his performance, a demand of the administrator, and a refusal to pay. A demurrer to the petition was sustained.

1. Consanguinity sufficient to uphold an executed contract will not render a promise to pay money enforceable. Fink v. Cox, 18 Johns., 145; Priester v. Priester, Richardson's Eq. Cas., 26; Holley v. Adams, 16 Vt., 206; Wilbur v. Estate of Warren, 6 Cent. Rep., 214. There must be a valuable as distinguished from a *meritorious* consideration.

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2. A valuable consideration is either a benefit to the promisor or a detriment to the promisee. An inconvenience merely is a detriment. Corbett v. Cochran, 3 Hill Law, 41; though it benefits neither the promisor nor any other person. Hired v. Holdship, 2 Watts, 104; Fisher v. Bartlett, 8 Greenl., 122; Brown v. Ray, 10 Ire Law, 72; so is the waiver or surrender of a legal right; or the doing of an act not one's duty, even though it may be a benefit to him; as if he owes $100 due the day after, and pays $50, or gives a pig worth only $50 in discharge of the debt. All relevant cases are to this effect.

3. The motive of the promisor or promisee is no part of the consideration. Philpot v. Gruninger, 14 Wall., 570; L. Ed., Bk. 20, 743. B's motive for accepting A's offer and for doing the act required is usually that the result will benefit him; and, therefore, the realization of that motive is no part of the consideration. Because, e. g., it may be a benefit to him to go and remain a month at the Hot Springs is no reason why A shall not pay what he promised if B would go. It may be to B a very good and pleasant thing to marry C, but that is no answer by A, if he promised her $1,000 to do so; though an English judge remarked very irreverently, in the opinion of Judge Hare, that it was the same as if an offer had been made to a man to break his leg. Hare on Contracts, 225.

4. If a pleader alleges the doing or forbearing of an act which it was not her duty to do or forbear, and which is *potentially* a benefit to the promisor or a detriment to the promisee, it is sufficient on demurrer; if it *may* be a benefit or detriment, the court can not, as matter of law, say there is no consideration, assuming that what may have existed did not exist. That can be said only where it is "demonstrable" that there was no benefit or detriment. Ferrell v. Scott, 2 Speer's Law, 344; Goodspeed v. Fuller, 46 Me., 141; citing Bainbridge v. Firneston, 1 Per. and Dav., 2, where permission given by the plaintiff to the defendant to weigh certain boilers of the former was held to be a sufficient consideration, the court saying: "We must not inquire into the nature of the benefit derived to the defendant. The plaintiff may have sustained some injury." So when a smaller sum is paid before maturity or something different in kind is given in discharge, it is *possible* there may have been a benefit to the creditor or a detriment to the debtor; and the sufficiency of the consideration is not affected, though it could be shown that in point of fact there was none. If, e. g., B is solvent and owes A $100 due in two days, and A agrees to discharge B if he will pay $50 cash or give him a pig worth only that sum, it might be difficult to conjecture how A was benefited or how B was prejudiced, yet it is *possible* that one or both facts existed.

5. The question is, therefore, this: Is it demonstrable that the grandmother could not have been benefited and that the grandson could not have been prejudiced?

6. A court does not judicially know everything. It can readily say that A's promise to B to pay a certain sum in consideration that they refrain from immoral practices in the future, as was the case of Binnington v. Wallis, 4 B. and Ald., 650, cited by Hare on Contracts, 225, is without consideration; it could not possibly be a detriment to forbear leading a vicious life. But notwithstanding the Counterblast of the first James, and without any purpose of sustaining Sir Walter, we do not feel authorized to declare that chewing tobacco or smoking cigars is immoral or hurtful. Even the framers of the Connecticut Code of 1650 conceded that the use of tobacco was not necessarily sinful, but that it might be beneficial. Reciting that

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"forasmuch as it is observed that many abuses are crept in by frequent taking of tobacko," it was ordered that no person "that hath not already accustomed himselfe to the use thereof shall take any tobacko untill he hath brought a certificate under the hands of some who are approved for knowledge and skill in phisick that it is useful for him." By its use a physical condition may be possibly produced which, though compatible with the discharge of every duty, may be changed by the disuse, and the process of this change may involve a temporary loss of capacity to do what otherwise could have been done. In whatever higher sense it may be degrading to say that "time is money," the law does not hesitate to adopt this practical and materialistic version of Benjamin Franklin. If A, in no way benefited by it, promises B $10 if he will go to a named place, or remain idle where he is a given time, B's performance is enough to make the promise enforceable. His time is potentially money; it is a commodity which, in that sense, can be bargained for, and it would not relieve A to show that B had nothing else to do and would not have done anything else. It may be that the disuse of tobacco would involve a similar loss of time, and, if so, the law ought to be the same; that which reduces one's power by half imposes a loss of half the time.

7. It is possible there may have been a benefit to the grandmother. They may have had such relations as required or made it desirable that they should be together, and under circumstances which gave her no right to insist that he should forego a habit disagreeable to her. If it should be said as matter of law that it is immoral to chew or smoke tobacco; or as matter of fact, that the act, without regard to excess, is a physical injury, it should be also said that the abandonment of it could not confer a benefit in any decent sense, or otherwise than as one might claim he had conferred a benefit by failing to injure himself or the promisor. A court, however, can not properly say either of these things, but must regard the use of tobacco as the exercise of a right subject to the general rule *sic utere*. While one may not smoke in another's parlor against his objection, he may smoke in his own; and if another's private interest require him to be there, his promise to pay for the forbearance which promotes his own comfort is not without a consideration. In Neal v. Gilmore, 29 P. F. S., 421, a promise by a husband and wife that if a child of tender years would stay with them until he was of age, they would raise and care for him as if he was their own, and at their death give him all they had, was held to be on a sufficient consideration, although the material benefit was conferred on and not by the promisee, because the promisors received an equivalent in the society and companionship of the child. Hare on Contracts, 200. It is not material, if it is true, that the grandson was benefited, if it is also true that the grandmother was also benefited; and if the fact of society is a consideration, an act of forbearing the exercise of a legal right to do a thing pleasant and not immoral, which may make the association a matter of still greater comfort, should, it seems to us, be also regarded as a consideration.

The grandmother got all the consideration bargained for, and if the performance by the grandson involved the possibility of benefit to her or of inconvenience to him, her representative should not now be permitted to say the consideration was not valuable.

The judgment is reversed, with directions to overrule the demurrer to the petition and for further proceedings.

Judge Barbour dissenting.

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SUPERIOR COURT ABSTRACTS.

JOHNSON v. WARREN, &c.

Filed March 14, 1888. Appeal from Livingston Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Arbitration and award—Each of the four appellees instituted a separate action against appellant. The suits were alike, except as to names and amounts, the defense in each being the same. By agreement between all the plaintiffs and defendants the several suits were consolidated, or were to be tried as one action, and by subsequent agreement they were all referred to arbitrators for settlement. There was a single order of submission, having as its caption the style of each case. The award followed the order of submission, giving all the cases at the head, and then following with a statement of the amount each plaintiff should recover. The only exception was that the arbitrators failed to render a separate award in each case. *Held*—That the award was, as it should have been, joint as to the right of recovery, and separate as to the amount of recovery.

Hibbs & Husbands for appellant; Bush & Trail and J. K. Hendrick for appellees.

BANTA v. HENRY'S EX'OR.

Filed March 14, 1888. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Acceptance of deed presumed—Acceptance of a deed by the grantee, as between the parties thereto, is presumed by its execution and acknowledgment and delivery to the grantee. And even where it is delivered that he may have it examined, his acceptance will be presumed after the lapse of reasonable time without complaint, or when he suffers himself to be sued, refuses to return the deed or to produce it for the inspection of the court and fails by allegation to point out any defect in the title or deed.

A plea denying that there was a delivery and acceptance ought to state facts so certainly and positively that no other conclusion could be drawn.

Thomas Kennedy for appellant; Ross & Owens for appellee.

CALLIHAN v. TRIMBLE.

Filed March 14, 1888. Appeal from Floyd Circuit Court. Opinion of the court by Judge Barbour, affirming.

Evidence—Entries in account book—Subsection 7 of section 606 of the Civil Code, which provides that "a person may testify for himself as to the correctness of original entries made by him * * * in an account book according to the usual course of business, though the person against whom they were made may have died or become of unsound mind," applies only to the account books of merchants, tradesmen and others, whose business requires that an account of their transactions should be kept in a book, and not to entries made by persons of transactions which are not connected with their business. In this action by a surviving partner against a physician upon an account for merchandise it was not competent for the defendant, in support of his plea of payment, to testify as to the correctness of entries of payment by him to the deceased partner, which he had entered, at the time of the several payments, in an account book kept by him for the purpose.

J. E. Stewart for appellant; James Goble for appellee.

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HOOSER & OVERSHINER v. METCALF.

Filed March 14, 1888. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, reversing.

Contracts—Appellee executed to appellants a writing, in which, after reciting that appellants had two accounts, one against V. and one against C. & Co., he thus agreed: "I am willing to pay what is right, but am not now ready for a settlement, and want until the first day of August to settle, by which time I agree to pay the two accounts above named after the proper offsets and counterclaims are deducted, if there is anything due upon settlement." This action was instituted by appellants upon that writing three years after the time fixed for the payments of the debts, the petition alleging that appellee was a member of the firm of C. & Co., and further averring "that there are no offsets or counterclaims against said two accounts." A demurrer to the petition was sustained. *Held*—That the petition is good as to the debt against C. & Co., a sufficient consideration for the agreement as to that debt being alleged, and it being admitted by the demurrer that there is no offset or counterclaim against the debt.

Harry Ferguson for appellant.

WILLIAMS, &c., v. WILLIAMS.

Filed March 14, 1888. Appeal from Hancock Circuit Court. Opinion of the court by Judge Bowden, affirming.

Benefit societies—Beneficiaries—The charter of the "Presbyterian Mutual Assurance Fund" declares that its purpose is to create a beneficiary fund "for the *families or relations* of deceased members," and provides that if for any reason it be impossible for the person designated in the application for membership to take, the fund shall go, "first, to the widow and infant children; second, to his mother and sisters; third, to his father and brothers; fourth, to his grandchildren; fifth, to his legal heirs." *Held*—That the member may designate in his application any person who *may be* his heir when he dies, and, therefore, may designate collateral kindred.

Geo. W. Williams & Son and W. S. Roberts for appellants; David R. Murray and Miller & Morrison for appellee.

RITCHIE v. HERNDON.

Filed March 14, 1888. Opinion of the court by Judge Bowden, reversing.

Contracts—Conveyance in consideration of support—S. sold and conveyed land to H. for $500—$155 cash and the remaining $345 to be paid by furnishing S. with a support during her life, and with proper medical attention, etc., "all of which goes in liquidation of said $345; and should said amount be consumed before the death of said S., * * said H. * * agrees to continue her support as herein indicated during her life; and at her death should anything remain of said $345, together with all personalty belonging to said S., * * becomes the property of said H. * * or his heirs, should he be dead." S. having died H. sues N. to recover a horse which S. gave to defendant after the contract made by her with plaintiff. For defense N. relies upon the fact that H. did not furnish S. with provisions, etc., as agreed. *Held*—That while it may be that in a proper proceeding, in which it is alleged and shown that H. strictly complied with his undertaking, it would be held that the contract did not permit S. to *give* her property away, yet the title to the personalty of S. did not vest in H. upon the making of the deed, and, therefore, the answer in this case presents a good defense.

Thomas Kennedy and William Lindsay for appellant; John P. Norvell and Hanson Kennedy for appellee.

NELSON v. HOWE MACHINE CO.

Filed March 14, 1888. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Demurrer*—The improbability of the truth of facts alleged as a defense can not be considered on a demurrer to the answer.

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2. *Sham plea*—Before the court would be authorized to strike out a pleading upon the ground that it is a sham pleading, it must clearly appear from the record that it is false, and not merely a defective or insufficient plea.

3. *Bonds—Fraud*—It is a good defense to an action on a bond that the obligee fraudulently substituted another writing for that which was read to defendant, and which he supposed he was signing.

4. *Sureties—Guaranty*—The surety in a bond executed by an agent to his principal for the faithful performance of his duties is not entitled to notice of the acceptance of the bond, the bond not being a contract of guaranty but an original undertaking of suretyship.

5. *Bonds*—The penalty in a bond being fixed at "— thousand dollars," the bond is not void, but the penalty will be understood to be limited to *one* thousand dollars.

Z. T. Morrow for appellant; O. H. Waddle and L. D. Parker for appellees.

Davezac v. Seiler, &c.

Filed March 14, 1888. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bowden, affirming.

Partnership—While partnership real estate passes by deed like other realty, it is affected like personalty by the rights of the partners, and one of the partners can not sell to a stranger a definite interest in it, and thus convert his partner into a joint owner with the stranger. Therefore, where one of two partners undertook to sell to a stranger an interest in the partnership real estate, he is not liable for even nominal damages for not doing so, as both he and the vendee must be presumed to have known that it could not be legally done.

Hallam & Myers for appellant; James P. Tarvin and B. F. Graziani for Seiler.

Daum v. Hackett.

Filed March 21, 1888. Appeal from Bracken Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Parties to appeals*—The mere insertion in the statement of parties of the names of garnishees as appellants did not make them parties to the appeal, as they did not except to the order appealed from requiring them to pay the attached fund into court or pray an appeal.

2. *Garnishment*—The principal defendant can not complain of an order requiring garnishees to pay money into court merely because the money was not owing to him but to another. He is not prejudiced.

3. *Same*—It appearing that there were others than the principal defendant claiming the fund attached, the court should not have ordered the garnishees to pay the money into court until these claimants had an opportunity to be heard, and they may yet be made parties and assert their claim if they ask to be permitted to do so.

H. P. Willis and John L. Scott for appellant; R. K. Smith for appellee.

Ison v. Ison.

Filed March 14, 1888. Appeal from Garrard Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. *Pleading—Fraudulent purchase*—An averment that the defendant, after he had sold the property he had purchased, said that it was then his purpose not to pay for it, was not equivalent to an averment that the defendant bought the property with the fraudulent intent not to pay for it, although the fact alleged might have been *evidence* of a fraudulent purchase if such a purchase had been alleged.

2. *Continuance*—As the plaintiff had two distinguished lawyers the court properly refused a continuance applied for upon the ground that *one* of them was absent.

Owsley & Landram for appellant; R. H. Tomlinson for appellee.

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ULIN v. FORD.

Filed March 21, 1888. Appeal from Boyd Circuit Court. Opinion of the court by presiding Judge Ward, affirming as to one judgment and dismissing as to another.

1. *Sale bonds—Limitation*—The statute providing for the release of sureties in bonds having the force of a judgment, when the plaintiff, at any time for the space of a year, fails to issue executions, applies only to bonds to beneficial creditors who alone may control the collection by *execution*. It can not be applied to judicial bonds, the collection of which the court only can control. In this case the bond was made payable to "James R. Ford, assignee of John D. Mims, Commissioner." The sale was made in a suit instituted by James R. Ford, assignee of John D. Mims, to settle the trust estate. In this action to enjoin the collection of an execution on the bond upon the ground that more than a year had elapsed between the maturity of the bond and the issual of execution, it is not alleged that James R. Ford was the beneficial creditor, or that he had any right to the fund or power to control it other than as the court might direct, or that the court had authorized anyone to collect the bond until a short time before the execution issued. *Held*—That the surety in the bond was not released.

2. *Void judgment—Appeal*—The court rendered a judgment dismissing plaintiff's petition and granted him an appeal. Five days thereafter the court rendered a judgment assessing the damages occasioned by the injunction. *Held*—That the latter judgment was void, the defendant being out of court, but this court can not reverse a void judgment until there has first been a motion in the lower court to set it aside.

E. F. Dulin for appellant; L. T. Moore for appellee.

BROWN v. FUGATE, &c.

Filed March 21, 1888. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Bowden, reversing.

Guardian and ward—A guardian had the power to sell personal property which had been set apart to his wards from the estate of their deceased father as exempt from distribution, and, therefore, had the power to ratify such a sale made by the administrator, and, having done so and accepted the proceeds, the wards thereafter had no other claim than they would have had if the guardian had sold instead of having ratified the sale.

J. T. Simon for appellant; John H. Barker for appellees.

COLLING'S ADM'R v. KNEFLER.

Filed March 21, 1888. Appeal from Spencer Circuit Court. Opinion of the court by Judge Bowden, dismissing.

Appellate jurisdiction—The amount in controversy may be fixed by agreement when there is any element of doubt as to how much it is, but when the amount is certain the parties can not give this court jurisdiction by agreeing that the judgment may be for a greater amount than the plaintiff has claimed.

G. G. Gilbert for appellant; W. H. Anderson for appellee.

HOPKINS, ADM'R v. MYERS.

Filed March 21, 1888. Appeal from Nicholas Circuit Court. Opinion of the court by presiding Judge Ward, affirming.

1. *Reversible errors*—Considering the amount in controversy and the number of credits in dispute, an error of $10 in the verdict of the jury—being about 3 per cent. of the amount in controversy and 5 per cent. of the verdict returned—is too small to warrant a reversal, especially as it was clearly an error of calculation, and was not called to the attention of the trial court in the motion and grounds for a new trial.

2. *Certificate to deposition*—Where a party is present at the taking of a deposition the certificate should state whether he was present in person or by attorney, but if not present it is sufficient to state the fact in the certificate.

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as such a statement means that he was not present either in person or by attorney.

Ross & Owens for appellant; Thomas Kennedy for appellee.

RILEY v. CALTRON.

Filed March 21, 1888. Appeal from Clinton Circuit Court. Opinion of the court by presiding Judge Ward, dismissing appeal and cross appeal.

Appeals—Value in controversy—In a contest between an attaching creditor and the claimant of property attached the value of the property in contest determines or fixes the amount in controversy, and no appeal can be taken from the judgment determining the right of the claimant to the property unless it is shown that the value of the property is one hundred dollars or more.

Sam C. Hardin for appellant; J. A. Brents for appellee.

MOUNT v. JOHNSON.

Filed March 21, 1888. Appeal from Hardin Circuit Court. Opinion of the court by presiding Judge Ward, affirming.

Pleading—Former adjudication—An answer relying upon the fact that there had been a judgment rendered against defendant in a previous action on the same liability was not sufficient, as it did not aver that said judgment had been satisfied, or that it was in full force and effect.

James Montgomery for appellant; Bush & Robertson for appellee.

CITY OF OWENSBORO v. BOARD OF TRUSTEES OF OWENSBORO PUBLIC SCHOOLS.

Filed March 21, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

Municipal taxation—Public schools—Mandamus—By an act of the Legislature it was provided that the mayor and council of the city of Owensboro should annually levy a tax of not exceeding a certain amount, upon application of the board of trustees of the public schools, "which shall be under the exclusive control of said board of trustees, for the purpose of keeping in repair said school buildings, and for supplies necessary to carry on said schools." By a subsequent act it was provided that the mayor and council, on demand of the school board, should annually cause to be assessed, levied and collected for school purposes a tax not exceeding a certain amount, which, when collected, was to be paid over to the school board, and to be under their exclusive control for the purpose of paying the annual expenses of said schools. Prior to these enactments there was nothing in the acts relating to the subject directing the school trustees to make the application for the levy of the tax. This was an application for a mandamus to compel the mayor and council to levy a tax of a certain amount for tuition purposes and another tax for repairs and supplies, the amounts fixed being within the limits prescribed by the acts referred to. The defendants denied that there was any necessity for any greater tax than they had levied, and averred also that the board of trustees had in their treasury a surplus of $11,882.84. A demurrer was sustained to this answer. *Held*—That under the statutes referred to the school trustees are the persons who are to determine the amount of tax within the limits prescribed, and the mayor and council have no discretion as to levying the tax when the amount fixed is within that limit, and, although the answer avers that the school board has a surplus of $11,832.84 in its treasury, it does not present a defense, as it does not aver that any part of that surplus can be used for the expenses of the school or for repairs. It may all belong to the fund set apart for the payment of bonds, or for building.

G. W. Williams & Son and R. W. Slack for appellant; W. N. Sweeney & Son for appellees.

MCBRAYER v. WATERFIELD.

Filed March 21, 1888. Appeal from Anderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

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Mechanic's lien—Application of payments—Ordinarily one who purchases materials to be used in the construction of several houses is not entitled to a lien as to all or any one without making an account as to the material furnished for and used in *each* house, but thts rule does not apply to the facts of this case.

Appellee sued appellant upon an account for lumber sold and delivered for and used in the building of two houses. The two houses were built together and at the same time, but on adjoining lots, one of which was owned by appellant and the other by his wife. About the same amount and character of lumber was used in each. Since the statement was filed in the clerk's office appellant has paid upon his indebtedness $150, leaving a balance of $116.77, for which appellee claims a lien on the house and lot owned by appellant. There are no facts shown which give to appellee a lien on the wife's property. *Held*—That appellee had two debts against the appellant, one secured by a lien and one unsecured, and as appellant made no direction as to the application of the payment the appellee had the right to apply it to the payment of that debt, or part of the indebtedness which was unsecured, and if appellee failed to do this the chancellor had the right to so apply it. Therefore, appellee is entitled to enforce his lien upon appellant's lot for the balance of his account.

Thomas H. Hanks for appellant; W. H. Bickers for appellee.

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KENTUCKY COURT OF APPEALS.

BANK OF COMMERCE v. PAYNE & VILEY, &c.

(*Filed Dec.* 17, 1887.)

1. *Attachments*—Where a debtor's departure from the county of his residence for the purpose of avoiding arrest to answer a criminal charge has the *effect* to prevent the service of summons to answer in a civil action for the same wrong the creditor is entitled to an attachment against his property upon the ground that he "has left the county of his residence to avoid the service of a summons."

2. *Same*—Where a debtor, for his own benefit, without consent of the creditor, has disposed of goods for which warehouse receipts have been issued and delivered as collateral security for money borrowed, an attachment may be issued against his property upon the ground that he has disposed of his property "with the fraudulent intent to cheat, hinder and delay his creditors."

3. *Same—Exemptions*—An assignee for the benefit of creditors did not acquire by the deed of assignment any interest in or control over property of the debtor which was exempt from execution and expressly excepted from the conveyance, and the debtor having failed to assert any claim to such property or its proceeds in this action in which it was sought to be subjected under an attachment, the court should have applied the proceeds to the debts of the plaintiff, the only other party having any claim to the fund.

4. *A deed of assignment for the benefit of creditors* is not rendered invalid by the failure of the assignee to take the oath and execute the bond required by the statute.

5. *Where the Fidelity Trust and Safety Vault Company is made an assignee* for the benefit of creditors the county court may in its discretion require the company at the time the bond is executed to give personal security, or may dispense with it, and in either case the instrument is good as a statutory bond.

6. *The intent with which a deed of assignment for the benefit of creditors is made*, and not the actual tendency or effect of the deed, determines the question whether or not it is fraudulent and void. Therefore, if it be a trick or contrivance for the debtor's own advantage an equal and honest distribution of his estate among his creditors being a *secondary and subordinate* consideration, or part of a plan or scheme previously concocted, in

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pursuance of which creditors are intended to be or *have been* deceived into false security, overreached and defrauded, then the deed should be held void.

As the deed of assignment attacked in this case was executed not in good faith and with intent to deal fairly and justly by creditors, but in furtherance and as part of a scheme devised by the debtors to obtain an advantageous settlement and get possession of and destroy certain outstanding warehouse receipts, which were evidence of their criminal violation of law, in the accomplishment of which purpose they had already deceived, defrauded and wronged their creditors, the deed is set aside as fraudulent and void, although the effect is to prefer an attaching creditor to the exclusion of other creditors.

7. *Estoppel*—The fact that the president of a bank, one of the creditors of the grantors, was present at a creditors' meeting and assented to a resolution requesting the assignee to proceed to collect and apply the property conveyed to pay the debts does not, in view of the short time that had elapsed since the execution of the deed and the conduct of the grantors, of which the creditors were not then fully advised, estop the bank from questioning the validity of the deed.

8. *An assignee for the benefit of creditors is not a purchaser for value*, and, therefore, it is not necessary, in order to render the deed of assignment invalid, that the assignee or the beneficiaries should have participated in the fraud of the grantors.

9. *The plaintiff was entitled to personal judgment* for the debt sued on, although there had been no actual service of summons, the defendants by counsel having filed an answer, in which they did not controvert the plaintiff's claim. It was, therefore, error to dismiss the petition, whether or not the alleged grounds of attachment were sustained.

Alex. P. Humphrey, Chas. S. Grubbs and W. O. & J. L. Dodd for appellant.

B. F. Buckner for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Lewis.

September 10, 1884, the Bank of Commerce instituted this action against Payne & Viley, a firm composed of H. C. Payne and John T. Viley, doing business prior to that time in the city of Louisville.

In the petition it is stated the plaintiff held four promissory notes not then due on the firm for the aggregate amount of $18,500; that each of the defendants had departed from the county of his residence to avoid the service of summons, and had sold, conveyed or otherwise disposed of his or their property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his creditors. In an amended petition it is stated the deed hereafter referred to was made by them with like intent.

An attachment was issued, and the Fidelity Trust and Safety Vault Company, created a corporation by the general assembly, was with others summoned on the same day as a garnishee.

September 12 the plaintiff filed in the clerk's office its amended petition making said corporation a party defendant, and stating therein that September 6 Payne & Viley executed and acknowledged a pretended deed of trust, purporting to transfer to it all the property owned by them as partners and as individuals, except such as was by law exempt from execution, the kind and description of which is set out in the amended petition.

It is recited in the deed, a copy thereof being filed as an exhibit, that the conveyance was made to the corporation in trust to collect

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all the property mentioned therein, and with convenient speed sell the same for cash, or on such reasonable credit as the trustee in its discretion might deem for the best interest of the creditors of Payne & Viley; that the trustee should of the money collected first pay all charges, costs and reasonable compensation to itself, and the balance left to all creditors of the firm and of the individual members thereof, according to such priorities or liens as existed by law or contract, and then to distribute ratably.

It is also stated in the amended petition that said corporation Sept. 8 took possession of a considerable portion of the property and sold some of it before this action was commenced, but did not by any one of its officers qualify as trustee until after the writ of attachment was issued and executed upon divers garnishees, nor had executed the bond required by law in such cases when the amended petition was filed.

The relief prayed for was judgment setting aside the deed subjecting the property conveyed thereby and that attached to the satisfaction of the debts; and in a subsequent pleading, the notes having become due in the meantime, personal judgment against Payne & Viley thereon was also asked.

Payne & Viley, though not actually summoned, entered by counsel their appearance and filed answer, denying the deed was executed with the intent alleged by the plaintiff and controverting the ground of the attachment, as was likewise done by the trustee in its answer, but the justice of the debt sued on was not controverted by either of the defendants.

The judgment appealed from is that the attachment be discharged and petition dismissed at the plaintiff's cost.

There is very little room for discussion about the facts of the case, but legal questions arise, some of which have not heretofore been passed on by this court.

It appears that Payne & Viley commenced business as warehouse commission merchants in 1878, and were from the beginning in the habit of giving wharehouse receipts on bagging in or by them represented to be in their warehouse as collateral security for the payment of money borrowed from banks. One of the members also contracted individual debts, for which he pledged his private property, consisting principally of stocks and bonds, and in the end became heavily involved.

In the summer of 1882, as both members of the firm in their depositions admit, they knew it was insolvent, but except their bookkeeper no one else was aware of or seemed to suspect it, and consequently they were enabled to effect new loans or postpone the payment of existing debts by means of the warehouse receipts, although, as the bookkeeper testifies, "they disposed of the bagging while the receipts were still outstanding without the consent of the holders of such receipts."

In July, 1884, however, being convinced they could not much longer conceal the actual financial condition of the firm, they commenced to devise some plan by which to obtain a composition settlement satisfactory to its creditors, and consulted a friend on the subject and soon after employed counsel to advise and aid them.

There was at first a difference of opinion as to the feasibility of obtaining such settlement without the execution of a deed of assignment, which for manifest reasons they wished to avoid, one of the members of the firm and the friend consulted believing it could be done, while the other and their counsel believed it could not.

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But it was understood and agreed between them that in order to have the required time in which to determine upon and carry out the plan most likely to accomplish the object of settling with and satisfying the creditors it was essential to obtain a renewal of such of their notes as fell due about that date, and to induce the banks, their creditors, to agree to it, the members of the firm, or one of them, represented that as the season for the sale of bagging did not commence until about September it was necessary for the payment of the debts to be deferred until that time to enable the firm to sell the bagging for which the receipts held by the banks had been given, and with the proceeds of such sales as made to take up the receipts.

Accepting that representation as true, and believing the bagging was still in possession of the firm, the officers of the banks applied to except one, The Breckinridge Bank, consented to the proposed removal and extension, while the debt of the one that refused was then paid off in full.

Immediately after the transaction Payne, who seems to have been the leading and controlling member of the firm, left his place of business and county of his residence and remained away until Saturday, September 6, when, being notified by his friend, he returned to Louisville for the purpose of executing and acknowledging the deed of assignment, which was done in the office of their counsel after 9 p. m., the president of the Fidelity Trust and Safety Vault Company being there ready to accept, and a deputy clerk present to take acknowledgment of the deed, both of whom were admonished to say nothing about the transaction.

In each of the two daily newspapers published in Louisville the next morning (Sunday) an article appeared, prepared at the instance of Payne & Viley, in which the assignment was announced, and the statement made the debts were less than half the amount they turned out to be, and the assets sufficient to pay them, and on the same day, by the first outgoing railroad train, they both left and went to another county of the State for the purpose, as they substantially admit, to avoid inquiries as to the actual condition of the firm, and to await the action of their creditors on the proposition for a settlement to be submitted at a meeting which was held the next day, Monday.

The estimated value of the firm and individual assets, as appears from a memorandum furnished by them to their creditors, was about $93,000, but two items of the list valued at $25,000 could not then be regarded as more than possibly available in paying the debts, even if in good faith so designed, because they consisted of proceeds of land lying in a distant State, the property of Payne's wife, the power to sell which for that purpose was questionable, and a gift from his father which might or might not be made. On the other hand the indebtedness of the firm was about $161,000, and that of Payne about $59,000, while of about 42,000 rolls of bagging, for which they had issued and delivered to their creditors warehouse receipts as collateral security, about 37,000, valued at about $144,000, had been disposed of, only about 5,500 rolls being upon examination made after the execution of the deed found in their warehouse or under their control. Being as they state in their depositions advised by their counsel that their creditors had rejected their proposition for a settlement, were very angry with them, and that it was the only thing left for them to do, both Payne & Viley, immediately after the creditors' meeting, left the United States and went to the Domin-

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ion of Canada, where they remained up to the time the judgment was rendered.

Whether the deed of assignment be valid or not we think the lower court was not authorized by the pleadings and proof in this case to either dismiss the petition or discharge the attachment. The record shows Payne & Viley by their employed counsel went into court and filed answer, which was not only duly sworn to by them but, as they admit, expressly authorized by them to be filed. They should, therefore, be regarded as waiving actual service of summons and before the court; and such being the case the plaintiff was clearly entitled to personal judgment against them for the debt sued on. The proof is sufficient to sustain both the alleged grounds of attachment.

The purpose of Payne in absenting himself from the county of his residence from July to September, as is substantially admitted by him, was to prevent inquiry and investigation by creditors in regard to the true condition of the firm and the fraudulent methods of business used by the members, which he knew would inevitably cause meritorious actions to be brought and summons issued against them. Their flight to Canada, though for the purpose of avoiding arrest to answer a criminal charge, had the effect to prevent the service of summons to answer in civil action for the same wrong. While, therefore, the proof does not bring this case within the letter, it does come within the reason of subsection 4, section 194, Civil Code.

The second ground existed beyond question. For if the disposal by the debtor for his own benefit, without consent of the creditor, of goods for which warehouse receipts have been issued and delivered as collateral security for money borrowed be not an act done with the fraudulent intent to cheat, hinder and delay such creditor in the meaning of subsection 7, it is hard to conceive a case that would be. Such an act is not only fraudulent but by statute is made criminal.

The bagging for which warehouse receipts were held by the Bank of Commerce was, as its chief officer testifies, of value sufficient to satisfy the whole of its debts against the firm, but it had been fraudulently disposed of and none was to be found when this action was commenced.

The remaining inquiry in this connection is then whether there was any property besides that attempted to be conveyed by the deed of assignment subject to the plaintiff's debts.

The trustee did not acquire by the deed any interest in or control of the property of H. C. Payne that was then exempt from execution by reason of his status of *bona fide* housekeeper with a family, then as it is conceded existing, for it was expressly excepted from the conveyance. Nor has Payne, though a party, set up any claim to that property or to the proceeds of such of it as has been sold. Therefore, though we think the evidence shows he had before the judgment was rendered ceased to be such housekeeper, it is immaterial whether he had or not. For whatever right he had to the property or its proceeds was waived by his failure to set up claim to it in this action, and it was in the power of the court and its duty, having control of the fund arising from that source, to have applied it to the debts of the plaintiff, the only other party having any claim to it.

The two grounds upon which it is contended the deed of assignment is invalid and inoperative against the attachment are:

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First. That the trustee failed to comply with section 1, chapter 109, General Statutes.

Second. That it was made with intent to delay, hinder or defraud creditors.

The section referred to is as follows:

"That hereafter it shall not be lawful for the trustee or assignee, in any conveyance made for the benefit of creditors, in any wise to proceed to execute the trust until he shall appear in the county court of the county where such conveyance may have been recorded and taken an oath faithfully to execute the duties confided to him by such conveyance agreeably to law; and shall likewise execute a covenant in open court, with good and sufficient security, to be approved by said court, payable to the grantor or any beneficiary in such conveyance, to the effect that he will faithfully in proper time discharge all the duties of trustee or assignee imposed upon him by the conveyance or by the law of the land."

It appears that the attachment was issued and levied and summons executed on the Fidelity Trust and Safety Vault Company before either the required oath was taken or bond executed, and that it was not until February, 1885, that any bond with personal security was made, the first one having been given without. It is, however, contended for appellees that by section 9 of the act incorporating the company and empowering it to act as an assignee it was exempted from the duty of giving personal security in such cases. That section is as follows: "The capital of said company shall be taken and considered as the only security required by law for the faithful performance of its duties; and other security shall not be required upon its appointment to any of the offices or duties mentioned herein except when required by the courts or by parties in interest."

We perceive no necessary conflict between the two sections; for the court may, in its discretion, require the company at the time the bond is executed to give personal security or may dispense with it, and in either case the instrument would be good as a statutory bond.

But we do not assent to the proposition of counsel that the assignee did not under the statute acquire title to the property, and as a consequence the attachment lien of the plaintiff should prevail merely because process in this action was executed before the oath was taken or bond was executed.

To sustain that position we have to disregard a rule admitting of no exception that a trust never fails for want of a trustee, and to assume the legislature intended by the section quoted that the beneficiary interest already vested in creditors, so far as a deed of assignment duly executed, acknowledged and accepted can vest such an interest in property, may be divested by any appreciable delay to take the oath and give the bond by the mere recipient of the nominal legal interest.

Before the enactment of the section quoted it was settled by this court that if a deed of assignment be valid it can not be rendered invalid by omission or negligence of the assignee. Bank U. S. v. Huth, 4 B. M., 423. And counsel admit that prior to that section the deed, if valid, operated to pass the title of the property to the assignee, and as a necessary consequence it was not subject to attachment.

It seems to us that admission is fatal to their argument. For both the reason for the statute and the language used show it was intended to benefit, not prejudice, the beneficiaries; to render more certain and

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secure not more uncertain and precarious their rights and interests. It was manifestly, for the better security of creditors against the fraudulent and improvident conduct of assignees, that the oath and bond are required, and for no other apparent reason. For the faithful execution of his duties by the assignee inures to their benefit and to them, and the grantor, who is entitled to the residuum, is the bond made payable.

We think, if it had been intended that the omission or delay of the assignee should so unjustly prejudice the rights of the beneficiaries, not at all in fault, language not susceptible of misconstruction would have been used to say so. The principal ground upon which the deed is assailed is that it was in the language of section 1, article 1, chapter 44, General Statutes, made "with the intent to delay, hinder or defraud creditors."

But we will first consider the effect to be given to the attendance at a creditors' meeting held September 8, and the assent by the chief officer of the plaintiff to a resolution there adopted, in substance authorizing and requesting the assignee to proceed to collect and apply the property conveyed to pay the debts.

In the reply of the plaintiff it is stated, and not controverted, that at the time of that meeting its president was not informed of the nature and contents of the deed, and he testifies to the same fact.

The circumstances of this case preclude the belief that officer acted fraudulently or in bad faith to either the grantors, assignee, or the other creditors; and in view of the short time that had elapsed since the execution of the deed and the conduct of the grantors, of which the creditors were not then fully advised, we think it would be an improper and unreasonable application of the doctrine of estoppel to deprive the plaintiff of the right to have it set aside if, as alleged, it was fraudulently made.

The ruling of this court as to the true test of the validity of deeds of assignment, which are in terms embraced by the statute, has been uniform and unvarying, for the language used admits of but one interpretation.

"It is the intent and purpose with which the grantor acts that characterizes the conveyance and renders it fraudulent under the statute." Taylor v. Eubank, 3 Mar., 239; Lynn v. Bank of Kentucky, 5 J. J. M., 545; Emery v. Fisher, 2 Bush, 76.

"We readily concede that if the intention in the execution of the deed be to hinder or delay creditors, such an intention entering into and producing its execution, being against the statute and bad, will vitiate the whole deed though it be made upon a good consideration, or for the just and equitable purpose of securing an equal distribution of the effects among all the creditors. * * * * When it appears on the face of the deed of trust that the motive for making it was to *prevent a sacrifice* of the property, a bad motive is shown—a motive to obstruct the ordinary process of law in the subjection of the property to the payment of the debts—which vitiates the whole deed. So if that motive and intention be proved *aliunde*." Vernon v. Morton, 8 Dana, 263.

"In every such assignment some delay is unavoidable. It is not, therefore, the fact of delay but its character, and the motive which actuated it, that is deemed fraudulent in law." Christopher v. Covington, 2 B. M., 358.

"The object of the statute was to prevent deeds, &c., fraudulent in their *inception* and *intention*, and not merely such, as in their *effect* might hinder or delay other creditors. It is the corrupt and covinous *motive*, the fraudulent *intention*, the *mala mens*, with which the as-

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signment or conveyance is made that constitutes the fraud against which the denunciations of the statute are directed, and without the existence in fact, or presumed existence of an immoral or bad *intention* or *motive*, fraud can not be perpetuated either at common law or under the statute. The *motive* is to be arrived at from the facts and circumstances appearing in each particular case." Bank U. S. v. Huth, 4 B. M., 430.

In German Insurance Bank v. Nunez, 80 Ky., 334, is this language: "In all cases where conveyances are made for the ostensible purpose of securing an equal distribution among creditors of the property of the debtor, the validity of the conveyance depends upon the intention of the debtor. If the intention is to hinder and delay creditors in the enforcement of their demands against the debtor rather than to secure an equitable distribution of the property among creditors and for their benefit, the conveyance is fraudulent and void. It is not the effect of such conveyances that determines their validity, for every such conveyances in effect hinders and delays creditors. It is the intention that controls, and that intention can not be better determined than from the language of the conveyance, although it may be established by extrinsic evidence."

In Codogan v. Kennett, 2 Cowp., 432, Lord Mansfield, construing the English statute, 13 Elizabeth, said: "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defeat creditors."

And, as said in Burrill on Assignments, sec. 332, "the same test has been referred to as decisive by Story, in his work on Equity Jur., and by Chief Justice Marshall, in U. S. v. Hare, 8 Cranch, 73."

The preamble to the English statute, from which our own against fraudulent conveyances was taken, so clearly and fully sets forth the reason and object of such enactment as to leave no room for doubt or construction. It is as follows: "For the avoiding and abolishing of feigned covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, &c., more commonly used and practiced in those days than hath been seen or heard of heretofore, which feoffments, &c., have been and are devised and contrived of malice, fraud, covin, collusion or guile to the end, purpose and *intent to delay, hinder and defraud creditors* and others of their just and lawful actions with debts, accounts, damages, penalties, forfeitures, &c., not only to the let and hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

It seems to us impossible, looking at either the language or reason of the statute, to adopt any other test of the validity of a deed of assignment. For having the necessary effect of suspending, and in many cases defeating, altogether "remedy by the due course of law" guaranteed by the Constitution, it should never, when attacked by a complaining creditor, be upheld, if made in bad faith and tainted with fraud. Accordingly, as held in Vernon v. Martin, though such deed be made upon a good consideration, or for the just and equitable purpose of securing an equal distribution of the effects among all his creditors, yet, if the intention in the execution of it be to delay, hinder or defraud them, such an intention entering into and producing it will vitiate the whole deed. And, as said in Christopher v. Covington, in ever such assignment some delay is unavoidable; but it is not the fact of delay or hindrance,

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but the intent or purpose which actuates the assignment that stamps it as *bona fide* or fraudulent.

As, then, it is not the actual tendency or effect of such a deed, but the interest with which it is made that determines the question of its validity, it follows that if it be a trick or contrivance for the debtor's own advantage, an equal and honest distribution of his estate among his creditors being a secondary and subordinate consideration, or part of a plan or scheme previously concocted, in pursuance of which creditors are intended to be or have been deceived into false security, overreached and defrauded, then the transaction should be held tainted, and the deed vitiated and void.

It does not appear that the assignee or the beneficiaries under the deed participated in the fraud imputed to the grantors, nor is it necessary they should have done so in order to render it invalid. For, as recently held by this court, an assignee for the benefit of creditors generally is not a purchaser for value. He stands in the position of his assignor, and can assert no equity that could not be asserted by the debtor himself. Bridgford, trustee v. Barbour, &c., 80 Ky., 529; Dietz's Assignee v. Sutcliffe, 80 Ky., 650. Nor does it affect the question that in setting aside the deed the attaching creditor may, to the partial exclusion of others, be paid his entire debt. For it is not the right of a debtor, unless in good faith and legally done, to deprive any creditor of the remedies given by law, and the injury to those who choose to abide by a fraudulent deed is of less consequence than the necessity of enforcing "true and plain dealing between man and man." In testing the deed of assignment in question by the rules mentioned, so plainly in accord with the letter, object and scope of the statute, the first inquiry that naturally arises is why, if the intent of Payne & Viley was to make an honest, fair and full transfer of their estate for the benefit of creditors, it was not done in July. The hopeless bankruptcy of the firm was then known to them, its business was at an end and practically abandoned.

The record places it beyond question that their leading and controlling purpose was to bring about a composition settlement with creditors, whereby to obtain a release from their debts, and get possession of and destroy the outstanding warehouse receipts which were indisputable evidence of their criminal violation of law. It is equally clear that the assignment was a secondary consideration, and not made until they were advised and became satisfied the main object could not be accomplished without it.

They, therefore, in order, using the language of Payne, "to hold the thing in its present shape until ripe for settlement," not only delayed until September what good faith to their creditors required done in July, but intentionally and studiously kept the true condition of the firm in the meantime concealed from them. But, as most of the debts were falling due and suits would be commenced for their collection unless an arrangement deferring payment could be made, they got all of them renewed but that due to the Breckinridge bank by falsely representing they still had the bagging for which the receipts were given. The Breckinridge bank is not shown to have had any greater claim upon them than the others, and the only reason for discriminating in its favor, by paying its debt in full when they knew their estate was not sufficient to pay one-half of the whole indebtedness, was that it was necessary to prevent suit by it, and the consequent exposure of the condition of the firm which it was their purpose to then conceal.

The same motive induced Payne to leave Louisville after the debts were renewed, for he admits he left to avoid inquiry and investigation by the creditors.

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The time and circumstances under which the deed was executed, and the false statement made the next day in newspapers, show the same leading and consistent purpose to deceive creditors as to the actual condition of the firm and their methods of business, and thus more certainly bring about the settlement and enable them to secure possession of the warehouse receipts.

The evidence makes it plain to us that the deed was executed not in good faith, and with intent to deal fairly and justly by creditors, but in furtherance and as part of a scheme devised by the debtors to obtain an advantageous settlement and to prevent the enforcement of the statute violated by them, in the accomplishment of which they had already deceived, defrauded and wronged their creditors.

To adjudge such deed valid merely because under it there may be an equal distribution of such of their estate as the debtors may have seen proper to give up, would be neither wise policy nor sound morals.

The judgment of the lower court is overruled for further proceedings consistent with this opinion.

Chief Justice Pryor delivered the following dissenting opinion:

The intent of the grantor in making a conveyance, or the assignor in making an assignment, is the important inquiry in determining the validity of the instrument when assailed for fraud, and if the motive for making the conveyance and the purpose to be effected by it is illegal if carried out, the conveyance will be cancelled.

That this is the undoubted rule to be applied between the debtor and grantor on the one side and his creditors on the other will not be denied. In fact there is no essential difference between my associates and myself as to this general doctrine, but, when applied to the facts of the particular case, I feel compelled to dissent from the opinion rendered. This conveyance is assailed by the appellant, one of the creditors of Payne & Viley, on the ground that it was made to delay, hinder or defraud their creditors, and, therefore, under the statute against fraudulent conveyances, is void. The assignment was adjudged valid by the court below, and that judgment has been reversed.

I maintain, first, that no creditor has been defrauded by the execution of the conveyance or hindered and delayed in the collection of their debts; second, that if the debtors were insolvent when they made the assignment and by its terms disposed of all their property for creditors, without preference and receiving no advantage to themselves to the prejudice of creditors, the chancellor will not look to the motive influencing the debtors in its execution. That although the principal object in making the assignment was the hope, expectation or belief on the part of the debtors that the creditors would release them from the balance of their debts, or would decline to prosecute them for crimes committed, originating out of their business transactions, such purposes or intention can not affect the validity of the instrument unless an agreement to compound the felony has been shown, or, by the terms of the assignment, the title was to vest in the assignee for creditors on such a condition. I shall assume, therefore, that Payne & Viley commenced a system of fraud by repeated promises to pay, and the renewal of paper to the banks, so as to give them ample time to prepare for an assignment that would result, in their opinion, in the delivery to them of their warehouse receipts by their creditors, and in that manner escape all criminal responsibility. The concession made is broader, perhaps,

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than the facts justify, but necessary to meet the legal questions or rather the view taken of this case by my associates.

If the purpose to be effected by the assignment is illegal, that is, if the illegal consideration becomes a part of it, either expressly or by fair construction, or is to be carried out by the parties intended, whether by secret agreement or otherwise, then the assignment is void. When absolute and unconditional and the assignment is made not only to secure honest debts but all the *bona fide* debts of the grantor, then the motive to constitute the fraud must in some manner enter into the transaction itself in order to affect innocent parties or honest creditors. The reason is that it is not unlawful for a dishonest man, one whose life has been mainly devoted to defrauding others, to make an assignment for the benefit of all his creditors; and although the prime purpose is the belief on the part of the debtor at the time he executes it that his creditors will then be merciful to him and relieve him from punishment for crime, it is not such a motive as should cause the chancellor to cancel a conveyance, equitable in all of its terms and just in its results. Where the intent is unlawful and enters into the agreement it is not doubted that the conveyance is void. The sufficiency of the consideration in such a case will not uphold the conveyance, and, as was said in Vernon v. Morton, 8 Dana, 247, "if the object be to delay and hinder creditors the just and equitable distribution of the effects among all creditors" will not save the conveyance. Men do many lawful acts from impure or improper motives, but the vicious purpose will not of itself render that unlawful that without it would be lawful. It was the duty of the debtors in this case, both in law and morals, to secure equality among their creditors. The claims upon them by those they had defrauded, as well as other creditors, demanded of the debtors in their insolvent condition that an assignment should be made. They could make no preference, and when providing for creditors they were compelled to secure equality to all. The act of an insolvent debtor in producing equality between creditors in the distribution of his assets is both commendable and lawful, and when done it is immaterial what motive prompted the debtor in its execution. The motive may be corrupt, but when no creditor has been injured by it and no advantage obtained by the debtor under it, either by an agreement with creditors or others, the act is lawful and the transaction should not be disturbed. The creditor who has been provided for with all others under the same instrument will not be listened to because his vigilance has enabled him to discover an impure motive on the part of the debtor in its execution. The assignment had been accepted by the assignee and also by nearly all the creditors, including the president of the appellant, before the latter obtained its attachment, but it is alleged, and doubtless true, that when the assignment was accepted or the resolution passed directing the assignee to sell and pay creditors as soon as practicable, and for which the president of the appellant voted, the latter was not aware of the contents of the assignment or the motives causing the execution of the instrument. While one can not be estopped by reason of the existence of facts he could not have ascertained, and I do not propose to rest the determination of this case on the doctrine of estoppel, *it shows* the danger in permitting mere intent and motive to invalidate an instrument lawful in itself protecting the rights of all and injuring no one. What facts were discovered and really existed? It was ascertained that Payne & Viley had, in dealing with the appellant (a bank) and many other banks, subjected

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themselves to a prosecution for felony by reason of certain warehouse receipts they had deposited as collaterals; that they were or had been maturing a plan to compromise with creditors and get possession of those receipts that evidenced their crime. That in order to do this they obtained renewals of their paper from time to time until a period had been reached when they could make an assignment and bring, as they believed, the creditors to the desired compromise.

They then made the assignment, with all their motives unknown to any creditor, and it is now held that the discovery of the fraudulent purpose must cancel the deed and give the assets to the attaching creditor to the exclusion of all others. The intent, purpose and belief formed no part of the contract, but was the inducement to do an act which every principle of equity and justice demanded should be done. That which was lawful is set aside, and that which seems to me to be inequitable and unjust directed to be substituted by the chancellor. It is proper to examine the cases in which the general doctrine as to *intent* on the part of the grantor has been applied and the utterances made in the opinions delivered now relied on as establishing the principle to be followed by the chancellor in the present case. The facts and circumstances connected with those cases may be and are essentially different from the one under consideration, and, therefore, the propriety of making the investigation to see how this doctrine has been applied so as to enable us to distinguish the one class of cases from the other. It will be found that those utterances were made, either in cases where there was no fraud established, as in Vernon v. Morton, 8 Dana, 247, and Bank of U. S. v. Huth, 4 B. M., 423, or in cases where the fraudulent motive or intent affected the rights of creditors or resulted in some advantage to the debtor or the grantor. In the case of Ward v. Trotter, 3 Monroe, 1, the consideration was sufficient, but the fraudulent intent appearing on the face of the deed it was held as a matter of law that the deed was void. The facts being conceded, the legal question was alone raised. The recital in the deed in that case was that the debtor *had ample property* to pay his debts, but made the conveyance to prevent a sacrifice of his property. In the late case of the German Insurance Bank v. Nunez, 80 Ky., 334, the debtor made an assignment of like character, the deed expressing on its face that he had ample estate to pay his debts, but to prevent a sacrifice of his property he conveyed it to an assignee for his creditors. Extraneous proof might have been offered in the absence of such a stipulation in either deed *that the grantor had ample* property to pay his debts, and the chancellor would have cancelled the conveyances. Suppose, however, an assignment is made declaring the insolvency of the debtor and his purpose to have his creditors share equally in his assets, but it appears that the debtor said at the time of its execution he made it to prevent creditors from suing him, and require them to purchase his property for more than its value, or that he had forged a note on B, one of his creditors, and he believed unless he made the assignment B would prosecute him; that but for the fear of a prosecution he would not make the conveyance. Now ought the chancellor, at the instance of a creditor in either instance, disregard an assignment placing all on terms of perfect equality for the benefit of one creditor by reason of a motive or intention unknown to any creditor, and communicated only to the confidential friends and advisers of the debtors. Opinion after opinion may be found where the consideration is sufficient, and the creditors placed on terms of perfect equality, and still the assignment has been held fraudulent because

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on its face or by its very terms the intent of the debtor is made manifest; as in the cases cited where the debtor in his assignment says that he has an ample estate to pay his debts, but to prevent a sacrifice by creditors he transfers his property for the benefit of all.

In those cases the intent to hinder is plain, and as a matter of law from the recital the assignments will be held fraudulent. So we see from those cases what is meant by cancelling a conveyance made to hinder and delay creditors, although it be made upon a good consideration or for the just and equitable purpose of securing an equal distribution between creditors. Such intention must not only produce but enter into the execution of the instrument. Although the consideration is sufficient if the intent to hinder and delay appears, the assignment will be disregarded. The mere declaration of the intent or the purpose, or where devices have been resorted to in order to accomplish the intent when no fact appears showing a hindrance or delay, but on the contrary it appearing there was neither, the chancellor will not long hesitate before pronouncing the act valid. There is no benefit reserved in this assignment to the debtors. Nothing compulsory on the assignee or the creditors, the assignee being required to sell as soon as practicable and pay the debts. The hope—expectation—the motive made known only to counsel and friends can not affect the rights of creditors. If the rule of equity is applied, as in the principal opinion, and the fraud practiced on creditors prior to the assignment and traced to the day of its execution is to affect creditors, to what extent is the doctrine to be carried? Can a debtor, who has defrauded his creditor, make a general assignment? If so, what mere motive or intent will defeat it? Every intent that is not innocent, but which, if carried out, would be unlawful, must, if this rule is established, be the guide. Innocent beneficiaries, whose rights are secured by it, must always be governed by the intent of the maker, although the act done is lawful, or field for judicial speculation is opened that, in my opinion, places the honest creditor at the mercy of the insolvent debtor, who, while he can not prefer under the statute, may protect his favored creditor by a general assignment, with a fraudulent intent, that the latter may obtain his attachment and secure his debt. The barriers against fraud are removed, and the dishonest invited to enter. The punishment inflicted on the maker of such an instrument is but what he invites and is willing to receive for the protection of his favored creditor. The innocent are made to suffer for the motive and intention of the wrongdoer, that forms no part of a contract that is legal, just and equitable to all. I concede, as all the authorities say, that an intent to defraud, when established, avoids the assignment, but, says Mr. Burrill, in his work treating of this subject: "In determining whether an assignment is or is not fraudulent against creditors, the question is said to be not whether fraud may be committed by the assignee, but whether the provisions of the instrument are such that when carried out according to their apparent and reasonable intent they will be fraudulent in their operation." (Burrill on Assignments, section 351.)

What is the assignee required to do under the assignment in this case? He is to sell the property in a reasonable time and divide the proceeds between creditors. No felony has been compounded or criminal prosecution abandoned, but on the contrary, as appears from the record, no such proposition would be listened to by creditors, and the debtors sought refuge from prosecution in going to the Dominion of Canada. That the debtors defrauded the appellant as well as many other banks, who are now claiming an equal distribution

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with it, is evident. That they delayed and postponed the time for making the assignment by false promises in order to accomplish their purpose, which was to avoid prosecution, is equally manifest, but while this fraud and delay and false promises affected one creditor as much as another, in what manner did an assignment for the benefit of every creditor Payne & Viley had hinder, delay or defraud creditors in the collection of their debts? They may have defrauded them by constant promises to pay and delayed the bringing of any action against them for the purpose of making the general assignment, but at last in what manner is that assignment fraudulent in its operation, and in what respect does it hinder and delay creditors? The response must be that it neither hinders, delays nor defrauds creditors, and is just such a distribution of the assets as the debtors should have made, and such as the law required them to make.

Payne & Viley had divested themselves of all title to the property. The estate was in the hands of an assignee for the benefit of those entitled to it. The delay was only such as pertains to every ordinary assignment, and the fact that the debtors believed that this one apparent evidence of honesty would appeal to the mercy of enraged creditors, affords no reason in law, equity or justice for the interference of the chancellor and the cancellation of the assignment.

"Assignments must be absolutely and fairly made for the genuine purpose of paying honest debts and not for the use and benefit of the grantor, or to hinder and delay creditors," &c. State v. Benoist, 37 Mo., 500. This is a correct rule, but it does not mean that, if made with the intention merely to use it for the benefit of the grantor to accomplish some vicious purpose, it is fraudulent as to creditors who are not parties to the wrongful intent. The assignment is for the benefit of all creditors. It vests the assignee with the absolute title, and no right to use it for a bad purpose exists with the grantor without the assent of the beneficiaries in the deed, and when that assent is obtained or the right of the creditor to the property or its proceeds is made to depend on the exercise of such a use by the grantor, the instrument is then fraudulent and void.

Prior to the act of 1856 a debtor in this State, although insolvent, could in good faith secure one creditor in preference to all others. Now suppose, as the law then existed, the debtor had secured an honest debt to a *bona fide* creditor, the security being fair and reasonable in its terms, but it appeared that the intent of the debtor was to secure the one creditor so as to force a compromise with the other creditors by which they could be induced to take less than the real amount of their debts. This intent is unknown to the secured creditor, but he stands innocent of any wrong. Now will it be maintained that the deed is fraudulent as to this creditor because of the improper use the debtor supposes he made of it? Surely not. In the investigation of this case since the original opinion was delivered I have read the case of Marbury v. Brooks, 7 Wheaton, 556, the opinion delivered by Chief Justice Marshall, a case bearing a striking analogy to the case before me, and one not before the court when this case was considered. Fitzhugh had executed his notes for large sums of money in Dec., 1819, and forged the names of certain parties as indorsers of the paper and then discounted the notes in certain banks. Fitzhugh, being unable to meet the paper at maturity, with a view of pacifying the banks, executed to one Marbury a deed to valuable property for the benefit of the defrauded creditors, they to be first paid, and the balance, if any, to go to the unpreferred creditors. Fitzhugh then fled the country and

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the unsecured creditors obtained their attachments that were levied on the property.

They contended that the consideration of the conveyance was illegal because executed for the purpose of suppressing a prosecution by the banks for the felony. The testimony in the case, says the great jurist, 'was abundantly sufficient to justify the jury in drawing the inference that the deed was executed by Fitzhugh in hope that payment of the forged notes would enable him to escape a prosecution, and that the same hope was entertained by Marbury, the assignee." The jury, at the instance of the banks, was in substance instructed by the court below "that if this purpose or motive on the part of Fitzhugh and Marbury was unknown to the banks, and accepted by them without any agreement, express or implied, to suppress or forbear the prosecution of Fitzhugh, they must find for the banks." This instruction was excepted to, and the creditors asked the following instruction: "That if, from the evidence, the jury believed that the deed was devised and executed by Fitzhugh, and procured and accepted by Marbury with the motive and intent and for the purpose and object of suppressing a prosecution against Fitzhugh by prevailing with the holders of the forged notes to forbear and forego a prosecution for the forgeries, that then the deed is fraudulent and void in law as to the plaintiffs." The instruction was refused. The chief justice, in discussing this last instruction, says in substance that it is of doubtful meaning, and if confined to the stipulations of the deed is in conflict with the instruction given for the banks, "but if counsel is to be understood as asking the court to say that if the deed was to be used by Marbury as an instrument by which to procure the suppression of the prosecution, that being the condition on which the holders of the forged notes were to entitle themselves to its advantages, it was fraudulent and void as to the plaintiff, there can be no doubt but that the instruction should have been given," etc. The counsel for the plaintiffs also asked the court to instruct the jury "that if the great majority of creditors, in number and value, of said Fitzhugh were by means of said deed unjustly and purposely hindered, delayed and defeated in their proper suits and remedies for the recovery of their debts on the absconding Fitzhugh, and that the deed was executed with the purpose of defeating all legal recourse in behalf of the unsecured creditors against the property of Fitzhugh, then the deed is fraudulent and void." This instruction was refused and for the reason that the debtor had the right to prefer one creditor over another. In discussing the facts of that case the chief justice said: "This act was entirely consistent with law. His right to give the preference is not questioned, nor is the validity of the consideration, so far as it moved from creditors, infected with any vicious principle or in any manner brought in doubt. Everything on the part of creditors is exceptionally fair and legal."

The case cited meets directly the question of motive and intent, where the act done is lawful and the intent alone of the grantor when executing it is vicious. Here the creditors connived at no fraud or vicious act on the part of the debtor. They were innocent in their acceptance of a writing, lawful on its face, just and equal to all, of any impure motive on the part of the maker. Creditors are entitled to demand equity when their debtor is insolvent and undertakes to make provision for them.

The principle recognized in Marbury v. Brooks should apply with greater force in this case because there a certain class of creditors were preferred, but here all are placed on an equal footing.

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The Legislature of this State affords a guide to the chancellor when called on to determine the validity of such assignments. The statute in regard to fraudulent conveyances (General Statutes, chapter 44) is not only in force, but by section 1 of article 2, same chapter, it is provided "that every sale, mortgage, assignment made by debtors, and every judgment suffered by any defendant, or any act or device done or resorted to by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors." Insolvent debtors, in their effort to secure creditors, often gave priority by mortgages and assignments to those more vigilant than others, and to prevent such a preference and place all creditors on terms of equality, when the insolvent debtor attempted to prefer, by any plan or device whatever, it was provided that such a preference should, by operation of law, pass the whole of the debtor's estate to his creditors.

The law makes the assignment for him, and all are permitted to share equally in the assets, subject to existing liens, or such as are given by the statute. The securing of one creditor by the debtor when in this insolvent condition, has been held by this court, in repeated decisions, to evidence his design to prefer.

So in July, 1884, or at the time the assignment was made, and long before, these insolvent debtors could have made no preference between creditors without being guilty of constructive fraud, and passing their whole estate to all creditors. The limitation to a proceeding for constructive fraud in such a case is six months, and if assailed by a creditor within that time the chancellor would have said to Payne & Viley, you have violated the statute by giving a preference, and I will now do what you should have done—pass your whole estate in the hands of a trustee or commissioner for the benefit of all your *bona fide* creditors. So these debtors could secure no creditor, or make terms with any, because it would have resulted in an assignment to all; but when they make an assignment to all they are then told that the intent was vicious, and, therefore, the doctrine of equality is disregarded, and the attaching creditor is at last given the preference over all others. Payne & Viley occupied the anomalous position of being unable to secure one creditor, and, in their condition, unable to secure all.

They had progressed so far with their fraud and their vicious motives leading to the assignment that no act, however lawful, done by them could be free from the taint of fraud or corrupt intent. The policy and wisdom of the Legislature pointed out to the debtors the path they were to pursue in their deplorable condition, and while they may have obscured it in being prompted by an unlawful motive, the act itself being lawful, innocent parties will hold under it. Every principle of law, justice and equity will sanction the act, while no judge or chancellor can approve the motive prompting its execution. Other questions have arisen, about which a difference of opinion exists, but I am content to confine my views of the case to the principal question involved.

My individual opinion is, although not necessary to the decision of this case, that no general assignment can in any case be held fraudulent by reason of the equities of the statute in regard to preferences, unless the creditors, or some of them, participate in the fraud.

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THURBER V. CRUMP.

(*Filed Dec.* 6, 1887.)

1. *Transfers of stock in corporations* organized under chapter 56 of the General Statutes, are valid, not only between the parties but as against creditors, although not entered upon the books of the company. The provision of the statute requiring such transfers to be made upon the books of the company is for the protection of the corporation and purchasers, and not for the protection of creditors of the stockholders, the books of the company not being open to the inspection of the public.

2. *Bona fide purchaser*—A purchase of stock in a corporation, which was attacked in this case as fraudulent, is held to have been a *bona fide* transaction, the circumstances of the purchase being set forth in the opinion.

Brown, Humphrey & Davie for appellant.

Emmett Field for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellee, on the 26th day of November, 1880, filed his petition in the Louisville Chancery Court against James Wilson and the Southern Dairy Company. In his petition he alleged in substance that he made a verbal contract with James Wilson, by which he agreed to assist him, Wilson, in selling the right to manufacture, in the States of Kentucky and Indiana, animal fats for the purposes of food, in the form of butter, &c.; that the right to manufacture animal fats, &c., in these two States was secured by patent, which patent Wilson owned; that by the terms of the agreement Wilson was to receive twelve thousand dollars for the right to manufacture under his patent for the State of Kentucky, and all over that sum received by Wilson for the right to manufacture in the State of Kentucky the appellee was to have one-half of it as compensation for his services; that Wilson was to receive eight thousand dollars for his right to manufacture under his patent for the State of Indiana, and all over that sum received by Wilson for the right to manufacture in the State of Indiana the appellee was to have one-half of it as compensation for his services. The appellee alleged that he did materially aid in getting a company organized and incorporated under the incorporation law of this State in the city of Louisville, which company was styled the "Southern Dairy Company of Louisville;" that by his aid Wilson was enabled to sell his patent right for the State of Kentucky to the Southern Dairy Company for five hundred shares of stock in said company, each share being for one hundred dollars; that afterwards he aided Wilson in selling to said company his patent right for the State of Indiana, for five hundred additional shares of stock in said company, each share being for one hundred dollars; that Wilson sold, before the certificate of stock on his Kentucky sale was issued to him, one hundred of said shares, for which he received five thousand dollars; and that the company's certificate of stock was issued to him for the remaining four hundred shares; that the company issued to Wilson certificates of stock for five hundred shares on account of the Indiana purchase. Appellee alleged that Wilson had realized more than twelve thousand dollars from the stock issued to him for the Kentucky purchase, and more than eight thousand dollars from the stock issued to him for the Indiana purchase; that

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after the sale of stock enough to realize said sums of money, a large amount of stock still remained upon the books of the company in the name of Wilson, and was held by him. He alleged that he was entitled to one-half of this stock, but Wilson refused to surrender the same to him. Having made the Southern Dairy Company a defendant, he asked that it be compelled to cancel the certificates of one-half of the stock remaining on its books in the name of Wilson, and issue new certificates to him for the same. The Southern Dairy Company, on the 4th day of February, 1881, filed its answer, in which it stated that there remained on its stock books in the name of Wilson two hundred and fifty shares of its stock; but that the company had been informed that Wilson, on the 26th of October, 1880, had transferred the certificates of said shares to the appellant, Thurber, and that Thurber had demanded that a transfer of the stock be made to him, but the stock still remained in the name of Wilson; and that the company was willing to transfer it to whom the court might order it transferred. The appellee then filed an amended petition, in which he alleged that the appellant, Thurber, had never paid any value for the stock; and that the transfer of the certificates had never been made to him, or, if the transfer had been made to him, it was done after he had instituted his suit. Afterwards the appellant appeared and filed his answer, in which he alleged that he purchased such stock in the city of New York, on the 26th of October, 1880; that the purchase was made for value, in good faith, and without any knowledge or information of the appellee's alleged claim. He also alleged that the certificates of stock were delivered to him by Wilson at the time of purchase. The appellee, in his reply, put in issue the appellant's allegations, and attacked the *bona fides* of the alleged purchase.

The lower court adjudged that the appellee was entitled to the two hundred and fifty shares of stock, but, inasmuch as the appellant had disposed of the stock since the institution of the appellee's suit, the court rendered judgment against the appellant for its value, to-wit, one hundred and seven dollars per share. The court's judgment was based upon the fact that the appellant was not a *bona fide* purchaser of the stock. So the first question to be determined is, does the evidence in the case sustain the conclusion reached by the lower court to the effect the purchase of the stock was not *bona fide?*

The appellant gave two depositions in the case. His first deposition was given in November, 1881. In this deposition he swears that he purchased this stock from James Wilson on the 26th of October, 1880; that he paid fifteen thousand dollars cash for it, which sum was its market value; that he was unable to tell whether the payment was by check, but it was a cash transaction; that the purchase was made in good faith and without any knowledge or suspicion that the stock did not belong to Wilson; that he took an assignment of the certificates of stock at the time he made the purchase; that thereafter he made a demand of the Southern Dairy Company to have the stock transferred on the book of the company in his name. It appears, from other facts in the record, that this demand was made the first of February, 1881. The appellant gave his second deposition in December, 1885. In this deposition he says that at the time of his purchase of this stock he was engaged in the wholesale grocery business in the city of New York, as a member of the firm of H. K. & F. B. Thurber, which firm did a yearly business of about eighteen or twenty millions of dollars; that James Wilson was at that time largely interested in the oleomargarine business, and was managing the Commercial Manufacturing Company in

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New York; that his, appellant's, firm sold all the products of Wilson's firm. In that way there were large dealings between the two firms; that Wilson and himself had individual dealings with each other, consisting mostly, if not wholly, of money transactions, such as loaning him, Wilson, money, discounting his notes and effecting loans for him; that on or about the 4th of September, 1880, he loaned Wilson fifteen thousand dollars and took as collateral security for the same some stock which Wilson owned in the Commercial Manufacturing Company of Chicago; that this fifteen thousand dollars was paid to Wilson by two checks in the name of the appellant's firm. One of the checks was given on the 4th of September, 1880, and for fifteen hundred dollars; the other check was given on the 8th of September, 1880, for thirteen thousand four hundred and eighty-five dollars. Both checks were drawn on the Importers and Traders National Bank; that Wilson owed him a balance of fifteen dollars, which sum made up the fifteen thousand dollars. He says that, after giving Wilson these checks in the name of the firm, he credited Wilson on the books of the firm with the amount of the checks, and he settled the amount with the firm. He explains why he did not give a detailed account of the transaction in his first deposition, which is, that, having given the checks in the name of the firm, he was unable, until some time afterwards, to trace the checks to this transaction.

Appellant's testimony, as given in his second deposition, certainly does not contradict his evidence as given in his first deposition. In his second deposition he details the history of the transactions between Wilson and himself that culminated in the purchase of the stock, which transactions show, as stated in his first deposition, that the purchase of the stock was really for cash. In other words, the purchase was in fact a cash transaction. The appellant's evidence is the only evidence of this transaction. He is not contradicted, as to the transaction, in any particular by other evidence. It is true there appears in his evidence some discrepancies upon minor and collateral points, but taking his first deposition upon the subject of the purchase and the circumstances given in his second deposition that led to the purchase, we are constrained to the conclusion that his evidence as to the transaction is not contradictory. We can not discredit the appellant's evidence, as to the *bona fides* of the purchase, upon the ground that he, in the light of other evidence, was mistaken in his recollection as to the *bona fides* of the transaction; but if he is to be discredited, it must be upon the ground that he has committed forgery. We think the evidence does not justify such a conclusion.

Before discussing the question of the legal right of the appellant to the stock, it is necessary to determine how Wilson held it, whether in his own right or not.

First. The appellee's evidence shows clearly that the stock was issued to Wilson with appellee's knowledge and consent; that, in a word, the stock was to stand on the company's stock books in the name of Wilson, and the certificates of stock were to be issued to Wilson.

Second. That the appellee was to have one-half of all that might be realized over twelve thousand dollars on the sale of the patent right for Kentucky, and one-half of all that might be realized over eight thousand dollars on the sale of the patent right for the State of Indiana; that the agreement clearly contemplated a money transaction between the appellee and Wilson. So, on the 26th of October, 1880, James Wilson was the legal owner of

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this stock. The appellant purchased the stock from him at its market value and without notice of the appellee's claim, and took an assignment of the certificates of stock. These certificates were not presented to the Southern Dairy Company to be cancelled, and the stock entered in the name of the appellant until after the appellee brought this action. So the question arises, what title did the appellant acquire by his purchase and the transfer of the certificates?

The Southern Dairy Company was organized under chapter 56 of the General Statutes. The 11th section of this chapter reads as follows: "Transfers of stock shall not be valid, except as between the parties thereto, until the same are regularly entered upon the books of the company so as to show the name of the person by whom and to whom the transfer is made, the number or other designation of the shares and the date of the transfer. The books of the company shall be so kept as to show intelligibly the original stockholders, their respective interests, the amount which has been paid thereon, and all transfers thereof; and such books or correct copies thereof, so far as they relate to the items mentioned in this section, shall be subject at all times to the inspection of any stockholders desiring the same."

By this section Wilson was not denied the right to transfer his stock in the company. By the common law, his stock being personal property, he had the right to sell it at private sale and pass a perfect legal title to it, which sale, upon delivery of the stock itself, if susceptible of manual delivery, if not, upon the delivery of the certificates—a symbolical delivery—would pass the legal title to the vendee, which title would prevail against any prior lien upon the stock, or executory contract for the sale of it, of which the vendee had no notice, which sale would also prevail against any subsequent sale or transfer of the same stock. So far, therefore, as the statute treats the transfer of stock as between the vendor and vendee as valid, it is simply declaratory of a common law principle. This common law principle is unrestrictive of the right of the owner of stock to sell it at private sale and pass a perfect legal title to it. James Wilson was the legal owner of the stock; the absolute legal title was in him. When he sold it to the appellant he parted with all the title that he had. He had the legal title, and he sold that title. There was nothing left for him to do concerning the transfer—all the title that he had vested in his vendee. It is well settled that when a person makes an absolute sale of property, to which he has a legal title, the legal title passes to the vendee, subject, however, to such restrictions as our registration laws may put upon such transactions for the protection of innocent purchasers, etc. Even where the registration laws require that certain conveyances, to be valid as against innocent purchasers and creditors without notice, must be recorded, such sales, as between the vendor and vendee, pass the legal title, for the reason that the vendor has the legal right to sell the property, and when he owns the legal title and sells it he passes all that he has. There is nothing left for him to do in order to pass his title, for the purchaser has all his right in the property. So in this case Wilson sold the stock to the appellant; he parted with all the title he had, which was the legal title. There was nothing left for him to do to perfect that title in the appellee. The Southern Dairy Company was not a joint owner of this stock. This company had no legal or equitable title to it. Wilson was a member of the company, one of the incorporators, and by the terms of his membership this stock was to be free from assessment. He held his stock, not in common with his brother members, but in his own absolute

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right. So the appellant was not compelled to look to the company in order to get it to relinquish any legal or equitable title that it might hold to the stock, for it held neither legal nor equitable title to it. The appellant then by his purchase acquired Wilson's title to the stock; the company owned no legal or equitable title to it, nor did any one else. It follows, therefore, that the appellant, as between Wilson and himself, acquired the legal title to the stock, and according to common law principles he acquired the legal title as against all the world.

But according to the 11th section of the statute the "transfer of stock shall not be valid, except as between the parties thereto, until the same are entered upon the books of the company," &c. This provision was certainly made for the protection of the corporation and purchasers, but not for the protection of the creditors of the stockholders. It is but right that the company should know at all times who its stockholders are. Their right to vote, their right to draw dividends, their right to shape and control the destiny of the company, in the prosperity and welfare of which each member has a direct interest; the protection of the company against paying dividends to the wrong person; the protection of the company against conflicting claimants of the stock; the risk of paying dividends or other emoluments to illegal claimants; the risk they would run in recognizing the rights of claimants who held conflicting private transfers of stock from the same stockholder—these reasons doubtless, caused the insertion of the provision requiring that transfers of stock, in order to be valid as against the company, should be transferred on the books of the company.

So also as said above, but for the restriction in the 11th section a purchaser of stock from the stockholder would acquire a perfect legal title to the stock as against antecedent liens and purely executory rights of third persons, of which the vendee had no notice; also, his purchase would prevail against subsequent purchasers, and as the statute does not require that the transfer of the stock shall be made only by a transfer of the certificate of stock, but as the transfer may be made by any writing, and as it is within the power of the owner of the stock to sell it to different persons, it was, therefore, also intended that the object of said section of the statute *supra* should have the effect of a registration law as between conflicting purchasers of stock from the same person, and to provide that the right of the junior purchaser should prevail against the right of the senior purchaser; provided the junior purchaser should succeed in having his transfer entered upon the book of the company first and without notice of the senior purchase.

But the section *supra* does not operate as a registration law in the interest of the creditors of the stockholders, for the reason that the books of the company are not required to be kept open for the inspection of the public. The books are required to be kept open to the stockholders only. Outsiders have no right to demand an inspection of the books. Therefore, the section in question was not intended for the protection of creditors. As to the creditor the stock of the stockholder is as though the stockholder held it in his pocket or some private individual, in which case a *bona fide* transfer for value is good against the transferrer's creditors. So in the case at bar the recording of the transfer of stock on the books of the company not being required for the benefit of the stockholder's creditors but for the benefit of the company and purchasers, the transfer of the stock, without the transfer being entered upon the books of the company, limited the passage of the legal title strictly to the vendor

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and vendee as between the vendee and the company and a subsequent purchaser for value, and without notice of the prior purchase at the time he had his transfer recorded on the books of the company; but as between such purchaser and the creditors of the stockholder the purchaser acquires a perfect legal title. (N. Y. & M. H. R. R. Co. v. Schuyler, 34 N. Y., 30; Lowell on Transfer of Stock, sections 93, 95, 96.)

The judgment of the lower court is reversed and the case is remanded, with directions to dismiss the appellee's petition.

PUGH, &c. v. COMMONWEALTH.

(*Filed March* 1, 1888—*Not to be reported.*)

Criminal law—Rape—As the testimony conduced to show that appellants were guilty of the crime of rape, with which they were charged, the court properly refused to instruct the jury to find the defendants not guilty.

G. A. Cassidy, M. H. Stitt and L. J. Moore for appellants.

P. W. Hardin for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Chief Justice Pryor.

These appellants were indicted and convicted of the crime of rape committed on the person of a child between thirteen and fourteen years of age. The only exception found in the record is as to the action of the court below in refusing to instruct the jury, after the evidence had closed for the State, to find the defendants not guilty.

While an absence of any proof as to guilt would authorize a reversal, an examination of the record discloses the fact that these parties did have intercourse with the little girl, and from her testimony compelled her to submit to their beastly desires. One of the appellants is a man of family, and had persuaded this little girl to go with him to the State of Ohio upon a promise to pay her some small sum in the way of wages as a servant in his family. On their way to Ohio, in some secluded spot near the roadside, these two appellants, as the child swears, had sexual intercourse with her, and physicians who made an examination of her person corroborate her statements in stating that after an examination they had no doubt but that some one must have had intercourse with her. This child, it seems, is a mere waif, without a knowledge of her parentage, and, from the testimony detailing the history of her young life, has had no one to guard her against the approaches of bad men, but left to be made the victim of their lusts until, as the evidence conduces to show, she has become a depraved girl. If her unfortunate condition in life is a justification for the assault upon her person by these stalwart men, then the court below should have directed a nonsuit; but if helpless infancy, with its purity sullied by a moral depravity imparted by the amorous passions of bad men, deserves the protection of courts of justice, then the judgment below should be affirmed.

Judgment affirmed.

To a petition for rehearing filed by counsel for appellants Chief Justice Pryor delivered the following response of the court:

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We infer that the record before us is different from the one read by counsel, as he seems so confident, as to the errors committed by the court, in saying that Fannie Barnet was a little girl, when there is no testimony on that subject. One witness states that Fannie Barnet was apprenticed to him about two years prior to the date of his testimony, and she was then said to be ten or eleven years old. The question was submitted to the jury as to the venue. If the crime was committed in Fleming county, where they were tried, they must find the parties guilty, if the offense charged had been proven beyond a reasonable doubt.

Petition overruled.

LOUISVILLE & NASHVILLE R. R. CO. V. SCHUSTER, BY, &C.

(*Filed April* 7, 1888—*Not to be reported.*)

1. *Contributory negligence* is affirmative matter of defense, and if relied upon must be pleaded.

2. *While a verdict may aid a defective plea, it will not avail if there be no plea*—Therefore a verdict for the defendant will not cure a failure of the defendant to plead contributory negligence.

3. *Concurrent negligence*—Where the defendant's negligence was the *proximate* cause of an injury, the plaintiff may recover, although he was also guilty of negligence.

4. *Railroads—Negligence*—At places on a railroad not frequented by the public, either by right or the permission, express or implied, of the company, and in localities where people can not reasonably be expected to be, those in charge of a train are not required by law to be on the lookout for them, but are only required to avoid injury to them if they can do so upon becoming aware of their peril. In a place thickly populated, however, and where many persons are known to be constantly passing about and across the road, as in a city like Louisville, those in charge of the train must be on the lookout for persons crossing its tracks, and must, by the customary signals, warn them of the approaching danger.

5. *Same*—While the jury failed to say, in express terms, that the place where the plaintiff was injured was a crossing in general public use, their finding that it was a "crossing" must be interpreted to mean that it was used as such by the public, and this fact, as well as the additional one that the locality was one where people might reasonably be expected to be upon or crossing the track, made it the duty of the train to keep a lookout for the protection of such persons.

6. *Same*—Although the jury did not find whether any signal by bell or otherwise was given as the train approached the place where the injury was inflicted, yet as they did find that those in charge of the train could, by the exercise of ordinary care, have discovered the danger to the plaintiff in time to have either checked the train or notified him of its approach, this was sufficient to authorize a judgment for the plaintiff.

Barnett, Noble & Barnett for appellant.

Brown, Humphrey and Davie for appellees.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Holt.

The appellee avers that through the gross negligence of those in charge of it, a train of the appellant's ran over him, crushing both of his legs, in consequence of which they had to be amputated. The

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answer merely denies the negligence. There is no plea of contributory neglect upon the part of the appellee. It is affirmative matter of defense, and if relied upon must be pleaded. Even a verdict will not cure a failure to do so because while it may aid a defective plea, it will not avail if there be no plea. Moreover, in this case there were special findings; and among them the jury found that, notwithstanding the want of ordinary care upon the appellee's part when he was injured, those in charge of the train could, by the exercise of ordinary prudence upon their part, have prevented it. The jury found that the proximate cause of the injury was the lack of ordinary care upon the part of the appellant.

In such a case it is a well settled rule in this State that the injured party can recover. Commencing with the L. & N. R. R. Co. v. Yandell, 17 B. M., 466, if not earlier, there is an unbroken line of cases down to McCoy against the same company (81 Ky., 404) [5 KY. LAW REP., 397], and, indeed, some later, so holding. The only question, therefore, involved here is whether the appellant was guilty of such neglect.

The accident happened upon that portion of its road between Bear Grass creek and its depot, in the city of Louisville, and within the corporate limits of the city. At the immediate point where it occurred there is a heavy fill from twenty to thirty feet high, and about twenty-three feet wide at the top. Upon it are two tracks with some seven or eight feet of space between the inside rails of each. Buchanan street has been constructed to within from 150 to 200 feet of this fill upon its south side. Many people live and work in that vicinity. Indeed it is a part of the city, and appears for the most part to be thickly peopled. There are, therefore, many persons passing about and along and across the appellant's road at that point. There are other streets not far from Buchanan street, and running in the same general direction, and which are connected with it by cross streets that have been built across the railroad. The only way to cross it, however, from Buchanan street, in a course continued like that of the street, is to follow a pathway leading from the end of it to the railroad embankment, and thence up it onto the railroad track from whence, after passing along and across it diagonally for a few steps, you descend upon the north side by means of a footway. The appellee, who was then but fifteen years old, had been peddling matches in another part of the city, and late in the afternoon was on his way home. He came down Buchanan street in company with another boy, and at the end of it they pursued the footpath and climbed up the embankment for the purpose, probably, of going down the path upon the other side, and in that way reaching home. They started along the track upon the south side of the embankment, but as a train leaving the city upon it was nearing them they left it and stepped upon the track upon the north side. Owing, doubtless, to their attention being drawn to the outgoing train they failed to discover that an incoming train was behind them and upon the same track upon which they now were. It was coming at the rate of six miles an hour upon a down grade. It had come in sight of them around a curve a short distance from them, but far enough off to have enabled those in charge of it to have kept it from running over the appellee if they had seen him. The outgoing train had just passed them, or was in the act of doing so, when the incoming train came upon them, striking the appellee, while his companion jumped from the track and thus escaped injury.

The special findings are that the appellee was injured by the appellant's engine, when in charge of its employes, and near the mouth

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of Buchanan street, and within the city limits; that there was a crossing over the railroad at that point; that the appellee was, when struck, upon the track upon which the train was moving; that those in charge of it did not know of his position in time to have avoided the injury, but by the exercise of ordinary care upon their part could have discovered it in time to have checked or stopped the train, or notified him by whistling or otherwise of his danger, thereby avoiding the injury or enabling him to escape; that the employe who could, by the use of such care, have known and done this was the fireman; that the appellee knew before he attempted to cross the track that trains were frequently moving thereon, and could, when attempting to cross, by the exercise of ordinary care, have discovered the approaching train in time to have saved himself from injury; that those in charge of the train could, notwithstanding the want of ordinary care upon his part, by the exercise of such care, have avoided the injury; that appellee was then fifteen years old; that it would not have been safe for him to have stood between the two tracks and thus permitted the two trains to pass upon each side of him at the same time, and that $5,000 in damages would reasonably compensate him for his injury.

The jury, by reason of disagreement, returned no answer to the question whether those in charge of the train as it approached the point where the accident occurred gave any signal thereof by whistle or bell.

It is urged that, as the appellee was a footman and hence could easily get out of the way of the train upon warning of its approach, there being no claim that its speed was too great, that, therefore, there could have been no negligence upon the part of the trainmen save in failing to give the usual signals of its approach; and, as the jury did not find upon this point, that the appellee failed to make out a case.

The degree of care to be exercised by a railroad company must necessarily depend upon the location and the circumstances of the case. At places not frequented by the public, either by right or the permission, express or implied, of the company, and in localities where people are not constantly passing about, and where they can not reasonably be expected to be, those in charge of a train are not required by law to be on the lookout for them. In such cases the company is entitled to the exclusive use of its track, and those upon it are trespassers; and those in charge of a train are only required to avoid injury to them if they can do so upon becoming aware of their peril. In a place thickly populated, however, and where many persons are known to be constantly passing about and across the road, as in a city like Louisville, the public interest and regard for the safety of human life require a different rule. In such a case those in charge of such a dangerous agency as a railroad train must be on the lookout for persons upon and crossing its track, and must by the customary signals warn them of the approaching danger. This rule should be rigidly enforced. (L. & N. R. R. Co. v. Hoehl, 12 Bush, 50; L. & N. R. R. Co. v. Howard, 82 Ky., 218.) [6 KY. LAW REP., 163.]

We do not mean to hold that in such a case the train must stop whenever it comes within sight of a person upon the track, provided he is not then in immediate danger. Such a rule would of course impede public travel and destroy the recognized usefulness of railroads. But at such places and under such circumstances it is the duty of those in charge of a train to be on the lookout for persons upon its track and give all reasonable notice of its movements.

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In this instance the train was running within the limits of a large city. It was in the midst of its population. Those in charge of it knew that the people were almost constantly upon and crossing the track. The path by which the appellee went upon it and that leaving it were plainly visible. The evidence shows that persons frequently crossed the track at that point. It is reasonable to presume that this use was permissive from the appellant. It is true that the jury failed in express terms to say that it was a crossing in general public use, but they did say that it was "a crossing," and the fair interpretation to be placed upon the answer is that it was used as such by the public. The appellee was, therefore, there by the implied consent at least of the appellant. Its agents were, therefore, by reason of this fact, as well as the additional one that the locality was one where people might reasonably be expected to be upon or crossing the track, bound to keep a lookout for their protection.

The evidence is conflicting as to whether the signals customary in passing through a city or a public thoroughfare were being given at the time of the accident. It is tolerably certain that the usual sharp whistle generally used in case of immediate danger was not given. Indeed the engineer and fireman did not discover the appellee until the train was upon him; and the evidence tends strongly to show that one or the other of them would have done so if the necessary outlook had been kept. While, therefore, the jury did not find whether any signal by bell or otherwise was given as the train approached the place where the injury was inflicted, yet they did find that those in charge of it could, by the exercise of ordinary care, have discovered the danger to the appellee in time to have either checked the train or notified him of its approach, thereby either avoiding the injury or enabling him to escape. The answer to this interrogatory is sufficiently definite, at least when considered in connection with the succeeding one, by which the jury said that the fireman, by the use of ordinary care, could have known of the appellee's position upon the track in time to have stopped the train or notified him of his danger.

The findings, therefore, present this state of case, to wit: The injury resulted from the appellee being struck by the appellant's train when upon its track at a crossing in a large city; that although those in charge of the train did not discover his danger in time to save him, yet by the use of ordinary care they could have done so and avoided the injury by either checking the train or warning him of his danger by whistle or otherwise, thus enabling him to escape. In short the jury found, as a matter of fact, that the injury to the appellee was the result of the want of ordinary care upon the part of those in charge of the train, and this was sufficient, in our opinion, to authorize the judgment in his favor, although the jury failed to say whether, as the train was approaching the point where the accident occurred, any signal, by whistle or bell, was given.

Judgment affirmed.

ROGERS' ADM'R V. HUGHES.

(*Filed April* 21, 1888.)

Wilful neglect—In an action to recover damages for a personal injury resulting from wilful neglect, it is sufficient to aver the extent of the injury and the manner of its infliction without stating the facts constituting the

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wilful neglect; but if it appears from the statement of the manner in which the injury was inflicted that the alleged injury could not reasonably have been expected to result from the act of the defendant, no cause of action is stated, and a demurrer to the petition should be sustained.

In this action by the personal representatives under section 3 of chapter 57 of the General Statutes to recover damages for the destruction of the life of his intestate by the wilful neglect of the defendant, it is stated that the intestate was of feeble mind and without will power to control his appetite for liquor; that the defendant knew this and carelessly and with wilful neglect furnished him with liquor, and tempted, caused and induced him to drink to such excess as to die therefrom in a few hours thereafter. *Held*—That a demurrer to the petition was properly sustained, as the use of the liquor, though immoderate, was not reasonably calculated to produce death.

Hanson Kennedy and Thos. Kennedy for appellant.

John P. Norvell for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Holt.

The administrator of John Rogers seeks to recover damages of the appellee, John Hughes, under section 3, chapter 57 of the General Statutes, which provides as follows: "If the life of any person or persons is lost or destroyed by the wilful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid."

A general demurrer to the petition was sustained. Two amended petitions, which were tendered and are a part of the record by a bill of exceptions, were rejected and the action then dismissed. The averments of both the petition and the amended petitions must, therefore, be considered and taken as admitted upon this appeal. They in substance state that the intestate was of feeble mind and without will power to control his appetite for liquor; that the appellee knew this, and carefully and with wilful neglect furnished and gave it to him, and tempted, induced and caused him to drink to such excess as to die therefrom in a few hours thereafter. Do they constitute a cause of action under the statute?

In an action for a personal injury resulting from wilful negligence it is not necessary, in order to show that it was so occasioned, to plead the particular circumstances attending it. It is sufficient to aver the extent of the injury and the manner of its infliction. The facts constituting the wilful neglect need not be stated. Thus a petition stating that the defendant through wilful neglect shot and killed the deceased is sufficient. In this instance, however, although it is stated that the killing was through wilful neglect, yet it is averred that the manner of it was by furnishing liquor to the deceased and inducing and causing him to drink it to such an extent as to result in death. There is no averment that it was furnished in violation of law. Undoubtedly the use of it is an evil, as is attested by the untimely death of thousands annually, but it is not dangerous *per se* like a loaded weapon; and the presumption is that the appellee in this instance had the right under the law to give it to the deceased. It is unlike placing a loaded gun or a recognized deadly poison in the hands of a child. In such a case a fatal result might naturally be expected. Every reasonable person would look

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for it. Here, however, the death resulted from the immoderate use of an article which, while it is injurious to man, was not reasonably calculated to produce a deadly result. It could not reasonably be expected that it would be a proximate cause of death, and that it would probably result therefrom. If the statute is to be so extended as to embrace such a case then it would be difficult to fix its limit. There are other articles of food and drink which are to some extent injurious to the human system, and the excessive use of which might sometimes result in death. Certainly the statute should not be so construed as to hold one responsible for wilful neglect in furnishing them, although the party receiving them might so use them as to produce a fatal result. A standard of action must be applied which is reasonable and suited to the ordinary judgment and business of life.

It is urged, however, that the petition avers that the appellee "caused him to drink the same to excess," and it is suggested that it might be shown upon the trial that he forced him to do so by threat or otherwise. The averment is of an indefinite character; but assuming that it means the employment of force, even then it would not be a case of neglect. Such conduct resulting in death might be of a criminal character, depending upon the circumstances of the case. It can not avail, however, in this character of action that the deceased was of feeble mind. The ground of it is wilful neglect, and, as already stated, it could not be reasonably apprehended that even the immoderate use of the article furnished would result in death. Such a case is not embraced by the statute.

Judgment affirmed.

HERROLD V. COMMONWEALTH.

(*Filed April* 21, 1888—*Not to be reported.*)

1. *Second appeal—Mistake in first record*—The fact that this court, upon a former appeal in this case, held that the indictment, as it was *by mistake* then made to appear, was defective, does not require that this court, upon this appeal from a second judgment of conviction under the same indictment, shall adhere to that decision and again reverse the judgment, as the indictment, as it truly and correctly appears in this transcript, is free from the supposed defect.

2. *Verdict*—While it was not the province of the jury to recommend a reduction of punishment below the period actually fixed in their verdict, nor of the court to render the judgment for a less punishment than that prescribed in the verdict, yet the fact that the jury recommended that the defendant be given credit by the time served in the penitentiary under the former conviction, and the court undertook by its judgment to thus reduce the time, did not prejudice the defendant.

3. *Jury allowed to take indictment*—The court did not err in allowing the jury to take the indictment to their room, although the former verdict of "guilty" was indorsed thereon. But even if error, it was not prejudicial, as the second verdict fixed a shorter term of imprisonment than the first verdict.

Hallam & Myers and Fisk & Fisk for appellant.

W. W. Cleary and P. W. Hardin for appellee.

Appeal from Kenton Circuit Court.

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Opinion of the court by Judge Lewis.

Appellant was indicted for the statutory offense of wilfully and maliciously shooting and wounding another with intent to kill, and at the Auguest term, 1887, of the trial court convicted and sentenced to confinement in the penitentiary for four years. But upon appeal to this court that judgment was reversed and the case remanded for further proceedings consistent with the opinion then delivered. The ground of that reversal was that, as shown by the transcript then before us, the indictment charged appellant simply with wilfully shooting and wounding another with intent to kill, and the jury were instructed, upon that hypothesis, to find him guilty of a felony. Upon the return of the case he was retried under the same indictment, and, the jury having found him guilty and fixed his punishment at confinement in the penitentiary for three years and six months, he again appeals to this court.

The principal ground relied on for reversal is that, inasmuch as this court, in the former opinion, decided the indictment, as it was by mistake then made to appear, was defective, we should adhere to that decision, though the indictment, as it, in the present transcript truly and correctly appears to us, is entirely free from the supposed defect.

The effect of sustaining such a proposition would be to place it in the power of a ministerial officer to defeat justice, not merely for the time being, but permanently and effectually. The result of reversing the former judgment has been a new and distinct trial, and the only question proper for us to now consider is whether there has been any error of law committed to the prejudice of the substantial rights of appellant. It now clearly appears to us, and it is not disputed, that the indictment actually returned by the grand jury, and under which appellant has each time been tried, contains a charge of the offense of wilfully and maliciously shooting and wounding another with intent to kill, which is by statute made a felony. And consequently the lower court was authorized to instruct the jury upon that hypothesis, as was done, and the verdict, if sustained by the evidence, about which there is no controversy, must stand, if there be no other error of law. It seems the jury, after finding appellant guilty and fixing his punishment, recommend in their verdict that he have credit by the time already served in the penitentiary. And the court in its judgment undertook, perhaps improperly, to reduce the time of confinement from three years and six months to three years and thirteen days, by giving him credit for the time he had been confined under the previous conviction. But though it is not the province of the jury to make any suggestion or recommendation for a reduction of punishment below the period actually fixed in their verdict, nor of the court to render judgment for a less or different punishment than that prescribed in the verdict, we are unable to preceive how appellant has been prejudiced by the irregular proceeding of the lower court. So far from it he has been really benefited by the judgment, for the time of his confinement has been thereby lessened, and can not exceed the period fixed by it.

Sec. 248, Crim. Code, provides that "upon retiring for deliberation the jury may take with them all papers and other things which have been received as evidence in the cause." And as it is usual and proper for them to take the indictment, we do not think the court erred in that respect, although there was written upon the indictment the verdict of the previous jury. Nor do we see how appellant has been prejudiced, for it is almost impossible to conceal

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from a jury the result of a previous trial, if one has taken place. Morever, as the present verdict is less than the former one, it is clear the jury was not influenced by what had previously taken place.

There being, in our opinion, no error of law in the trial of this case prejudicial to the substantial rights of appellant, the judgment is affirmed.

BEATTY, &c. v. BEATTY'S ADM'R, &c.

(*Filed April* 21, 1888—*Not to be reported.*)

1. *Final order*—In an action for a partition of real estate between heirs, the partition prayed for was adjudged, the several amounts with which the heirs were to be respectively charged in the partition were ascertained, determined and fixed, and commissioners were appointed and empowered without further action of the court to make partition of the several parcels of land identified and described in accordance with the terms fully set out in the judgment. *Held*—That the judgment was such a final order as may be appealed from, and, being rendered in the Louisville Chancery Court, was not revocable after sixty days.

2. *The report of commissioners appointed to make partition* was subject to exception only upon the ground that they departed from or disregarded the judgment.

3. *Advancements*—A father made an advancement to his son of $15,000, which was invested by the son in an iron foundry. The son afterwards conveyed the property to his father, who agreed to give for the property, as stated in the deed, $5,500. The son afterwards executed to the father a mortgage upon the fixtures, &c., in and about the foundry. the mortgage reciting that it was executed to secure the payment of $4,000 due and payable by the son to the father in one year. The father having died, in an action for a partition of his real estate among his children. *Held*—That in charging the son with advancements the two sums of $5,500 and $4,000 should be deducted from the $15,000, leaving a balance of only $5,500 to be charged.

4. *Same*—The declarations or statements of the father that he intended what had been received of him by his son as advancements will not prevail against the language of the mortgage, by which the $4,000 is treated as and stated to be a debt and not an advancement.

E. E. McKay and Saml. Cleaver for appellants.

C. B. Seymour for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

The parties to this action united in asking judgment for a partition of the real estate left at his death in 1881 by D. L. Beatty, between his heirs-at-law, consisting of appellants, D. H. and F. W. Beatty, grandchildren, and appellees, Wm. R., E. D. and Emma Beatty, children, and the allotment of dower to the widow; and the only issue between appellants and appellees was as to the amount received by John Beatty, father of the former, and whether they should be charged therewith in the partition and division. At the October term, 1883, of court the chancellor rendered judgment in substance that E. D. Beatty received as an advancement from D. L. Beatty, which is to be charged to him in the partition of the

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realty therein mentioned, $2,000, and that John Beatty, deceased, received, as an advancement, $13,500, to be charged to D. H. and F. W. Beatty in such partition; that the widow is entitled to dower in said realty, and Wm. R., E. D. and Emma Beatty are each entitled to one-fourth, and D. H. and F. W. Beatty each to one-eighth, subject, however, to the charges above respectively adjudged against them. It was further adjudged that persons therein named as commissioners make the partition according to the terms of the judgment, first setting apart one third of said real estate to the widow, and then dividing the remaining two-thirds among the parties entitled thereto, charging them respectively with the amounts adjudged against them, and in case the share of any party shall be less than the amount charged against him, the excess of the charges to be charged against his interest in the reversion of the other one-third, to bear interest from the date of partition. The commissioners were directed to report the value of the several pieces of property, each of which was specifically set out and described in the judgment, and also the value of the life estate of the widow.

The first question raised by counsel for appellees is one of jurisdiction, and is whether the judgment appealed from, that we have first referred to, is, in the meaning of the Civil Code, a final judgment, that is, a final determination of the rights of the parties in this action.

It seems to us that even if tested by the rule laid down in Bondurant v. Apperson, 4 Met., 32, cited by counsel, there can be no room for controversy. That rule is: "That a judgment to be final must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose without further action by the court, or by process of contempt."

In this case the partition of the real estate, which all the parties prayed for, was adjudged, the several amounts with which they were to be respectively charged in the partition were ascertained, determined and fixed, and commissioners were appointed and empowered, without further action of the court, to make partition of the several parcels of land identified and described in accordance with the terms fully set out in the judgment.

Under a special provision of the Civil Code the judgment itself, being rendered in the Louisville Chancery Court, was not revocable after sixty days from the time it was rendered, and the report of the commissioners appointed to make the partition was subject to exception upon the sole ground they departed from or disregarded the judgment. The evidence in this case is not, by any means, conclusive as to either the actual amount received by John Beatty from his father, D. L. Beatty, nor as to the character of the transactions between them. There is no proof that D. L. Beatty kept a book containing an account or memorandum of advancements made to any of his children; nor is there any written evidence of the indebtedness of John Beatty to him filed in this action. The evidence of the amount, which is, however, not at all definite, is given by E. R. Beatty and Emma Beatty, both interested witnesses, and by C. R. Beatty, the widow and mother of Emma, but the step-mother only of John Beatty. Their evidence tends to show that the whole, or at least the larger amount of money received by John Beatty from his father, was so given or loaned between the years 1856 and 1859, and was used by John in buying land and machinery for the purpose of carrying on an iron foundry in Keokuk, Iowa. Certified copies of a deed made by John Beatty to his father in July, 1858,

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and of a mortgage executed April 8, 1859, are filed. The deed is for the identical real property situated in Keokuk, which was sold and conveyed by D. L. Beatty in 1879 to another person. It seems to us that assuming, as the chancellor has done, that John Beatty received of his father as much as $15,000, a part, if not the whole, of which was invested in the Keokuk property and business, it would be reasonable to deduct from that amount $5,500, the consideration stated in the deed of July, 1858, that D. L. Beatty agreed to give for the property then sold to him. The chancellor seems to have acted upon that idea, but instead of deducting the amount which D. L. Beatty gave or agreed to give for the property in 1858, only the sum for which he sold the same property in 1879, viz, $1,500, is deducted. The mortgage mentioned was upon the fixtures, stock and property in and about the Union Foundry, situated in Keokuk, Iowa, and was given to secure the payment of $4,000 due and payable by John to D. L. Beatty in one year from that date.

Whether the mortgage property was ever subjected and sold to pay that sum, which it was stipulated in the instrument might be done upon two weeks' notice of the time and place of sale, or what became of the property, does not appear. But we think it satisfactorily appears that the debt of $4,000, mentioned in the mortgage, must certainly have been a portion of what the witnesses state was received by John Beatty from his father between 1856 and 1859 to enable him to establish and carry on the foundry business in Keokuk, Iowa. For there is no intimation that he received money from his father previous to 1859 for any other purpose.

While in order to obtain a deduction from the amount of $15,000 charged against them as an advancement received by their father, appellants would, perhaps, be required to show that the mortgaged property was subjected and sold by D. L. Beatty, yet the language of the instrument shows that the amount, to secure which the mortgage was given, was treated and regarded by the father and son, not as a gift or advancement, but as a debt which the son agreed and bound himself to pay. And being a debt which John Beatty was bound to pay, appellants should not now be charged with it as an advancement made to him by his father, and consequently, as it seems to us it clearly constitutes a portion of the $15,000, it should be deducted therefrom. For even if clearly established to have been made by D. L. Beatty, his declarations or statements that he intended what had been received of him by John Beatty as advancements, would not prevail against the language of the mortgage by which the $4,000 is treated and stated to be a debt and not an advancement. (Clark v. Clark, 17 B. M., 708.)

Neither D. L. Beatty nor John Beatty are now alive to explain the nature and amount of money transactions between themselves, nor is there produced any written evidence of what was received by the latter, except the deed and mortgage mentioned, but the evidence as to the amount received, and that it was received as an advancement, is given by the brother, half-sister and step-mother of John, the two first having a distinct pecuniary interest in cutting off the two grandchildren, and the last having a natural desire to see her own daughter benefited. But the evidence does not conclusively show the money received by John was advanced instead of being loaned to him. For the existence, a short time before the death of D. L. Beatty, of notes given to him by John, as proved by Emma Beatty, but not now to be found, tends to show not only that the amount received by John was a debt and not an advancement, but that it had been paid and cancelled. But assuming the amount

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which appellants ought to account for at $15,000, which we should, but for the opinion of the chancellor, hesitate to do, we are clearly of opinion that $9,500, instead of $1,500, should be deducted therefrom, leaving $5,500 as the amount to be charged.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

MOESSER V. MOESSER.

(*Filed March* 28, 1888.)

To entitle a married woman to a decree empowering her to trade in her own name it is not necessary that either the pleadings or the evidence should show the reasons which induce the husband to consent; nor should the wife "be required to make a public record of her husband's faults or misfortunes in order to secure rights which the statute clearly says she may have with his bare assent when no creditor of his has cause to complain." And whether the husband unites with the wife, or whether he remains silent when made a defendant, his consent is to be presumed.

In this case the allegations of the wife's petition, to which the husband was made a defendant, and the evidence show that plaintiff has property consisting of real estate: that she has capacity to manage it; that her husband is not in debt, and that notice was published as required by the statute. Neither the husband nor any creditor of his objects to the relief being granted. *Held*.—That plaintiff is entitled to the relief sought.

Marshall & Lochre for appellant.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Presiding Judge Ward.

Appellant, a married woman, filed her petition in the Louisville Law and Equity Court, to which her husband was made defendant, asking said court to empower her to use, enjoy, sell and convey for her own benefit any property she may own or acquire free from the claim or debts of her husband, or to make contracts, sue and be sued as a single woman, or to trade in her own name, or dispose of her property by will or deed.

Theallegations of the petition and the evidence show that plaintiff has property consisting of real estate; that she has capacity to manage it; that her husband is not in debt, and the notice required by the statute was published for ten days in a paper designated by the clerk of said court by an order made by him in vacation. The plaintiff's case is, therefore, within the letter of sections 6 and 7 of article 2, chapter 52 of the General Statutes.

Neither the husband nor any creditor of his objects to the relief being granted, and the powers which the wife asks to have conferred upon her are essentially the same as might have been conferred before the statute, by an agreement between her and her husband, through the instrumentality of a trustee. It seems, therefore, not pertinent to the facts of this case to inquire what action the court should take in a case where the wife, without cause therefor, should whimsically apply to the court for the granting of powers which

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would divest the husband, without his consent, of important and valuable marital rights.

Whether the husband unites with the wife, as he may do, or whether he remains silent when made a defendant, as he may be, it must be presumed in the one case or the other that he consents that the powers and rights may be conferred on the wife which she asks, and if he consents, and no creditor has just cause to complain, why should the courts undertake to give the husband protection which protection might be a bondage less to be desired than submission to the will of even a strong-minded wife.

Before the act of 1866, now the section referred to, the courts had been much perplexed with questions as to the validity and effect of agreements between husbands and wives, the objects of which were to set apart property to the separate use of married women. This statute not only recognized the powers of husbands and wives to so agree, but enlarged their powers so that an agreement or arrangement might be made which would anticipate the earnings and profits of the wife's business or labor, and provided a means by which the wife's rights in these respects could be "specifically set out, distinctly recognized and adequately secured." (Uhrig v. Horstman & Sons, 8 Bush, 172; Penn v. Young, 10 Bush, 626.)

Neither can we recognize the principle that it is necessary under the statute for the pleadings or evidence to show the reasons which induce the husband to consent, or that he ought to consent when in fact he does consent. These reasons may be such that do him credit in head and heart, but for which he desires no public recognition. They may be such as show him to be incapable or unworthy, and yet desirable for many reasons to withhold from public record. The wife should not be required to make a public record of her husband's faults or misfortunes in order to secure rights which the statute clearly says she may have with his bare assent when no creditor of his has cause to complain.

The judgment is reversed and the cause remanded, with directions to enter a judgment in conformity to the prayer of the petition.

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SUPERIOR COURT ABSTRACTS.

LATHAM v. GLASSCOCK.

Filed March 28, 1888. Appeal from Lewis Circuit Court. Opinion of the court by Judge BARBOUR, affirming.

1. *Pleading*—As this action was instituted prior to the adoption of the new Code and the answer presented no set-off or counterclaim, a reply was not necessary.

2. *Usury—Agreed judgment*—As the issue was made as to the usury in the note sued on, and the parties after the issues were joined compromised the matters involved in the action, whereby it was agreed that judgment should be rendered for plaintiff for a certain amount, which was considerable less than the amount claimed, and judgment was so entered, this judgment as effectually disposed of the question of usury as if the court had upon the trial of the issues joined rendered judgment for the same amount.

3. *Usury*—The statement of the defendant that he was "confident that of the debts sued for by plaintiff $500 to $600 was usurious interest" is too indefinite to authorize the court to adjudge that there was usury.

4. *Judicial sales—Judgment*—A decree for the sale of land may authorize the commissioner, after the expiration of a certain number of days from the day of sale and after the terms of sale have been complied with, to deliver the possession of the premises sold to the purchaser, and to that end may order a writ of possession to issue. Such a judgment does not vest the commissioner with judicial powers.

Geo. T. Halbert for appellant; Cochran & Son for appellee.

GATES' EX'ORS v. FINNELL.

Filed March 28, 1888. Appeal from Madison Circuit Court. Opinion of the court by Judge BARBOUR, reversing.

1. *Deceit in sale of jack—Excessive verdict*—In this action by appellee for deceit in the sale of a jack, as there was no evidence which would enable the jury to fix a greater value upon the jack than the amount paid for him, which was $301, a verdict for $600 was excessive, and a remission of $200 by the plaintiff still left the amount too large.

2. *Damages*—As the plaintiff chose to retain the jack and sue for damages, he could not, as he could have done had he offered to rescind, recover for the expenses incurred in keeping the jack, and the court properly excluded the evidence offered by the plaintiff to prove such expenses.

3. *Judgment against executors*—As the action sought to make defendants personally liable, it was error to render judgment against them as executors to be levied of assets, and while the court would not reverse on that ground alone, as defendants asked that the judgment be rendered in that form, yet the judgment is irregular and could not operate to the prejudice of the beneficiaries who were not parties to it.

Burnam & Sullivan for appellants; C. F. & A. R. Burnam for appellee.

GARR, SCOTT & CO. v. BREEZE.

Filed March 28, 1888. Appeal from Bracken Circuit Court. Opinion of the court by Judge BOWDEN, reversing.

1. *The separate affidavit in an action to recover possession of personal property* is not a part of the pleadings, and can not be considered on a demurrer.

2. *Action by mortgagee to recover property*—Even if it were conceded that a mortgagee after condition broken can maintain an action at law to recover possession of mortgaged personalty from either the mortgagor or one holding possession under him, it would be necessary to so set out the mortgage contract as to show that the title is in the plaintiff, when, as here, the peti-

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tion shows that the plaintiff has no title other than that which comes through a mortgage.

3. *Same—Attorney's lien*—In this action by a mortgagee of personalty to recover possession of the mortgaged property from an execution creditor of the mortgagor and the officer who had levied the execution, the court, after dismissing the petition and ordering the property to be restored to defendants, allowed the attorney for defendants a fee of $100, and gave him a lien on the property in controversy therefor. The court having overruled a motion to set aside this judgment plaintiffs appeal. It appears that the plaintiffs as mortgagees have an interest which a court of equity would enforce; at least there is enough to show *prima facie* that such is the case. The amount of the execution levied on the property was less than $100. *Held*—That the judgment giving the attorney a lien was erroneous, if not void, and it is, therefore, reversed, except to the extent of the interest of defendants, who do not appeal.

4. *All orders respecting litigated matters made on the same day may be considered as one*, but it is not clear that the rule should apply to an order in no way relating to the matter in controversy and made on motion and for the benefit of an attorney not a party to the action. It may, therefore, be doubted if the order giving the attorney a lien in this case, made after the petition had been dismissed, was not void.

R. K. Smith, W. V. Weldon and H. P. Willis for appellants; J. R. Minor for appellee.

GRAVES v. KESLER.

Filed March 28, 1888. Appeal from Shelby Circuit Court. Opinion of the court by Judge BOWDEN.

Practice—"The disputed instruction is not part of the record by bill of exceptions or order of court, and can not be considered. No other question is presented. The judgment is affirmed."

L. C. Willis for appellant; L. A. Weakley and Foree & Foree for appellee.

STACY v. COLEMAN, ETC.

Filed March 28, 1888. Appeal from Lewis Circuit Court. Opinion of the Court by Presiding Judge WARD, reversing,

1. *In this action against a vendor to recover for a breach of his bond for title*, the plaintiff, the assignee of the bond, alleges that he has been evicted, but does not allege that the eviction was by a title paramount to that of the vendor, or that the judgment was duly rendered, but he does allege that defendant is wholly unable to make a warranty deed as he agreed and promised to do. *Held*—That this fact so far supplies the failure to allege that the eviction was by title paramount to that of the vendor as to enable the plaintiff to maintian an action for a breach of the bond.

2. *Plea of payment*—An allegation that a note payable in money has been paid is a sufficient allegation of performance without stating how it was paid.

3. *Parties to actions—Pleading*—If the assignor of the title bond was a necessary party to the suit the failure to make him a party could only be raised by special demurrer, and as there was no special demurrer the defect, if one, was waived by the filing of the general demurrer.

Will L. Fitch for appellant; Thomas & Pugh for appellees.

SIMPSON v. DARBY.

Filed March 28, 1888. Appeal from Logan Circuit Court. Opinion of the court by Presiding Judge WARD, affirming.

Issue of fact—As the issue in this case is purely one of fact, and the testimony is conflicting, the judgment of the chancellor will not be disturbed.

Browder & Edwards for appellant; S. A. Bass and E. W. Hines for appellee.

BUCKNER v. BUCKNER.

Filed April 4, 1888. Appeal from Spencer Circuit Court. Opinion of the court by Judge BARBOUR, affirming.

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Guardian and ward—Settlement—Six years after appellant arrived at age he had a settlement with his father, who had been his guardian, in which he accepted a tract of land and his father's note for $150 in full of the amount due to him on account of the sale of land by his father and guardian, in which he had an interest. Appellant acquiesced in this settlement during his father's life and for four years after his death. Soon after his father's death he collected from the administrator the full amount of the note which he received in the settlement, and after receiving this money he allowed the administrator to settle up the estate, and the widow, ignorant of his claim, to accept the provisions of his father's will. *Held*—That in view of these facts the appellant should not be allowed to now come in and disturb the rights of others upon the ground that he did not learn the nature and extent of his father's liability to him until after his father's death, especially as he allowed two years to elapse without bringing suit after the time at which he claims to have discovered the facts upon which be bases his action. The settlement between appellant and his father must be treated as a compromise of the matters between them, and as such should be sustained.

G. G. Gilbert for appellant; W. A. Anderson for appellee.

NATIONAL BANK OF STANFORD V. BRUCE, ETC.

Filed March 28, 1888. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Bowden, reversing (for an error as to costs).

1. *Garnishment*—When a personal judgment is sought against a garnishee, the plaintiff must state the cause of action in favor of his debtor with the same particularity as that debtor would be required to do if he had sued.

2. *Same—Executors*—In this action to enforce a judgment it was sought to subject a legacy alleged to be due the debtor in the hands of an executor, who was summoned as garnishee. The executor answered that he had no funds whatever; that the will allowed him five years to sell certain property which had not been sold; that the testator owed more than $6,000, and that it was not and could not be known till a settlement had been made that any sum would be left for the debtor. There was no reply. *Held*—That the court properly refused to render judgment against the executor. An action does not lie merely to compel an executor to settle, but to recover an alleged balance to which the plantiff shows a right. A right to surplus assets must be averred.

J. B. Paxton for appellant; Welch & Saufley for appellees.

MULLINS V. HAND'S ADM'R.

Filed April 4, 1888. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. *Pleading*—A party will, *on motion*, be required to fill blanks if proper; a general demurrer is not the remedy.

2. *Execution sales*—In this action to recover the sum bid by defendant for property, both real and personal, purchased by him at execution sale, the plaintiff alleges that defendant became the purchaser for the sum sued for, and that on the day of sale he agreed to pay said amount to plaintiff within thirty days therefrom, with interest, on which condition his bid was accepted, and that the execution was thereupon returned satisfied. The defendant, by his answer, expressly admits that he "bid in" what was sold, but denies that he, at any time, promised to pay, alleging that "it was understood" that another would pay. *Held*—That a bid, when accepted, is a contract to pay the sum bid. Therefore, we must understand the denial that the defendant promised as referring to a time after his bid was accepted, which is immaterial.

3. *Same—Statute of Frauds*—While it must be taken that the plaintiff sued on an oral contract, yet, as part of the property sold was personalty, a general demurrer could not reach the question whether the oral promise to pay for the real estate was enforceable.

C. H. Lee for appellant; J. T. Simon for appellee.

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McIlvoy, etc. v. Russell & Avritt.

Filed April 4, 1888. Appeal from Washington Circuit Court. New opinion of the court by Judge Bowden, reversing.

Attorney and client—Contract construed—(See abstract of former opinion by Judge Ward, of which this is merely an extension. 9 Ky. Law Rep., 359.)

W. C. McCord for appellants; W. P. D. Bush for appellees.

Lawson v. Billeb.

Filed April 4, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Ward, reversing.

Mortgage—Estoppel—Where one is silent when in good conscience or morals he ought to have spoken, he will not afterwards be allowed to speak to the prejudice of a party who has trusted to his silence, and whose condition has been altered thereby. L, to secure a debt he owed to W, mortgaged to him a piano then in the possession of the mortgagor. Thereafter the mortgagee, at the request of the mortgagor, agreed that the piano might be moved to the house of J, the mortgagor's son. The mortgage debt having matured, the mortgagee agreed to an extention. J advising and assisting in the arrangement whereby the extension was secured, knowing at the time that the mortgagee supposed that his mortgage created a valid lien upon the mortgaged piano. *Held*—That J is now estopped to assert a claim to the piano.

John T. Milburn for appellant; Robert J. Elliott for appellee.

Powell v. Phœnix Insurance Company.

Filed April 4, 1888. Appeal from Henderson Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Insurance—In an action upon a policy of fire insurance upon a stock of goods, the defendant relied upon the fact that plaintiff had obtained additional insurance without the consent of the company. The plaintiff replied that it was agreed as a part of the contract of insurance that the plaintiff might and would, *as soon as she made additions to her stock of goods*, take out additional insurance upon said stock in some other company. *Held*—That as there is neither allegation nor proof that any additions were ever made to the stock of goods, the condition on which the right to take additional insurance was reserved was never performed, and the taking of additional insurance forfeited the policy.

Yeaman & Lockett for appellant; Montgomery Merritt for appellee.

Alvord & Son, etc. v. Mallory, etc.

Filed April 4, 1888. Appeal from Louisville Chancery Court. Order of the court by Presiding Judge Ward, overruling motion to dismiss, and requiring bond for costs.

1. *Appeals—Bond for costs*—The court is not authorized to accept money in lieu of bond for costs.

2. *Transcript*—Orders of postponement and notices and subpœnas to take depositions were never necessary to make a complete transcript. Affidavits and vouchers with proofs of claims may or may not be necessary to a complete record, depending on the question to be tried. Whether or not they are necessary in this case to make a complete transcript will be determined upon the trial of the appeal.

3. *An appeal can not be maintained upon a partial transcript* in any case unless a schedule has been filed in the mode prescribed by law. But in actions regulated by chapter 3 of title 10, wherein many actions, separate in nature, may be tried in one, an excerpt of any one cause of action may be made by bill of exceptions, as formerly allowed, and a complete record thereby made of all that pertains to that matter. This may be the better practice, as, without a bill of exceptions, it might be difficult to show that the transcript contained all of the record affecting the one matter complained of.

D. M. Rodman for appellant; C. B. Seymour and Wm. Mix for appellees.

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KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE R. R. CO. v. COLEMAN'S ADM'R.

(Filed January 17, 1888.)

Railroads—Duty to trespassers—While a railroad company is under no legal obligation to look out for trespassers on its track, nor to anticipate their presence there, yet when servants of the company, in charge of a train, discover that a trespasser on the track has placed himself in peril, it is their duty to use all reasonable means at their command to save his life, and the company is liable for their failure to do so.

In this case the engineer of a train on the main track, seeing the danger of a trespasser on the side track by reason of the approach of a detached flat car, blew his alarm whistle and called to the man on the side track in a loud voice to get off the track, but his warning was not heeded. Thereupon the conductor, who was on the rear end of the detached car, standing at the brake, ran to the front end of the car and called in a loud voice to the man to get off the track, but the deceased failing to heed the call, which he doubtless did not hear by reason of the noise at the time, was struck by the car before the conductor could get back to the brake, and died from the injuries received. Held—That there was sufficient evidence to justify the jury in concluding that the conductor was guilty of ordinary negligence in not at once putting on the brakes when he saw that the deceased did not heed the engineer's warning.

Wm. Lindsay, H. W. Bruce and Mitchell & DuBose for appellant.

Wright & McElroy and P. F. Edwards for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, T. A. Cook, as the administrator of James Coleman, deceased, filed his petition in the Warren Circuit Court against the appellant to recover damages for the killing of his intestate.

The appellee alleged in substance that the appellant's employes and servants in charge of one of its trains of cars, by their willful and gross negligence, ran one of its freight cars against his intestate, whereby he was injured, from which injury he died in a few hours afterwards. The appellant put in issue the allegations of negligence. The appellant also alleged

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in substance that the appellee's intestate, at the time he received the injury, was a trespasser upon its railroad track, and that the injury received was caused by his own negligence, and not by the negligence of the appellant. The appellee, by his reply, put in issue these affirmative allegations.

There were three jury trials of the case; the first resulted in a hung jury; the second resulted in a verdict for the appellee of $4,500, which verdict, at the instance of the appellant, was set aside by the trial court, and a new trial awarded; the third resulted in a verdict for the appellee of $3,000. The trial court having overruled the appellant's motion for a new trial the case is here by an appeal.

The most important question to be determined relates to the refusal of the lower court to instruct the jury peremptorily to find for the appellant. This necessitates a review of the evidence, for if the evidence made out no case against the appellant, then its motion should have prevailed; on the other hand, if the evidence did make out a case against the appellant, its motion was properly overruled. We mean by the expression, making out a case, that competent evidence went to the jury which tended to show that the appellee's intestate was injured and killed by the willful and gross, or ordinary, negligence of the appellant.

The facts are that the appellee's intestate was walking on the appellant's railroad track; that while thus walking on the track he came to where the appellant's side track, which was used for switching its cars, intersected the main track; that the appellant's freight train was just behind the appellee's intestate, moving in the same direction; that the engineer sounded the steam whistle the usual distance from this switch, which indicated that the train would stop at the station which was hard by; that appellee's intestate then quit the main track and continued to walk between the side and main tracks, the space between the two tracks being about eight feet. It is evident that he was induced to quit the main track and walk between the two tracks by the sounding of the whistle, which indicated that the train would stop at the station, and by so doing he would be out of its way. This conclusion is fortified by the fact that the side track at the intersection, at the time the intestate reached it, was not closed with the main track so as to allow the train to pass upon it. The appellant, while the train was moving and before it reached the switch, disconnected a flat car from the train, and then the engine continued to move on the main track until it passed the place where the side track intersected the main track. The switch was then closed by the brakeman, and the disconnected flat car moved upon it by its own momentum. The engine, after it passed the switch intersection with the main track, passed the intestate while he was walking between the two tracks. The engineer discovered the intestate's position just before he passed him, and kept his eye upon him until after he had passed him. After passing the intestate the engineer saw him start diagonally across the side track as if to go clear across it, but instead he continued his walk on the end of the ties just outside of the rail. It then occurred to the engineer that the intestate was in danger from the flat car that was moving on the side track a short distance behind him. The engineer, for the purpose of calling the attention of the intestate to his danger, blew his stock or alarm whistle, but the whistle was blown after the engine had passed the intestate on the main track. The blowing of the whistle did not arrest the attention of the intestate to the apprehended danger. The engineer then called to him in a loud voice to get off the track, but it is evident that the intestate did not

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hear the call, for the engineer was then blowing off steam from the boiler, and the intestate continued to walk on the end of the ties. It is also evident that the intestate was misled by the blowing of the stock or alarm whistle, for this is intended to alarm stock or persons on the track ahead of the train, and the intestate's attention was probably directed that way instead of the danger that threatened him. It is also evident that the intestate believed that the whole train was moving on the main track, and that he changed his walk from between the two tracks to the outside of the side-track in order to be more secure from danger. The conductor was on the flat car; he was at the rear end of the car and standing by the brake; he heard the sound of the alarm whistle, by which his attention was called to the fact that the intestate was walking on the end of the ties, and that neither the sound of the whistle nor the shout of the engineer, the conductor hearing the shouts, caused the intestate to change his course, and that he would be struck by the flat car if he continued on his course. But instead of putting on the brake and stopping the car, the conductor rushed to the front end of the car and called in a loud voice to the intestate to get off the track, but the intestate, doubtless not hearing the call, for there was considerable noise caused by blowing the steam out of the boiler, continued to walk on the end of the ties; the conductor seeing this, started back to the brake for the purpose of putting it on, in order to stop the car, but before he could accomplish this the intestate was struck by the car. He died from the injury received in about thirty hours afterwards. The proof is clear that had the conductor, upon hearing the alarm whistle and hearing the shout of the engineer and seeing that the intestate did not quit the track, but continued his course upon it, put on the brake, the car would have been stopped in time to save the life of the intestate. This he failed to do. Did this failure amount to ordinary neglect?

It seems to us that a conductor of ordinary experience and observation could have readily taken in the situation, first, that the intestate had reasonable ground to believe, from the fact that the switch at the intersection was not connected with the main track, that the train would continue on the main track, and that he left the main track in order to be out of danger; second, that his back being toward the train and seeing the engine passing on the main track, he believed that it was drawing the whole train, and he was, therefore, out of its way; third, the blowing of the stock or alarm whistle after the engine had passed him on the main track would cause him to look ahead of him, instead of behind him, for danger; fourth, seeing that neither the sounding of the whistle nor the shout of the engineer caused the intestate to change his course, the conductor should, as a reasonable man, have inferred that the intestate misconstrued the sounding of the whistle and did not hear the shout of the engineer, or, that if he did hear the shout, he misunderstood it. It seems to us, therefore, that the conductor, as a man of ordinary prudence and experience, should not have trusted to the experiment of repeating the shouting, because both the sounding of the whistle and the previous shouting had failed to accomplish the desired end, but should have resorted to the sure and safe means, which was at hand, of preventing the injury, by putting on the brake and stopping the car, for it is well settled by this court, that, although the intestate, by being on the appellant's track at that particular place, was a trespasser, and that the appellant was under no legal obligation to look out for him, nor to anticipate his presence upon the track, because it had the right to presume that he would not commit a trespass upon its property, yet when the appellant discovered that the in-

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testate had placed himself in peril, it was its duty "to use all reasonable means at its command to save his life." (L. & N. R. R. Co. v. Howard's Adm'r, 6 Ky. Law Rep., 166.) This doctrine rests upon the broad and high ground that the life of the intestate, although he was a trespasser and negligent, should not be at the mercy of the appellee after his danger was discovered, but it should use all reasonable means at its command to save his life; such is the regard of human law—the dictate of a noble humanity—for the life of a human being.

The instructions given at the instance of the appellee and appellant fully set forth the law as above laid down. They fully and fairly present the question of ordinary neglect on the part of the appellant and appellee to the jury.

The evidence in the case puts the question of willful negligence out of the case, therefore, the only question to be determined by the jury was whether or not the appellant used all the means at its command, after it discovered the intestate's peril, to save his life. As above stated, the jury were fully and properly instructed in reference to that matter. We, therefore, think that the lower court did right in refusing the appellant's other instructions.

We also think there was sufficient evidence before the jury to justify them in coming to the conclusion that the appellant, under the circumstances of this case, was guilty of negligence in not putting on the brake and stopping the car after the peril of the intestate was discovered by the conductor.

We also think that the objection to the competency of —— Cothran's answer to the 13th question in his deposition was properly overruled.

We also think that the interrogatories propounded to the jury were sufficient to cover all the questions raised by the pleadings and evidence, and that the lower court properly rejected the refused ones.

The judgment of the lower court is affirmed.

To a petition for rehearing Judge Bennett delivered the following response of the court June 16, 1888:

The counsel for the appellant think that the case of Thomas Nicoll's Adm'r v. The L. & N. R. R. Co., decided by this court January 10, 1888 (9 Ky. Law Rep., 702), is in conflict with this case. This is a mistake. In that case the court said, that as Nicoll was walking on the company's track without right, the engineer had the right to believe that he would look out for his own safety, and leave the track in time to avoid a collision with the train, and when the engineer saw that Nicoll did not leave the track and was in danger of being struck by the engine, "he called to him to leave the track, and blew the whistle for down brakes, but the car was then so near as to render it impossible to check its progress so as to save the life of the deceased." We thought in that case that the facts of it justified the decision. We still so think. It was not held in that case that it was not the duty of the engineer, after discovering the peril of a trespasser upon the track, to use all the means at his command to avert injuring him. It was not held that if the engineer saw the peril of Nicoll, and that his shouting to him did not arouse him to a sense of his danger, it was not his duty to put down the brakes and stop the train in time to avoid a collision, if he could. In the opinion in this case the doctrine was announced that, upon the conductor's seeing that the shouting to Coleman to leave the track, and

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the blowing of the alarm whistle failed to arouse him to a sense of his peril, it was his duty to put down the brakes, they being at hand, so as to stop the car, if he could, in time to avoid a collision, and not trust to arousing Coleman to a sense of his danger by again shouting, as that resource had failed to accomplish the purpose. This doctrine is in harmony with the Nicoll case and is sound law, and is supported by the weight of authorities.

The petition for rehearing is overruled.

BOYD'S DEVISEES v. BOYD'S EX'OR, &c.

BIGSTAFF v. BOYD'S ADM'R, &c.

(Filed February 7, 1888—Not to be reported.)

1. Final order—In an action by an executor to settle his testator's estate, the court rendered judgment allowing claims against the estate and fixing the amount, and directing the executor to pay a certain per cent. of the claims thus ascertained and allowed. Subsequently the court rendered judgment, awarding execution in favor of all persons who had previously obtained judgments which were not satisfied. Held—That the first judgment was final, but if not, the second judgment made it so, and more than two years having elapsed after the last judgment was rendered before this appeal was taken it is too late to appeal therefrom. It is immaterial that the last judgment was reversed as to some of the claims allowed, as that did not affect the debts as to which there was no reversal.

2. Contribution by devisees to pay debts—Two of six devisees being insolvent, the burden of contribution to the payment of the testator's debts fell upon the remaining four. To one of these four the testator devised a tract of land in addition to the other estate devised to him, but directed that he pay one-fifth of its value to each of the other devisees. He took this land at a valuation of $6,000, which, having been paid into court, the court applied to the payment of the testator's debts. The court then fixed the pro rata contribution of the four devisees for the purpose of paying the balance of the debts, in proportion to the amounts that each had received. Held—That as the amounts received by the several devisees were unequal, this was an error. Each of the four devisees should have been allowed $1,000 as a debt against the estate, and each should have contributed pro rata on the sum he had received to pay this amount.

W. H. Holt, W. P. D. Bush, V. B. Young and J. J. Nesbitt for appellants.

H. L. Stone, R. Gudgell & Son, Wm. Lindsay and J. S. Hurt for appellees.

Appeals from Bath Circuit Court.

Opinion of the court by Judge Bennett.

Spencer Boyd's executor having filed his petition in equity in the Bath Circuit Court for the purpose of having a settlement of his testator's estate, W. W. Boyd's administrator filed his petition in said action, in which he sought to recover judgment against the executor on several debts due his intestate by Spencer Boyd. The executor interposed pleas in bar to some of these demands, among which was a plea of the statute of seven years' limitation to a note of $729, upon the ground that Spencer Boyd signed said note as surety only. The report of the commissioner sustained the admin-

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istrator's claim. The circuit court overruled the executor's exceptions to the report. On the 27th of March, 1867, the circuit court adjudged that the executor was indebted to the administrator in the sum of over $10,000. The amount of said note and interest thereon was included in this sum. The circuit court also ordered the executor to pay 60 per cent. of this and the other claims ascertained and allowed by said judgment. On September 17, 1870, the circuit court rendered another judgment in the main action, in which execution was awarded in favor of all persons who had previously obtained judgments which were not satisfied. The administrator's judgment was one of these. This judgment, together with two others in the same case, one rendered in 1866 and one in 1868, was appealed to this court. Each judgment was reversed in some particulars. But the judgment of 1870, in reference to the debt now in controversy, was not reversed.

If there were any doubt about the judgment of the 27th of March, 1867, in reference to this debt being final, the judgment of the 17th of September, 1870, clearly makes it final, because this judgment awards execution on that judgment. But we entertain little doubt that that judgment was final, therefore, the time allowed by law in which to appeal having elapsed, the appellant's appeal, as to said matter, can not be considered.

The appellant also claimed the price of sixty two acres of land. This land was devised by Spencer Boyd to C. J. Boyd. It is claimed that he sold it to W. W. Boyd at the price of $40 per acre; that W. W. Boyd was to credit the price of this land on the notes that Spencer Boyd was bound for as surety. This defense was also settled against the appellant in the judgment of 1867. The appellant's claim for the rent of this land is not available. The judgment as to the foregoing matters must be affirmed.

The allowances for the services of the executor, etc., must also be affirmed.

J. A. Reynolds purchased, at the executors' sale, $45.83 worth of property, and W. W. Boyd purchased $306.70 worth of property. These sums were charged to the executor. These two sums were credited on the claims of J. A. Reynolds and W. W. Boyd against the estate. The executor, therefore, should have been credited by these claims. But it was not done. For the error in this particular the case must be reversed, with directions to enter these two credits.

The appellants, Bigstaff and wife, appeal from the judgment rendered in 1880. Mrs. Bigstaff is one of six devisees under Spencer Boyd's will. Spencer Boyd was largely in debt. Two of the devisees being insolvent, the burden of contribution to the payment of the testator's debts fell upon the remaining four. The value of the estate devised to these is as follows:

To E. J. Boyd, $19,500. To W. W. Boyd, $13,860. To Helen Reynolds, $8,000. To Mary E. Bigstaff, $3,600.

The testator also devised to E. J. Boyd 100 acres of land, but he was to pay one-fifth of its value to each of the other five devisees. E. J. Boyd took this land at a valuation of $6,000. The circuit court ordered him to pay this sum into court, and he having done so, the court applied it to the payment of the testator's debts. The court fixed the pro rata contribution of the four devisees for the purpose of paying the balance of the debts, in proportion to the amount as above set forth, that each had received. As the respective amounts received by these devisees were unequal, it was error, as between them, to appropriate the $1,000 due to each on account of this land to the

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payment of the debts, and then require each to contribute to the payment of the balance of the debts in proportion to the amount that he had received. But each one of the four devisees should have been allowed $1,000 as a debt against the estate, and each should have contributed pro rata on the sum he had received to pay it. Thus Mrs. Bigstaff received estate valued at $3,600. Her pro rata to pay this sum would be, say, $320; deduct this sum from $1,000 would leave to her $680. This sum deducted from her pro rata of $710.66, as fixed by the court, would entitle her to contribute only $30.66. E. J. Boyd would have to pay, say, $1,735. Deduct $1,000; this would increase his pro rata $735. The pro rata of the other two devisees should be governed by the same principle.

This case must be reversed, with directions for further proceedings consistent with this opinion.

GRIEF v. KAHN, &c.

(Filed February 18, 1888.)

1. Removal of partition fences—Under section 1 of article 2, chapter 55, General Statutes, which prohibits the removal of a partition fence which exists as such "by agreement or acquiescence," except between the 1st of December and the 1st of March next ensuing, it is not necessary that the fence should be on the division line, or that it should be partly on the land of each, to make it a partition fence. Nor is it necessary, in order to prevent the removal, that the party complaining should show that any injury would result to him, the statute being intended as an absolute security against any possible injury that might arise from any removal, however short the distance.

2. Same—The statute applies as well to partition fences in towns and cities as to partition fences in the country.

3. Same—Appellant and appellees, owning adjoining lots in a city, and appellees being about to remove a partition fence between the two lots, appellant brought this action to enjoin removal. The fence had been placed, by agreement, on appellees' lot, where it had stood for many years, and appellees were in the act of removing the fence and resetting it about sixteen inches nearer appellant's line, but, as appellees claim, still upon their land. The attempt to remove the fence occurred in the month of November. Held —That appellant is entitled to the relief sought, it being immaterial on whose land the fence is now located.

W. D. Greer for appellant.

Gilbert & Reed for appellees.

Appeal from McCracken Common Pleas Court.

Opinion of the court by Judge Bennett.

The appellant and the appellee, Mrs. Kahn, being the owners and in the possession of adjoining lots in the city of Paducah, the appellant brought this action to enjoin the appellees from removing the partition fence between the two lots.

The proof is overwhelming that the appellees, at the time the injunction was obtained, were in the act of taking up the fence and resetting it about sixteen inches nearer to the appellant's line, if not upon his land. The proof is also overwhelming that the appellees were doing this against the will of the appellant.

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The appellees contend that the ground on which the fence stood before they attempted to remove it belonged to the appellee, Mrs. Kahn; also that the ground on which they proposed to reset the fence belonged to Mrs. Kahn, and, therefore, had the right to remove and reset the fence. But if the said fence was a partition fence, within the meaning of article 2, section 1, chapter 55, General Statutes, then it is wholly immaterial whether the fence was on Mrs. Kahn's ground or not. Said section provides:

"When a partition fence has existed, or may hereafter exist, by agreement or acquiescence, between two or more persons, either party shall remove the same without the consent of the others, except between the 1st of December and the 1st of March next ensuing."

The second section provides:

"No such change as named in the last section shall be made unless three months' previous notice in writing shall be given to the opposite party by the person desiring to make the same."

It appears from the evidence of the appellee, N. Kahn, that he agreed, many years ago, with the former owner of appellant's lot that the fence should be set where it stood at the time of the attempted removal, and pursuant to that agreement the fence was so set and remained down to the time of the death of said owner; that the fence had so remained ever since the appellant purchasd the lot, without any agreement authorizing the appellee to remove it. The section, supra, is explicit, that if the partition fence exists, by agreement or acquiescence, neither party shall remove it, except between the 1st of December and the 1st of March next.

That this fence existed for many years as a partition fence, by the agreement of the appellee, N. Kahn, and the former owner, is absolutely clear; that it so existed by the acquiescence of the appellant and the appellees, Kahn and wife, is equally clear; that the attempt to remove the fence occurred in the month of November is admitted.

From the foregoing facts it is clear that said fence was a partition fence within the meaning of section 1, and that the appellees had no right to remove it.

But it is contended that, inasmuch as the fence was on the land of Mrs. Kahn, the appellees had the right to remove it. It is not necessary that the fence should be on the division line, or that it should be partly on the land of each, to make it a partition fence. The inquiry is, was the fence, whether on the land of either party, intended by agreement or acquiescence as a partition fence? If yes, then the statute says that it shall not be removed except in the manner therein provided.

Also if the fence is taken up for the purpose of resetting it at another place, however short the distance, the statute is violated. Its language is that the fence shall not be removed, and a removal of a few inches may seriously affect the rights of the other party in an individual case. And while the removal and resetting, although at a short distance, may not affect the rights of the other party, yet the statute was intended to give absolute security against any possible injury that might arise from the removal. It is best, therefore, to enforce its provisions in all cases without an inquiry into the fact as to whether either party will or will not be injured by the removal.

Also it is contended that the section, supra, was intended to apply to partition fences in the country, and not to partition fences in towns and

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cities. The statute does not so read. Its language applies to all partition fences, whether in the country, or town or cities, and we see no reason for making the distinction. On the contrary, there are many good reasons for applying it, as its language clearly indicates, to partition fences in towns and cities as well as in the country.

The judgment of the lower court is reversed and the cause is remanded, with directions to reinstate the injunction and sustain it. The question as to the ownership of the particular strip of ground need not be adjudicated.

BROWN v. LOGAN'S ADM'R, &c.

(Filed February 25, 1888—Not to be reported.)

1. Devise to pay debts—Liens—While the mere expression of a desire on the part of a testator that his debts should be first paid creates no lien or charge on the land devised, yet where a will expressly makes the payment of the debts a charge on the land the purchaser will be bound to see that his purchase money is so applied, or the land purchased by him may be sold at the instance of the creditors.

2. Same—The executor, having sold land charged with the payment of debts, can not in his own behalf enforce any lien against the purchaser.

3. Executors—Upon a general statement by an executor that he has paid more than he ought to have paid, and that the estate is insolvent, without any statement of the value of the estate or the amounts paid creditors, or the name of any creditor given, the chancellor will not audit the executor's accounts and hunt up creditors who have been overpaid for the purpose of relieving the executor.

H. W. Rives for appellant.

H. P. Cooper for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Pryor.

In this case the devisee sold the land devised, and the appellee, a creditor, claims that by the provisions of the will the creditors of the devisor had an express lien for the payment of their debts.

A mere desire on the part of a testator that his debts should be first paid creates no such lien or charge on the estate devised, but where a will makes the payment of the debts a charge on the land, the purchaser will be bound to see that his purchase money is so applied, or the land purchased by him may be sold at the instance of the creditors. (Grotenkemper v. Bryson, &c., 79 Ky., 353 [2 Ky. Law Rep., 335]; Ducker's Heirs v. Stubblefield's Heirs, 9 B. M., 577.)

In this case there is a charge on the estate for the payment of debts and the residue given to John C. Adams, who is also the executor. The sale of the land did not relieve it of this charge upon it, and, therefore, the chancellor properly subjected it. Nor was the chancellor required to refer the case to the commissioner to audit the accounts of an executor, who had made no settlement for a period of five or six years, so as to relieve him against creditors who have been overpaid, or to subject the land to the payment of their debts. The executor could only be substituted to their rights, and, having sold the land, he could not in his own behalf enforce any lien as against his purchaser; nor ought the creditors on the pleadings to be

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made to refund even if the estate was insolvent. The insolvency of the estate is alleged, but no creditor is made a party, and no statement of the amount overpaid, or of the condition of the estate, when it passed into the hands of the executor. The charge that it was insolvent, and a settlement asked, after the lapse of so many years, with a view of ascertaining what the executor ought to have known, was insufficient to authorize the chancellor, through his commissioner, to hunt up the creditors of the estate, and the amounts paid them, with a view of ascertaining the pro rata amount to which this appellee was entitled. There is no statement of the estate or its value, no statement of the amounts paid creditors, or the name of any creditor given, but an investigation asked as to the condition of the executor's accounts upon a general statement that he had paid more than he ought to have paid.

The judgment below is affirmed.

UNSEL v. COMMONWEALTH.

(Filed April 28, 1888—Not to be reported.)

The appellant was not entitled to a continuance on account of the absence of one of the his witnesses, as it did not appear from his affidavit for a continuance that the process for the witness was ever placed in the hands of an officer to be served.

Owen & Ellis for appellant.

P. W. Hardin for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, Unsel, was fined $100 before a justice of the peace of Daviess county for assault and battery. He appealed to the circuit court and was there fined $75. He has appealed to this court.

He filed his affidavit for a continuance in the circuit court on the ground of the absence of two witnesses, Floyd and Woolfolk. Woolfolk, after the affidavit was filed, appeared as a witness. Thereupon the Commonwealth admitted the affidavit as to Floyd, to be read as his deposition. Thereupon the court forced the appellant to try notwithstanding his objections.

The main ground relied upon for a reversal is that the act of the legislature, approved May 15, 1886, allowing the Commonwealth to admit the statements of a defendant's affidavit in a criminal case as to what his absent witness would prove, to be read as the witness' deposition, is unconstitutional. We can not consider this question for the reason that the appellant's affidavit failed to show that he was entitled to a continuance on account of the absence of Floyd. The affidavit says that the appellant "has had process for Floyd at this term of court," and that he was not served, "and when the case was postponed last Saturday he took an attachment for Woolfolk and an alias process for Floyd, both of which have been served." There is no statement in the affidavit that either process for Floyd was put in the hands of an officer to be served. The process, as far as the affidavit discloses, may never have left the hands of the appellant.

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The appellant, having failed to disclose proper diligence to obtain the attendance of the witness Floyd, he was not entitled to a continuance, therefore, the Commonwealth, having admitted the affidavit as to Floyd to be read as his deposition, the appellant, rather than being prejudiced, obtained an advantage.

The judgment is affirmed.

McFARLAND v. GARNETT, &c.

(Filed April 28, 1888—Not to be reported.)

1. Judicial sales—Land presumed to be divisible—In an action to enforce a lien upon real estate it is not necessary that it should appear by "the pleadings, by an agreement of parties, by affidavits filed, or by a report of commissioners," whether or not the property can be divided without materially impairing its value. It is sufficient, if the court is satisfied from the character of the boundary or the number of acres, as described in the pleadings, that such a division can be had.

Prima facie a tract of land containing as many as 106 acres may be divided without materially impairing its value, and the burden of proof is upon the party who contends that it is not divisible.

2. Same—Powers of commissioner—Where the defendant gives the commissioner no direction to sell the land off of any particular part of the tract, the commissioner has the right to designate what part of the tract he will offer for sale.

Hays & Stone for appellant.

Montgomery & Jones for appellees.

Appeal from Russell Circuit Court.

Opinion of the court by Judge Bennett.

The appellant executed to the appellee, Garnett, a mortgage on a tract of land lying in Russell county, Ky., containing 106 acres, to secure the payment of an indebtedness of $2,834. The appellee, Garrett, having brought this action in equity in the Russell Circuit Court for the purpose of enforcing his mortgage lien on said land, that court, at its May term, 1885, rendered a default judgment against the appellant for the amount of the mortgage debt, less certain credits, and for the sale of a sufficiency of said tract of land to pay said debt, interest and costs. The court's commissioner, pursuant to the directions of the judgment, sold, in 1885, 101 acres of said tract of land, which satisfied said debt, interest and cost, leaving five acres unsold. The sale was duly reported to court and confirmed. The court, at its May term, 1886, appointed commissioners to divide the said tract of land and allot to the appellant said five acres, and to the appellee, Snow, the assignee of the purchaser, the remainder of the tract. The commissioners were directed to take the appellant's five acres off of the lower end of the farm. The commissioners made the division and allotment and reported the same to court, which report was confirmed. The appellant has appealed to this court.

The appellant contends, first, that the judgment, ordering the sale of said land, is erroneous because there is nothing in the pleading, report of a commissioner, or proof, showing that said tract of land could be divided without materially impairing its value.

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Section 694 of the Civil Code, which directs that "before ordering a sale of real property for the payment of debt, the court must be satisfied by the pleadings, by an agreement of parties, by affidavits filed, or by a report of a commissioner, whether or not the property can be divided without materially impairing its value," does not require an allegation in the pleadings to the effect that the property is divisible or indivisible. Nor is it indispensable that the fact as to the divisibility or indivisibility of the property should appear, by the agreement of the parties, by affidavits, or a report of a commissioner, before ordering a sale of the property; but the court may satisfy itself, from the character of the boundary or the number of acres in the tract, as described in the pleadings, that a division of the property can be had without materially impairing its value. This is all that is required. (Sears, &c. v. Henry, 13 Bush, 415.)

Undoubtedly a tract of land, containing as many as 106 acres, may be divided without materially impairing its value. Prima facie it is divisible without materially impairing its value, and the burden of proof is on the party contending contrariwise. Here the appellant neither pleaded nor offered any proof that the property could not be divided without materially impairing its value. The commissioner making the sale announced that the five acres of land unsold should be taken off of the lower end of the tract. The appellant gave the commissioner no discretion to sell the land off of any particular part of the tract. In the absence of such direction the commissioner had the right to designate what part of the tract he would offer for sale; and the commissioner having done so, it devolved upon the appellant to show before confirmation that he was prejudiced by it, which he failed to do.

The judgment of the lower court is affirmed.

POOL, &c. v. THOMAS, &c.

(Filed May 3, 1888—Not to be reported.)

Resulting trusts in land may be established by parol evidence, but such evidence must be clear and satisfactory to authorize the establishment of the trust.

This is a contest between the widow of a decedent and his child by her, on one side, and the children of the decedent by a former wife on the other, in which the latter claim that certain land of the decedent was purchased by him with money received from their mother under an agreement by him to have the deed made to her, and that, therefore, a trust resulted in her favor which can be enforced by them as her heirs. Twenty-six years have elapsed since the alleged agreement, and nearly ten years since the death of plaintiff's mother. Held—That the evidence is not sufficient to establish the trust, as the plaintiffs rely upon their own proof of the admission of their father, which belongs to that class of evidence denominated as the weakest in law, and which admissions at most are in general terms and do not show with reasonable certainty that the agreement was made with his wife, or that her money was actually used to pay for the land, both of which facts must concur in order to establish such a trust.

G. W. Duvall for appellants.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Bennett.

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In 1859 C. C. Thomas and Mary M. Thomas, being husband and wife, and residents of the State of Tennessee, the former came to Caldwell county, Kentucky, and there purchased a tract of land containing two hundred acres from ——— Miller, for which land said Thomas agreed to pay $700. He took a bond for a title to the land, as is probable from the evidence, in his own name. In 1859 said Miller made to said Thomas a deed to the land. Said Thomas and his wife, Mary M. Thomas, moved upon said land in 1859, and resided thereon as their home. In 1876 Mrs. Mary M. Thomas died, and in the same year C. C. Thomas married the appellee, Amanda C. Thomas, with whom he lived until 1885, when he died. By Amanda C. Thomas C. C. Thomas had two children, one of whom is living. C. C. Thomas left a will, by which he devised to Amanda C. Thomas said tract of land during her life, and remainder to his children by Amanda C. Thomas and Mary M. Thomas. Amanda C. Thomas renounced the provisions of the will and claimed a homestead in said land, which, not being worth exceeding $1,000, was allotted to her as a homestead. The appellants, the children of C. C. Thomas by his first wife, Mary M. Thomas, instituted this action in equity in the Caldwell Circuit Court against the appellee, Amanda C. Thomas, and her child by C. C. Thomas, for the purpose of setting aside the deed to C. C. Thomas and having the said land conveyed to them upon the ground that C. C. Thomas purchased and paid for said land with money belonging to Mary M. Thomas, by an agreement with her that the purchase was to be made for her and the deed taken to her and her bodily heirs, but that he violated said agreement and had the deed made to himself. Upon the hearing of the cause the circuit court dismissed the appellants' petition, and they have appealed to this court.

There is proof in the case which tends to show that C. C. Thomas agreed with his wife, Mary M. Thomas, to use the money which she was to receive from her father's estate in the purchase of a home in this State, and have the deed made to her and her bodily heirs; that after the purchase of the land in controversy he paid for it with the money that he received from her father's estate; that he often promised her to make her a deed to the land, and he, a short time before her death, told her he had done so. On the other hand there is proof in the case that he said that he had paid for the land with the proceeds of a crop or crops of tobacco he had raised on the farm.

The proof of the agreement consists in the recollection of the witnesses, twenty six years after it is alleged to have been made, of what they heard C. C. Thomas and Mary M., his wife, say about it, and the proof of these witnesses does not clearly establish the fact of the agreement, but, at most, their evidence is only moderately pursuasive that such an agreement was made. As to the payment for the land with Mary M.'s money the proof, while it tends in that direction, by no means clearly establishes the fact, and when it is considered in connection with the proof that C. C. Thomas claimed that he had paid for the land with the proceeds of his tobacco, the dubiousness, as to the truth of the matter, is still more serious.

While it is the established law of this State that resulting trusts may be established by parol evidence, yet it is equally well established that the evidence establishing such trusts should be clear and satisfactory. It was formerly held that parol evidence was not admissible to prove that the holder of the legal title to land purchased the same with trust money and took the conveyance to himself in violation of a verbal agreement with the person for whom he was acting, whereby to raise a trust as to the title in the

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cestui que trust. But this court, as well as others, has departed from this rigid rule, and allows such trusts to be established by parol evidence, but such evidence must establish the trust clearly and satisfactorily. (Snelling v. Utterback, 1 Bibb, 609; Letcher v. Letcher, 4 J. J. Marshall, 593.)

The fact of this case illustrates the wisdom of this rule. For here, after a lapse of twenty-six years, and nearly ten years after the death of Mary M. Thomas, and after C. C. Thomas had married again and died, leaving his second wife and one child by her, the appellants attempt to establish the trust by their own proof of the admissions of C. C. Thomas, which belongs to that class of evidence denominated as the weakest in law, and which admissions, at most, are in general terms and do not show with reasonable certainty that the agreement was made with his wife, or that her money was actually used to pay for the land, both of which facts must concur in order to establish such a trust.

The judgment of the lower court is affirmed.

WHITE v. GUTHRIE, &c.

(Filed May 5, 1888—Not to be reported.)

Power of executor to sell land under particular will determined.

Simrall & Bodley for appellant.

J. C. Beckham for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Pryor.

J. D. Guthrie, of the county of Shelby, left a last will and testament, by which he made various devises to his widow and children of property, specifically mentioned, and left his widow, by the last clause of the will, his sole executrix, "with power to sell and convey any portion of my estate not devised to my four first-named children."

His widow, under this provision of the will, sold the tract of land known as the home farm to the appellant, White, for a large sum of money. He refuses to execute the contract because, as he maintains, the widow had no power to sell this land under the will. The power of sale is expressly given by the will of the testator, and it is not pretended that she has sold or is selling to the appellant any of the estate devised to his first "four named children;" but, on the contrary, it affirmatively appears that such is not the case. The language of the will has no ambiguous meaning, and the power to sell is unrestricted, except the property specifically devised to his first four named children.

This being the view of the court below the judgment is affirmed.

HOWARD, &c. v. TENNY, &c.

(Filed March 6, 1888.)

1. Husband and wife—Fraudulent conveyance—A married woman having purchased, with her own means, the land of the husband at a sheriff's sale

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for taxes, the fact that the purchase money was paid in small amounts, which were handed to the sheriff by the husabnd, and that the husband drew up the deed for the sheriff to sign, do not evince fraud, as the payments were doubtless made out of the wife's little income in such sums as she could spare from time to time, while the husband handed the money to the sheriff merely as her agent; and the husband being a lawyer and competent to draw up the deed in proper form, it was his duty to his wife to do so.

2. Same—The rents of a married woman's real estate are not liable for any debt of her husband, and may, with the husband's consent, be invested by her in real estate, which will also be exempt from the husband's debts.

3. Same—Evidence—In an action by creditors of the husband to set aside a conveyance to the wife as fraudulent the husband is a competent witness for the wife, the case falling within the exception contained in section 606 of the Civil Code, which provides that in "actions which might have been brought by or against the wife, if she had been unmarried, either the husband or wife, but not both, may testify."

Cornelison & McKee for appellants.

Henry L. Stone for appellees.

Appeal from Montgomery Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellee, O. S. Tenny, prior to 1877, was the owner of a lot of ground in the city of Mt. Sterling, Montgomery county, Ky. This lot of ground, in the year 1877, was levied on and sold by the sheriff of Montgomery county to satisfy the taxes due by the appellee, O. S. Tenny, for the year 1875, amounting to $161. At said sale the appellee, Mrs. Tenny, wife of appellee, O. S. Tenny, became the purchaser of the property, at the price of $161, the amount of the taxes due by the appellee, O. S. Tenny.

In 1881, — Dean, who was the successor in the office of sheriff to the sheriff that made the said sale, made the appellee, Mrs. Tenny, a deed to said lot. At the time of said sale the appellee, O. S. Tenny, was indebted to the appellants; upon some of these debts the appellants had already obtained judgment; upon the other debts they obtained judgment after said sale, upon which executions were issued. After the sheriff made said deed to the appellee, Mrs. Tenny, the appellants instituted their action in the Montgomery Circuit Court, by which they sought to have the sheriff's sale and deed to the appellee, Mrs. Tenny, set aside, and the said lot subjected to their judgment debts.

It appears from the record that the sheriff did his duty as to advertising and selling said lot. It also appears that Mrs. Tenny purchased the lot at the sheriff's sale. The only ground relied on for setting the sale and deed aside and subjecting the lot to payment of the appellant's debts is that the appellee, O. S. Tenny paid the purchase price of the lot with his own money, and that he caused the purchase to be made in the name of Mrs. Tenny and the deed to be made to her, for the fraudulent purpose of cheating, hindering and delaying his creditors. These allegations were denied.

If it is a fact that the appellee, O. S. Tenny, paid, with his own money, the purchaes price of the lot, then the sale and deed should be set aside as a fraud upon the appellants. But the evidence fails to sustain the fact; on the contrary, the fact is established by uncontradicted evidence that Mrs. Tenny was the owner of real estate, from which she received rents, which

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rents, under section 2, article 2, chapter 52, General Statutes, were not liable for any debt or responsibility of the appellee, O. S. Tenny, which rent she, with the consent of the appellee, could control and invest in real estate, and take the title of it to herself, which estate would not be liable for the appellee's debts or liabilities. It also appears that she had other sources of income, to which the appellee, O. S. Tenny, was not entitled. It also appears, by uncontradicted evidence, that Mrs. Tenny purchased the lot and paid for it with the money arising for these sources. The fact that the purchase price of the lot was paid in "dribs," and that the appellee, O. S. Tenny, handed them to the sheriff, and that he drew up the deed for the sheriff to sign, does not, under the circumstances of this case, evince fraud, for the reason, first, that the payment in "dribs" was, doubtless, the result of Mrs. Tenny having economized her little income so as to enable her to pay such portions of it as she could spare, from time to time, on the purchase; second, the appellee, O. S. Tenny, simply handed the money to the sheriff as her agent, which was in nowise improper for him to do; third, he was a lawyer and competent to draw up the deed in proper form, and it was a duty that he owed to his wife to see that the deed was made in proper form.

It is contended that the appellee, O. S. Tenny, by reason of his wife being a party to the suit and the claimant of the lot, was not competent as a witness in her behalf. She claims the lot by virtue of a purchase of it with her own means at execution sale, and a conveyance by the sheriff. There is no doubt that an action, were she unmarried, could be brought by or against her in reference to this property, or upon said sale or conveyance. The question, therefore, arises, does this case fall within the exception contained in section 606 of the Civil Code, which provides that in "actions which might have been brought by or against the wife if she had been unmarried," either the husband or wife, but not both, may testify. Had Mrs. Tenny been sued as an unmarried woman in reference to this property, there is no doubt that she could have testified to every fact essential to establish her title. Also there is no doubt that she could have testified in this case to every fact essential to establish her title, to wit: That she received rents from her real estate, which she controlled and managed as her own; also that she had in her own right other sources of income; that she purchased the property at the sheriff's sale, without collusion with her husband; that she paid for the property with her rents and other sources of income, and had the conveyance made to herself. By the provision of the Code, supra, she could waive her right to testify in reference to these matters, and have her husband to testify in reference to them in her behalf, in which case he was competent to testify to every fact to which she would have been competent to testify had she been a witness.

The judgment of the lower court is affirmed.

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GILLEN, &c. v. KENTUCKY NATIONAL BANK.

(Filed April 7, 1888—Not to be reported.)

1. Pledge—Sureties—Authority of bank president—Usury—H. & Sons, to secure several notes executed by them to a bank, pledged to the bank a number of barrels of whisky, authorizing the bank to sell the whisky and apply the proceeds to the payment of the notes. Thereafter the bank made to H. & Sons a further loan, G. becoming their surety in the note executed therefor, it being agreed that any surplus of the proceeds of the whisky, after satisfying the notes theretofore executed, should be applied to the payment of the note in which G. was surety. The notes first executed were renewed from time to time, the bank still holding the whisky for its protection. When sold the whisky failed to sell for enough to satisfy the notes which it was originally pledged to secure. G. now claims that he is released, for the reason that if the whisky had been sold sooner the notes could all have been made, and that when it was sold it did not bring its market value, and for the further reason that the president of the bank, after he, G., became surety, agreed to look to the whisky alone for protection. G. also claims that he is released for the reason that some of the notes contained usury.

The bank, under the pledge, had the right to sell when the notes matured, or it had the right to renew, still holding the collaterals for its protection.

2. As H. & Sons, as well as G., had notice of the sale, they should have purchased the whisky, if selling for less than its market value, as they state it was worth more to them than the market price.

3. If it be true that the president of the bank agreed that the bank should look to the whisky alone, this agreement was made after the surety became bound, when the president had no right to release him, particularly in the absence of any other consideration than that the bank already had.

4. The fact that some of the notes contained usury does not affect G., as, even after deducting the usury, the note for which he is bound remains unpaid.

Richards & Harris and Elliott & Hemingray for appellants.

Cary & Spindle for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

The appellant is the surety of Huette & Sons to the Kentucky National Bank on a note for $2,500. When sued on the note he pleaded that the bank had ample collaterals to pay all the indebtedness by Huette & Sons, including the debt on which the appellant was liable. It is further alleged that the bank agreed to look to the collaterals for payment, and in consequence of that fact the appellant neglected to provide means to obtain from Huette & Sons indemnity; that, having collaterals sufficient to pay off the indebtedness, the bank, by its carelessness and negligence, caused the whisky to be sacrificed, selling it for greatly less than it was worth, causing the loss on the appellant, and, therefore, he should be released; that the bank, if it had used diligence, could have made the debt shortly after the maturity of the notes, and, besides, if the collaterals had been sold at an earlier date the debts could have been made.

From the testimony in this case we see no reason for charging the bank with a want of diligence, or any neglect on its part, that should result in the discharge of the surety. The collaterals consisted of warehouse receipts for whisky, and the whisky disposed of at the market price. Huette and

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Gillen testify that the whisky was worth to them greatly more than it was sold for, but the testimony of those entirely disinterested in this controversy shows that it sold for its full market value, and some of it was in fact sold by Huette himself, and it brought greatly less than the price realized by the bank.

By the terms of the pledge Huette & Sons had the same right to sell the whisky that the bank had, and did sell a portion of it, applying the proceeds to the payment of the notes the collaterals were intended to secure. Some of the paper, and perhaps all of it, was renewed from time to time with the hope that whisky might advance, and in that way a sufficient sum realized from the collaterals to pay off all the debts. The renewals were for the benefit of the debtors, Huette & Sons, and if the whisky had been sold at the maturity of the notes such a sale would have been regarded as a sacrifice; also if the price of whisky had advanced. The bank, under the pledge, had the right to sell when the notes matured, or it had the right to renew, still holding the collaterals for its protection. Huette & Sons, as well as Gillen, had notice that the whisky would be sold, and if selling for less than its market value, should have purchased it, as they state it was worth more to them than the market price. There is nothing in this record to release the surety by reason of the sale of the collaterals or the whisky, or by reason of any neglect on the part of the bank.

It is said, however, by the surety that Fetter, the president of the bank, represented to him that the collaterals would pay all the indebtedness, and that he would not look to him for payment; and, relying on Fetter's statement, he was misled and failed to protect himself against the danger of loss.

This Fetter denies, and the statements of the two are directly in conflict; but whether so or not these representations, if true, were made three months after the appellant became bound as surety, when Fetter had no right to release Gillen, and particularly in the absence of any other consideration than that the bank already had. It is improbable, too, that Fetter, who had declined to discount any sum of Huette & Sons' paper on the faith of the security the bank then had, should exact security for the additional borrowing, and then, in three months after the surety had become bound, releasing, or attempting to release, him from all liability. It is inconsistent with the conduct of the most ordinary business man, and certainly inconsistent with the new mode of conducting bank transactions.

These collaterals were pledged to secure certain specific debts, and after that, by an agreement with the bank, any surplus of the collaterals was to be applied to any other paper held by the bank, and this included the debt on which Gillen is bound as surety. There was no surplus left, but, on the contrary, Huette & Sons still owe the bank near $3,000. The $2,250 loaned Huette & Sons, after the agreement to apply the surplus, was money advanced to pay tax on whisky taken in pledge to secure a note of $750 loaned before February 27, 1887. This whisky did not sell for enough to pay the amount of loan and the tax.

The exhibits filed by the bank show the entire transaction, and there is no reason for disturbing the judgment below. If there was any usury in the notes, and there doubtless was, it can not affect the surety, as the claim of the bank unpaid amounts to more than the note for which the surety is bound.

Judgment affirmed.

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McCAULEY, PEACHER & CO., &c. v. BUCKNER, &c.

(Filed April 26, 1888.)

1. A devise to one and the "lawful heirs of her body" is to be regarded as giving to the devisee an absolute estate unless a contrary intention plainly appears from the will itself.

In this case the words quoted are twice used in the will as descriptive of the estate devised by the testator to his daughter, and the words "her heirs" are used the same number of times, apparently for the same purpose. The testator clearly manifests in the will a fixed purpose that the husband of his daughter should have no control or management of any part of the property devised to her, and to secure it beyond contingency he appoints a trustee to manage the property for the benefit of her and "her heirs." Held—That there is not enough in the context of the will to authorize the court to assume that the testator intendd his daughter to take a less or different estate than the language of the will clearly and legally imports.

2. Evidence—Testimony to prove what a testator intended to express is incompetent.

H. A. Phelps & Son, Breathitt & Stites, Campbell & Ferguson and C. H. Bush for appellants.

Petree & Downer and John Feland & Son for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Lewis.

The question in this case is whether Sarah E. Buckner took under the will of her father, S. Gordon, probated in 1852, an absolute or estate for life in the property devised to her, for if she had only an estate for life, then her son, H. C. Buckner, has an interest in remainder, which may be subjected to the satisfaction of appellants' debts; otherwise not.

The will is as follows: * * "Second. I wish my son, William M. Gordon to have five negroes out of my estate, which shall be equal in value to the following five which were given to my daughter, Sarah E. Buckner, in the year, 1837, * * and I also give and bequeath to my son the Oak Grove and Waggoner tracts of land; third, I give and bequeath unto my daughter, Sarah E. Buckner, and the lawful heirs of her body, lands of my estate of equal value to those given to my son, William M. If, after the division is made, there should be any landed estate remaining, then I wish such remnant to be equally divided between my son, William M. Gordon, and Sarah E. Buckner and the lawful heirs of her body; fourth, I wish the balance of my estate, real and personal, to be equally divided between my son, William M. Gordon, and Sarah E. Buckner and her lawful heirs. It is my wish that F. W. Buckner, the husband of my daughter, Sarah E. Buckner, shall not have any control or management over any part or parcel of the property left by me to my daughter, Sarah E. Buckner, and her heirs, and I hereby appoint my friend, W. H. Pendleton, trustee for my daughter, S. E. Buckner, and her heirs, in the management of the property of my daughter for the benefit of her and her heirs," etc.

"Lawful heirs of her body" under our statutes, as often construed by this court, are words of limitation, import, and unless a contrary intention plainly appears from the will itself, are to be regarded as giving to the devisees an absolute estate. The words quoted are twice used in the will as descriptive of the estate devised to Mrs. Buckner, and the words "her heirs"

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are used the same number of times, apparently for the same purpose; and as the devise to William M. Gordon, son of the testator, is unaccompanied by the same, or any words descriptive of the estate devised to him, it might be inferred that they were intended by the testator to be understood in the sense and meaning of the "children" of Sarah E. Buckner, in which case her interest under the will would be held as either an estate for life, remainder to her children, or else a joint estate with them. But if, looking at the whole will and giving meaning to each part of it, it can be reasonably inferred the testator had some other object or purpose for the frequent and seemingly unnecessary repetition of the words "heirs of her body," and "her heirs," it should be construed so as to effectuate that purpose, rather than pervert the well-settled meaning of such words.

The testator clearly manifests in the will a fixed purpose that the husband of his daughter should have no control or management of any part of the property devised to her, for not only does he use full and emphatic language for that purpose, but in order to secure it beyond contingency, he appointed a trustee to manage the property for the benefit of her and her heirs. And it is proper to remark that, in connection with that subject, he uses the words "her heirs," instead of "heirs of her body." It is not a reasonable supposition that he intended the trustee to hold the property after her death for the use of her children, but his object evidently was to create for her a separate estate in it, and place it beyond the reach or control of her husband. We do not, therefore, think there is enough in the context of the will to authorize us to assume that the testator intended his daughter to take a less or different estate in the property devised to her than the language of the will, as heretofore interpreted by this court, and as it must be presumed it was understood by him clearly and legally imports.

The purport and effect of the testimony of the person who wrote the will is simply to prove, not what the testator expressed, for about that there is no controversy, but what he intended to express; and, as heretofore held by this court, it is, for that purpose, incompetent. (Wheeler v. Dunlap, 13 B. M., 291.)

If the testator intended to devise to his daughter merely a life estate, it would have been easy for him to have said so, and no better evidence of the utility and necessity of the rule of evidence just stated could exist than is afforded by the effort to prove by the draftsman, nearly forty years after he wrote the will, that the language used was intended to convey a meaning entirely different from what it imports.

Judgment affirmed.

JOHNSON v. COMMONWEALTH.

(Filed April 26, 1888.)

In an indictment for house breaking it is not material that the owner of the house broken, or of the property taken, should be described in the indictment with any more precision or certainty than is necessary to inform the accused of the actual offense charged against him, and to bar a second conviction therefor.

In this case the indictment sufficiently describes the house broken, although the person named as the owner of it was not the sole or the actual

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owner of it, being in possession merely as tenant, and that jointly with another. And the distinct offense of stealing therefrom being charged and proved, it is not material whether the person named in the indictment as the owner of the stolen goods owned all or any of them.

W. Allen Kinney for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

The indictment in this case charges the accused with the crime of house-breaking, committed by forcibly and feloniously, in the night time, breaking and entering the barber shop of Philip White with intent to commit a larceny, and then and there feloniously taking and carrying away one hone, razors, one clipping machine, and one pistol, the property of said White, with the fraudulent intent to convert said goods to his own use, and permanently deprive said White of his property therein. But the evidence showed the shop broken was, at the time of the alleged offense, leased and occupied not by White alone, but jointly with one Gatlin, his partner, and that the property stolen consisted of certain articles not described, a key to the back door of the shop and a pistol owned by one Smith. And it is, therefore, contended the lower court erred to the prejudice of the substantial rights of appellant in overruling his motion for a peremptory instruction to the jury to render a verdict of not guilty.

Section 126, Criminal Code, is as follows: "If an offense involves the commission of or an attempt to commit an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, or as to the owner of the property taken or injured, or atempted to be injured, is not material."

Two distinct offenses are charged in the indictment and sustained by the proof, each of which is a felony: First, forcibly breaking the barber shop with intent to commit larceny; and, second, actually stealing and carrying away therefrom goods with intent to convert them to the use of the accused.

The prosecution and conviction of a person guilty of house breaking is not to compensate or afford redress to the owner of the house broken, or of the goods stolen therefrom, but to inflict punishment for the public offenses thus committed. It is, therefore, material that the owner of the property injured or taken should be described in the indictment with no more precision or certainty than necessary to inform the accused of the actual offense charged against him, and to bar a second conviction therefor.

It seems to us the indictment in this case sufficiently described the house broken by appellant, although White was not, as charged, the sole or actual owner of it, but in possession only as tenant, jointly with his partner; and the act of stealing therefrom being charged and proved, it is not material whether White owned all or any of the stolen goods by appellant.

Judgment affirmed.

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LOCKARD v. COMMONWEALTH.

(Filed May 1, 1888.)

1. An indictment for uttering a forged writing must state the acts constituting the uttering and not the forging of the writing. It is not necessary, therefore, to state who committed the forgery or how it was done. And while the falsity of the paper is a fact necessary to the existence of the offense, the statement that the defendant knew it to be false embraces the charge that it was so in fact.

2. Impeachment of defendant's character—If the defendant in a criminal case avails himself of the privilege given him by statute of testifying in his own behalf he is to be regarded and treated as any other witness, therefore, his general moral character, and not merely his character for truth and veracity, may be put in issue by the Commonwealth.

R. W. Slack and Owen & Ellis for appellant.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

An indictment for uttering a forged writing must state the acts constituting the uttering and not the forging of it. It is immaterial who committed the forgery, or how it was done. The falsity of the paper is merely a fact necessary to the existence of the offense. If it be forged, and one so knowing utters it as genuine, he is guilty. The acts constituting the uttering are the gravamen of the offense.

In this case the indictment charges, in substance, that the appellant had the writing, knew it to be false, presented it to the party defrauded, representing it as genuine, and thereby obtained property of value. The statement that the appellant knew it to be false embraces the charge that it was so in fact.

It is charged in the fore part of the indictment when and where the paper was forged. This was unnecessary; but, in this instance, it aids as to the sufficency of the charge of uttering the paper because, in thereafter stating it, the words "then and there" are used, thus fixing the venue of the offense. The indictment is sufficient. We now reach the vexed question in the case, and one which has not been heretofore considered by this court.

The act of May 1, 1886, provides: 'In all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this Commonwealth, the defendant on trial, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or be allowed to create any presumption against him or her." (General Statutes, 548.)

The appellant testified for himself, but offered no evidence as to his character in any respect. The Commonwealth then introduced several witnesses who were, over the appellant's objection, permitted to testify that while they knew nothing of his character for truthfulness, yet his general moral character was bad.

The law invests every person charged with crime with a presumption of good character. If the accused chooses to rest upon it, and not put his general character in issue by offering evidence as to it, then the State can offer none to impeach it. It is only when the defendant casts aside this shield of presumption and attempt to show his general good character by affirmative evidence that the door is opened for evidence of his bad character upon the part of the prosecution. This has long been a familiar rule. He may now, however, be both a defendant and a witness.

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The weight of common law authority is that an inqiury into the general character of a witness must be confined to truth, and where this rule obtains there is no difficulty in holding that evidence as to the general moral character of a defendant is inadmissible unless he has first offered testimony as to it, although he may have testified for himself. The inquiry must be confined to his general character for truth and veracity. Thus in the case of Fletcher v. The State, 49 Ind., 124, it was held that, as the accused had not put his general character in issue, evidence of his general bad moral character was inadmissible to assail him as a witness. In that State a witness, whether he be a defendant or not, can not be thus attacked in a criminal cause. This is not so, however, in this State. Here evidence of the general moral character of a witness is admissible upon the ground, as was said in the case of Tacket v. May, 3 Dana, 80, that "a witness whose moral character is bad is not as credible as one whose moral character is good." This is the settled rule with us. It is no longer open to first impression. The real question, therefore, now presented is whether, while the testimony of witnesses generally may be assailed by reason of their general moral character, that of defendants in criminal cases shall only be open to attack upon the score of truth or veracity. If this restriction of the general rule existing with us is to be applied, it must be because otherwise the general moral character of a defendant would, without his consent, by his becoming a witness, be, in effect, thrown into the scale, and he might sometimes be convicted more upon his bad character than upon the facts of the transaction under investigation. It is, therefore, now urged—and the argument is not without weight—that an impeachment of his testimony upon the score of character should be confined to his general reputation for truth and veracity. If so, this qualification of the general rule must be attributed to the existence of that other rule, which, in a criminal case, gives to the defendant alone the right to put his general character in issue. The law making him a competent witness is silent upon this point. Its language merely places him upon the plane of any other witness if he chooses to testify.

Undoubtedly the rule that the defendant only can put his general character in issue is founded in sound policy. If the State could do so ad libitum, convictions would be likely to result often from bad character rather than from guilt of the offense charged. When, however, the defendant becomes a witness, he voluntarily assumes another character. Public policy and individual safety forbid that his reputation for veracity should then be beyond inquiry. Probably no case to the contrary can be found. A different rule would serve but as a shield for crime. Why, also, if the testimony of the witnesses may be impaired or destroyed by evidence of general bad moral character, should not his be open to like attack? If there be good reason for it in the one case, does it not exist at least equally in the other? If it be said that in his case it may affect him as a defendant, and not merely as a witness, that it, instead of the evidence as to the act in question, may produce a conviction, why may it not also be said that testimony showing he is unworthy of belief is likely to have the same effect? If by his becoming a witness the State is enabled in effect to avoid the rule that one criminally charged can alone put his general moral character in issue, yet he voluntarily affords the opportunity. If he chooses to exercise the privilege, should it not be with any burden that is necessary to the safety of the public? Its

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rights, as well as his, must be regarded. Reason dictates that he, as a witness, should not be afforded an advantage not enjoyed by other witnesses. If it is important to the administration of justice that their general character for morality should be open to inquiry, why is this not also true of the defendant when he voluntarily becomes a witness? If the testimony of others, who are disinterested, may be thus discredited, ought that of the party interested, however bad may be his character, to be beyond inquiry? Surely a shield should not be furnished to him that is denied to the disinterested and the impartial. It would be strange indeed if the character of a disinterested witness could be attacked by the adverse party, and shown to be infamous, while that of the party interested, and who voluntarily becomes a witness, could not be questioned. If so, then the legal presumption that a witness is of good character could be overthrown as to one although disinterested, but must remain indisputable when the party himself becomes the witness. The mere statement of such a position furnishes its own refutation.

These considerations must prevail over the suggestion that if the general moral character of the accused when he becomes a witness can be assailed, it is, in effect, a violation of the rule that in a criminal case the defendant alone can put it in issue. His credit, like that of any other witness, is for the jury. The end desired is to arrive at the truth or falsity of the statement. If the general moral character of the one renders him unworthy of credit, it should operate likewise as to the other. The statute permitting the accused to testify does not exempt him from cross-examination or impeachment. If he avails himself of the privilege, he subjects himself to the tests applicable to other witnesses. (Commonwealth v. Bonner, 97 Mass., 587.) It would not only be dangerous, but difficult to make an exception in his favor. Both reason and authority so dictate.

Statutes essentially like ours have been adopted in Nevada, New York, California, New Hampshire, Missouri and other States.

In the case of The State v. Cohn, 9 Nevada, 179, it was held that one accused of crime offering himself as a witness in his own behalf is to be regarded and treated as any other witness.

In Brandon v. The People, 42 N. Y., 265, it was said that when he elected to become a witness he left his position as defendant, and subjected himself to the same rules and tests as any other witness.

The later case of The People v. Connors, 50 N. Y., 240, decides that by availing himself of the privilege of testifying, he assumes all the burdens incident to the position; and in McCarny v. The People, 2 Lansing, 227, it was said: "He could not have been compelled to give evidence at all; but when he made himself a witness, under the privilege conferred upon him by this statute, he waived the constitutional protection in his favor, and subjected himself to the peril of being examined as to any and every matter prominent to the issue.

The cases of The People v. McGungill, 41 Cal., 429, and Town of Norfolk v. Gaylord, 28 Conn., 309, are to the same effect.

In The State v. Ober, 52 N. H., 459, this language was used: "If he consents to become a witness in the case voluntarily, and without any compulsion, it would seem to follow that he occupies, for the time being, the position of a witness, with all its rights and privileges, and subject to all its duties and obligations."

The case of The State v. Clinton, 67 Missouri, 380, however, seems to have been one in all respects similar to that now before us. In that State, as in this, the general moral character of a witness merely may be shown without inquiring as to his general reputation for truth. The defendant voluntarily

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testified for himself. The State was permitted to inquire of other witnesses not only as to his general character for veracity, but as to morality; and the Superior Court of that State, in passing upon the question, said: "In the light, both of authority and reason, our opinion is that a defendant, who, at his own option, becomes a witness under the act of 1877, occupies the position of any other witness; is liable to be cross-examined as to any matter pertinent to the issue; may be contradicted and impeached as any other witness, and is to be subjected to the same tests."

We concur in this view. In our opinion it is the safe one. It is not unfair to the defendant. It subjects him to no liability or test, when he voluntarily assumes the character of a witness, that may not be incurred by or applied to witnesses in general.

The judgment is, therefore, affirmed.

(Note—As to right to impeach defendant's character when he offers himself as a witness see McDonald v. Commonwealth, 9 Ky. Law Rep., 230.)

DOWNING v. MASON COUNTY.

(Filed May 1, 1888.)

County not liable for a tort—A county is not liable for an injury arising either from its mere neglect or from its positive act unless the liability is imposed by statute, either expressly or by necessary implication.

In this case it is held that a county is not liable for an injury caused by the flooding of adjacent premises in the erection of a county jail, there being no statute in this State giving a right of action against a county for the neglect or wrongful acts of its officers.

Cochran & Son and T. C. Campbell for appellant.

L. W. Robertson and E. Whitaker for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Holt.

The appellant avers that the appellee "unlawfully, carelessly and negligently" so changed and obstructed the course of a stream as to flood his premises.

A county can necessarily act only through its agents. If liable at all for a tort, it can only be when committed by its agents engaged in the course of its business.

It is inferable from the petition that the act complained of was done by them in the erection of a county jail. Assuming this to be so, or that it was done at least in the course of the county's employment and within the scope of its business proper, we reach the question involved, to wit: Is a county responsible for a tort?

Formerly it was held as to corporations proper that as they were not created to commit wrongs, therefore, it was ultra vires, and they could not do so. This has long ceased to be the rule, however. In The Railroad Co. v. Quigley, 21 Howard, 202, the Supreme Court of the United States decided, as to corporations proper, that they were liable for acts done by their agents, whether in contractu or in delicto, in the course of their business

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and employment. To the same effect is the case of Salt Lake City v. Hollister, 118 U. S., 256; and this is now the well-settled rule.

Counties, however, are subordinate political divisions. They do not possess corporate powers under special charters, but exist by virtue of the general laws of the State, apportioning its territory into political divisions for the convenience of government. They are a part of the machinery of the government. They are created for public purposes. Public duties are imposed upon those residing within their limits without request from them; and in order that they may properly perform them, they are clothed with certain corporate powers. They are, therefore, often called quasi corporations. A difference should manifestly be drawn between them, invested as they are with powers and duties without their consent, and corporations proper, that obtain special privileges for the peculiar benefit of their corporations. The State may compel the citizen to the performance of his county corporate duties by means of penalties, but he does not stand in the light of a person who has, for a consideration, voluntarily assumed obligations so as to owe a duty and be answerable to every one interested in its performance. In the case of municipal and ordinary corporations it is otherwise, because they accept special charters, and presumably valuable privileges. Their creation is due to local advantage and convenience or individual benefit; while the leading object in establishing a county is to effectuate the political and civil organization of the State as to its general purposes and policy. It is an arm of the State, giving local effect to them. It looks largely to the administration of justice; the maintenance of the highways and bridges; the support of education and kindred governmental objects. It is created at the will of the sovereign, without special regard to the consent or will of those residing in it. It is a necessary instrumentality in carrying out the policy of the State, and in governing its people. It is governmental in its purpose and nature. It is not, in the strict legal sense, a municipal corporation like a city. As a quasi corporation, it is distinguishable both from a private corporation and a municipal corporation proper. A city is liable to an individual in certain cases for a failure to discharge its corporate duties upon the ground that its powers have been granted at the special solicitation and for the benefit of its citizens, and not so much to aid in the administration of the State government as for local advantage and convenience. Further illustration by way of distinction is unnecessary.

A county, being but an arm or branch of the State government, it is no more liable to be sued for the neglect or tort of its officers than the State is for that of those in authority in it. The common law gives no such right, and it, therefore, can only exist by statute. There is none in this State. Judge Cooley says: "It is settled that these (quasi) corporations are not liable to a private action, at the suit of a party injured by a neglect of its officers to perform a corporate duty, unless such action is given by statute. The doctrine has been frequently applied where suits have been brought against towns, or the highway officers of towns, to recover for damages sustained in consequence of defects in the public ways. The common law gives no such action, and it is, therefore, not sustainable at all unless given by statute." (Cooley's Con. Limitations, page 247.)

In the case of Braham v. Supervisors of Hinds County, 54 Miss., 363, it was held that a county is not liable for an injury arising from its neglect to repair a county bridge.

In Kincaid v. Hardin, 53 Iowa, 430, it was decided that a county is not

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responsible for an injury sustained by reason of the defective construction and imperfect lighting of a courthouse.

In Dosdall v. County of Olmstead, 30 Minn., 96, it was declared that one can not sue a county for an injury due to the negligence of its officers in failing to repair a sidewalk appurtenant to the courthouse.

In Wehn v. Commissioners of Gage County, 5 Neb., 494, it is said that a county is not liable to a citizen for the erection of a jail in the immediate vicinity of his residence, nor for suffering it, through filth and disorder, to become a nuisance.

Many cases could be cited to the same effect. Among them are Commissioners of Hamilton County v. Mighels, 7 Ohio St., 109; Bigelow v. Randolph, 14 Gray, 541, and Eastman v. Meredith, 36 N. H., 284.

The same reason exists for denying the citizen the right to sue a county for a wrong, whether it arises from its action or mere nonaction; whether from mere neglect or a positive act. If permissible in one instance, it would be in the other; and even if in either, it would lead to innumerable suits, and open a wide avenue for trouble and obstruction to the State government. This is illustrated by the cases above cited. The denial of the right may sometimes, and no doubt often does, result in individual hardship; but public policy demands it. It must be kept in view that the paramount object of the existence of a county is governmental; that it is indeed a part of the sovereignty itself. In view of this, and for its proper conduct, it has become a settled judicial rule that no liability exists upon its part unless it be authorized expressly, or by necessary implication, by statute. Its general purpose forbids that it should otherwise be open to suit, or answerable for the manner in which it either exercises or fails to exercise its corporate powers.

Judgment affirmed.

HUHLEIN v. HUHLEIN, &c.

(Filed May 3, 1888.)

1. Devise in lieu of dower—While by the common law a devise to the testator's wife is not construed as in lieu of dower, unless such an intention is expressed or plainly inferable from the will, under our statute the widow is not entitled to dower in addition to the devise unless it affirmatively appears from the will that the testator so intended.

In this case such a purpose is not plainly expressed, nor does the will contain any expression from which it is necessarily inferable, and, therefore, the widow is not entitled to dower in addition to the devise.

2. To entitle the widow of a testator to dower she must relinquish the provisions of the will within twelve months after probate unless, under the provisions of the will, she is entitled to dower in addition to the devise.

3. Where the widow elects to take under the will, by failing to relinquish its provisions within the time required, she must comply with the requests or directions attached to the devise. The burden accompanies the benefit.

In this case the testator provided that his wife should furnish his imbecile daughter a home with her, care for her and take charge of her estate. Held —That these conditions were an executory charge upon the devise to the wife, and that she is not entitled to compensation for the support of her imbecile stepdaughter.

4. Wills—Estoppel—If a testator leaves a portion of his estate to A, and at the same time disposes of property belonging to A, and A accepts the bounty

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under the will, he must abide by the disposition of his own property made by the testator.

In this case the testator devised land to his wife, and at the same time devised to his daughter a part of the proceeds of an insurance policy payable to his wife. Held—That the widow, having accepted the devise of the land, is estopped from claiming the insurance money devised to another.

5. It was the duty of the chancellor to guard the interest of the imbecile daughter of the testator, and see that her estate was protected. It was, therefore, not error to grant her, upon a cross petition filed by her guardian ad litem, relief not asked in express terms.

6. It was not equitable to charge the widow with interest upon the sums allowed the testator's imbecile daughter as her portion of the insurance money and of the personal estate of the testator. The spirit of the will does not authorize it.

7. Allowance to guardian ad litem—Affirmative relief having been granted upon a cross petition filed by the guardian ad litem, it was error to require the plaintiff to pay the allowance to the guardian ad litem without providing that she should have credit therefor upon the amount adjudged against her in favor of the ward. While it was proper to require the plaintiff to pay the allowance, she should have credit therefor.

Dodd & Grubbs for appellant.

Chas A. Wilson and W. W. Watts for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

Ehrhard Huhlien died testate in 1876 the owner of three pieces of real estate in the city of Louisville. He had been twice married. He left surviving him his last wife, as his widow, and eight children, an equal number of them being by each wife. His will, which is in the form of a letter, provides:

"My wife, Katharine, remains in possession and enjoyment of all my immovable property until my youngest child, Benjamin, shall have attained his twenty-first year; my unmarried children will, of course, have, until that time, their home with their mother in their mother's house; she will educate my minor children, will take care of them, and also undertakes the especial care of my invalid daughter, Henrietta; she will, in the same time, be her guardian and administrator of her share of the property because she, my daughter, is unable to do so herself; my wife will have to pay the taxes and have the necessary repairs made so as to keep the property in good condition. Should my wife, however, marry again, she shall, from that day, lose possession and enjoyment of the property, except of that part to which, by right of law, she is entitled.

"2d. When the time for the division of my immovable property, as above, shall come, my wife shall keep in possession and use as long as she shall live and remain unmarried the house and lot on Twelfth street, between Main and Market, with everything therein contained in the shape of furniture, excepting the piano; she shall never be charged anything for the wear and tear of the furniture; at her death the said house will go back to my children. * * *

"3d. I am in possession of a life insurance policy for $3,000, of which my wife is to get, when the policy is paid, $1,000, and my daughter, Henrietta, $400, and the remaining $1,600 are to be divided equally, share and share, amongst my eight children; the balance of my cash property is also to be

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equally divided according to law amongst my wife and children, deducting, first, the expenses for doctor, undertaker, etc. It is necessary to have an administrator and guardian appointed for my minor children. I herewith appoint my wife administrator and guardian without requiring her to give security; * * * should my wife die, I beg that one of my children will take care of my daughter, Henrietta, and treat her Christian-like and lovingly. The said child shall have the right to draw the income of Henrietta's share of the property, but only so long as Henrietta shall remain with him or her, and is treated well. It is my wish that all you children will live in peace with your mother, who has raised you." * * *

The son, Benjamin, became of age in May, 1886, and on October 14, 1886, Ehrhard Huhlein, another son, brought this action against the widow and the other seven children for a sale of the real estate of the testator, save the Twelfth street property specifically devised to the widow for life. She claims dower in the other two pieces of property. The lower court correctly refused it.

By the common law a devise to the wife is not construed as in lieu of dower unless such an intention is expressed or plainly inferable from the will. She is entitled to it also unless the will requires a different interpretation. (Timberlake, &c. v. Parish's Ex'or, 5 Dana, 231.)

Our statute has, however, changed this rule. It provides: "Nothing herein shall preclude the widow from receiving her dowable and distributable share in addition to any devise or bequest made to her by the will, if such is the intention of the testator, plainly expressed in the will or necessarily inferable therefrom." (General Statutes, chapter 31, section 12.)

It is yet a question of intention upon the part of the testator; but she is not entitled to dower in addition to the devise unless it affirmatively appears from the will that he so intended.

In this instance such a purpose is not "plainly expressed," nor does the will contain any expression from which it is "necessarily inferable." The testator gave to the widow, provided she remained such, the use of all his real estate for a term of years, and then of a portion of it for life. She enjoyed it all for a period of ten years, and yet retains the portion devised to her for life.

Our statute provides that the widow may relinquish what is given to her by the husband's will and take her dower, but "such relinquishment must be made within twelve months after the probate." Here she failed to exercise this privilege. True she was not required to do so to entitle her to dower if the will, either by positive expression or plain inference, gave it to her in addition to the devise, but it not only does not do so, but, upon the other hand, plainly shows that the testator did not so intend. The acceptance by her under the will operated by way of jointure as to any claim for dower.

She has had the care of the imbecile stepdaughter, Henrietta, since the death of her father. She asks that she be allowed for her support at the rate of $100 a year out of her portion of the proceeds of any sale of the real estate. This claim she has asserted by cross petition against the daughter, and admits the receipt of about $300 from the personal estate of the father belonging to Henrietta. Upon the widow's motion a guardian ad litem was appointed to defend for the daughter. He not only resisted the mother's claim for pay for support, which is admitted in argument to be reasonable as to amount, but the answer asserts a claim against her for the $400 in-

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surance money named in the will, and asks in substance for all other proper relief.

By the terms of the will Henrietta was to have a home with the mother until the youngest child became of age; she was to have the especial care of her and the charge of her portion of the property. When the widow accepted the devise to herself she did so subject to the conditions connected with it. Among them were the care of Henrietta, the charge of her estate and the furnishing of a home to her. These conditions were an executory charge upon the devise to the wife. It was at least a precatory one, and choosing, as she did, to take under it she must comply with the requests or directions attached to it. The burden accompanied the benefit.

It is urged, however, that in any event she is entitled to compensation from the time the youngest child became of age in May, 1886, until her cross petition was dismissed in June, 1887. It is fair to presume, however, that during this period she continued in the use of all the real estate. Nothing appears in the record to the contrary. It was improved property, and an income, doubtless, was being derived from it. Moreover she was not under the will bound to care for Henrietta after the youngest child became of age. In our opinion the claim for support was properly rejected.

We have now reached the consideration of Henrietta's claims.

The policy of insurance named in the will was payable to the widow and her children, and not to her and all of the testator's children. She collected it, and denies Henrietta's right to any portion of the $2,824.54 received upon it. She alone appeals. Is the bequest of it by the will valid? The children are all of age, and none of them, save Henrietta, ask any relief as to it. The testator devised land to the widow, and the same will bequeathed insurance money belonging to her. A devise can not take both under and against a will. Her own children were also devisees under the will. They have taken under it; but in any event they are not now complaining. The will does not show that the testator believed that the policy was a part of his estate. The language employed is: "I am in possession of a life insurance policy." He had taken it out, and presumably knew to whom it was payable, and yet he unquestionably disposes of it. One taking under a will must abide by all of its provisions. If a testator leaves a portion of his estate to A, and at the same time disposes of property belonging to A, and the latter accepts the bounty under the will, he must abide by the disposition of his own property made by the testator. He has his election; but if he chooses to take under the will he is thereby estopped from claiming against it. Citation of authority is needless upon a point so well settled.

Here the testator bequeathed to Henrietta a part of the property of his wife and her children, but at the same time devised other property of his own to them.

An acceptance of the bounty requires an assent to the entire devise. As the widow converted Henrietta's portion of the insurance money she must account for it. It is said, however, that relief not asked by the guardian ad litem was afforded. It is true that the lower court, after deducting the $1,000 and the $400 of the insurance money, specifically devised to the widow and Henrietta respectively, allowed the latter one-eighth of the balance that had been received upon the policy. It also allowed her what had been collected by the widow from the personal estate of the testator as Henrietta's portion. Judgment was not specifically asked for these sums.

So far as the insurance money is concerned, however, the reply of Kath-

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erine Huhlein to Henrietta's claim denies that she is entitled to the $400, or "any other amount whatever." The pleading of the widow also avers that Henrietta's portion of the personal estate had been exhausted, and this is denied. The answer of Henrietta asks for all proper relief.

Aside, however, from all this she is an imbecile. As such she is the ward of the court. It was especially the duty of the chancellor to guard her interest and see that her estate was protected. Humanity so dictates, and public policy requires this to prevent such persons from becoming a public charge. It was not error, therefore, to afford her this additional relief, although the guardian ad litem had not asked it in express terms.

We do not think it was equitable, however, to charge the appellant interest upon the sums allowed Henrietta as her portion of the insurance money and of the personal estate of the testator. It amounts to several hundred dollars. This was not, in our opinion, intended by the testator. The daughter was an imbecile. It is true she was to live with her mother and she was to care for her and have charge of her estate; but medical services, or other extra expenses, might be needful, and it is unreasonable to suppose that the testator expected or intended the wife should account for interest upon the small amount of personal estate that would belong to the daughter. The spirit of the will does not authorize it.

The judgment allows the guardian ad litem "$200 for services rendered in this case, to be taxed as costs on the cross petition of Katherine Huhlein, the defendant."

If, as is probable, and as counsel appear to concede, the court intended by this that the appellant, Katherine Huhlein, should pay this and get no credit therefor upon the amount adjudged against her in favor of Henrietta, it is error.

The guardian ad litem must be a practicing attorney. The Code of Practice provides that he must attend properly to the preparation of the case. In an ordinary action he may cause as many witnesses to be summoned as he may consider proper, subject to the control of the court; and in an equitable one he may take depositions, not, however, exceeding three without leave of the court. Section 38 further provides: "The court shall allow to the guardian ad litem a reasonable fee for his services, to be paid by the plaintiff and taxed in the costs."

The statute evidently aims to secure the guardian in his compensation. The infant may have no estate. It, therefore, provides that the plaintiff shall pay it without regard to the result of the suit. This, however, surely does not mean that in a case like this one, where the infant, by a counterclaim or set-off, becomes in fact a plaintiff and recovers, while the nominal plaintiff is defeated, that, as between them, the latter shall pay the fee of the guardian ad litem. Suppose the action against the infant were defended by his statutory guardian, certainly no allowance could be made to him for his services. The language of the Code is that "it is to be paid by the plaintiff and taxed in the costs." It is not to be taxed as costs.

Suppose A sues B, an infant. A heavy litigation ensues. A recovers nothing, but B, by his guardian ad litem, recovers upon a counterclaim $50,000. The attorney, who has acted as guardian ad litem, is reasonably entitled to $5,000 for his services. Is A, in such a case, to pay it and not be credited by it as against B? It was not intended by this provision of the Code that the infant should not, in such a case, be liable for it. Such a construction would be unreasonable, and, while in conformity to the stat-

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ute. It was proper to order its payment by the plaintiff in the cross petition, Katherine Huhlein, yet the judgment, in this instance, should further have provided that upon payment of it by her she should be allowed or have credit therefor against Henrietta Huhlein.

For this error and that as to interest the judgment is reversed, but in no other respect, and cause remanded, with directions to render a judgment in conformity to this opinion.

KENTUCKY SUPERIOR COURT.

PITCHFORD v. GATEWOOD'S ADM'R.

(Filed March 14, 1888.)

1. Pleading—Limitation—The statute of limitation must be relied upon by plea, and all facts necessary to show a complete bar must appear from the plea and the pleading to which it is responsive, therefore, if the petition states facts showing that the right of action was suspended, it is incumbent on the party relying upon the statute to avoid the effect of these allegations by denial, or statement of other facts sufficient to overcome those stated in the petition.

2. Same—When it appears from the facts stated that the cause of action accrued at a particular time, the presumption will be indulged, nothing else appearing, that the party to whom it accrued labored under no disability, and the statute having commenced to run, will continue until the bar is complete, no fact being stated showing a suspension thereof.

3. Same—When the petition shows that the payee of a note sued upon is dead, the action being brought by his administator, and it is not stated when he died or when the administrator was appointed, it is not incumbent on the defendant, in order to avail himself of the statutory bar, to state facts which would show that the operation of the statute was not suspended by the death of the payee, or, if suspended, that the suspension was not for a sufficient length of time to prevent the bar from being complete.

The note sued on matured March 1, 1871. This suit was instituted by the administrator of the payee March 14, 1887. It is not stated in the petition when the payee died or when his administrator was appointed. The answer states that the right of action accrued March 1, 1871, and more than fifteen years before this action was brought, and concludes by relying on the statute. Held—That the answer is sufficient.

4. Same—The statute which provides that if a person entitled to bring any action mentioned in the third article of chapter 71 of the General Statutes dies before the expiration of the time limited for the commencement thereof and the cause of action survives, the action thereon may be brought by his representative after the expiration of that time; if commenced within one year after his qualification, can not extend the time within which suit may be brought beyond four years after the death of the person to whom the right first accrued.

5. Same—Application of payments—Although several notes evidence but one contract, as where separate notes are executed for the several installments of the purchase price of a tract of land, a payment upon one of the notes does not prolong the period within which suit may be brought upon the others, although the payee might have applied the payment to any one of the notes, no direction being given by the payor at the time as to how it should be applied.

W. L. Porter for appellant.

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John J. Gatewood and I. H. Goodnight for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Presiding Judge Ward.

The note to which the statutory limitation of fifteen years was plead in bar matured March 1, 1871. This suit was instituted March 14, 1887.

The petition does not clearly state that F. Gatewood, the payee of the note, was dead, but as the suit was brought by persons claiming to have been appointed his administrators, and as no objection was made, because the petition is not specific, it may be regarded as sufficient in that particular.

The answer makes no averment as to when F. Gatewood died, or when his administrator was appointed. It avers that the right of action accrued on the note March 1, 1871, and more than fifteen years before this action was brought, and concludes by relying on the statute. To the answer a general demurrer was sustained, and judgment entered accordingly.

"If a person entitled to bring any action mentiond in the third article of this chapter dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, the action thereon may be brought by his representative after the expiration of that time, if commenced within one year after his qualification." (Section 3, article 4, chapter 71. General Statutes.

By the provision of section 4 this suspension of the statute can not be more than four years.

Applying the statute to facts which are not stated in this record and it follows: First, that this action was barred unless F. Gatewood died before the 2d day of March, 1886; second, that even in that event it is barred if he died as much as two years, eleven months and eighteen days before that date; third, that it is barred, no matter when his death occurred, unless his administrator was appointed within one year next before the institution of the suit.

So the question arises, was it incumbent on the defendant, in order to avail himself of the statutory bar, to state facts which would show that the operation of the statute was not suspended by the death of the party, to whom the right of action first accrued for a sufficient length of time to prevent the bar from being complete?

The general principle is that the statute must be relied upon by plea, and that all facts necessary to show a complete bar must appear from the plea and the pleading to which it is responsive. In accordance with this principle, if the petition, in anticipation of the plea, states facts showing a disability or a reason why suit could not have been instituted or facts showing that the right of action was suspended, then it would be incumbent on the party relying upon the statute to avoid the effect of their allegation by denial or statements of other facts sufficient to overcome those relied upon or stated by the adverse party. On the other hand, it is equally well settled that, where it appears from the facts stated that the cause of action accrued at a particular time, the presumption will be indulged, nothing else appearing, that the party to whom it accrued labored under no disability, and the statute having commenced to run will continue until the bar is complete, no fact being stated showing a suspension thereof. (Baker's Adm'r v. Baker's Adm'r, 13 B. M., 406; Beachamp, Adm'r v. Mudd, 2 Bibb, 537.)

So the question arises, does the petition state any fact which shows that the cause of action on the note in question was suspended by reason of the

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statute aforesaid? It states no fact bearing upon that question at all except that the payee of the note is dead. The death of the payee does not necessarily suspend the statute. If the death occurred after the bar was complete it would not affect the question involved. If it occurred more than two years and eleven months and eighteen days before the 2d of March, 1886, the suspension caused by the death would be immaterial. So the result is that no fact was stated in the petition, either to show that the statute was suspended by the death of the party entitled to sue, or if suspended, that the suspension was material, and it, therefore, results that the answer was sufficient, provided the statute applied at all.

It is, however, claimed by appellee that the statute did not apply because of other facts stated in the petition, and not controverted, which we will now consider.

It is alleged that the note in question was one of a series of three of like date and amount executed as evidence of the consideration which appellant agreed to pay appellee's intestate for a tract of land; that the first note matured March 1, 1869, and had been paid; that the second matured March 1, 1870, and upon this there had been three payments made by defendant, the last one of which was on the 20th of April, 1874, less than thirteen years before the institution of this suit. That note was sued upon in this action and no defense made as to it. From these facts it is claimed that the three notes evidence but one contract, the sum to be paid for the land, and that a payment upon any one of the notes was a recognition of the existence of the obligation to pay for the land as first agreed, so far as not theretofore paid, and that a payment on the second note was not only a recognition of and a promise to pay that note, within the principles announced in Hopkins v. Stout, 4 Bush, 375, and English v. Wathen, 9 Bush, 387, but also prolonged the period within which suit could be brought upon all the notes not then paid. While it is true that all the notes evidence but one contract, it can not be maintained that they are all controlled by the same stipulations. They evidence one contract, a part of which is to be performed at one time and a part at another, and for which separate breaches may be assigned and recovery had accordingly. The advantages and disadvantages secured and imposed by the contract stipulations must be maintained and enforced, and for many purposes, both offensive and defensive, each note may be regarded as an independent contract.

It is argued that the appellant did not, at the time he made the admitted payment, direct to which note they or either should be applied, or did not direct that said payments should be applied to either, and that, therefore, the intestate could have applied them to either and thereby have prolonged the statutory period within which the suit could have been brought as to the note to which he did apply the payment. We do not understand the cases referred to as settling any such principle.

The cases hold that a credit endorsed upon a note and not disputed or denied is evidence of payment on that note, and of the recognition of that debt as a valid and subsisting demand. They do do not say that the admitted fact that the obligor paid money to the obligee without any direction as to its application, and a credit entered by the obligee on a note which he held against the obligor would be evidence of a recognition of that debt, so as to prolong the right of action upon it. The principle, as we understand it, is this: "If a partial payment is made by the debtor he thereby recognizes the remainder of the debt on which the payment is made as a subsisting obligation, as of the time of

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payment; the credit on the note is of no value except as evidence, and a payment is of no value, for the purpose named, except it be made on the debt in question.

The admitted facts in no way conduce to show that any payment was made on the note which matured March 1, 1871; in fact they show that they were not payments on that note.

The demurrer to the answer should have been overruled.

The judgment is reversed and the cause remanded for further pleadings and proceedings consistent herewith.

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SUPERIOR COURT ABSTRACTS.

SIMPSON v. SIMPSON.

Filed April 11, 1888. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Bowden, affirming.

Practice—Divorce—This court should defer to the opinion of the chancellor on matters of fact when the evidence is not clear; especially should this be done when he refuses a divorce which the law does not favor.

W. A. Morrow and J. T. Tarter for appellant; O. H. Waddle for appellee.

BRIDGEFORD, TRUSTEE v. OWEN, &c.

Filed April 11, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Ward, reversing.

Trusts—Life estate—Interest—In this action by a trustee to settle his accounts preparatory to turning over the trust fund to those entitled in remainder, his trusteeship having terminated with the death of the life tenant, the trustee was properly charged with a part of the principal of the trust fund which he had failed to collect from a former trustee, whether or not he had in fact collected it, as it was his duty to collect it, and it is not claimed that he might not by ordinary diligence have done so; but it was error to charge him, in a settlement with the remaindermen, with interest thereon, or with interest collected, as the entire interest on the fund passed to the life tenant, and whatever was left of that interest at her death, if any of it, passed to her personal representative and not to remaindermen, the devise being to the trustee for the use of E. "during her life, and then to go to her children." There ought, however, to be some one before the court to represent the rights of the life tenant in the interest on the trust found at her death, so that when a settlement is made it will be conclusive and final, both as to principal and interest.

R. J. Elliott and W. Lindsay for appellant; John W. McGhee for appellees.

HUGHES v. SAUSLEY & CO.

Filed April 18, 1888. Appeal from Fleming Circuit Court. Opinion of the court by Judge Bowden, affirming.

Exemptions—While exempted property in transit can not be taken, a debtor can not locate his family in another State and maintain an exemption here of such property as he may need for his personal convenience through an indefinite period of residence.

Wm. J. Hendrick and W. G. Dearing for appellant; W. A. Sudduth for appellees.

MEYER v. SPECKER, BUDDEKE & CO., &c.

Filed April 18, 1888. Appeal from Boyd Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Fraudulent mortgage—Where a mortgage is attacked by a creditor as fraudulent, and it is clearly proved that the intention of the mortgagor in executin the mortgage was fraudulent, the only remaining question is, whether the mortgagee had notice of that fraudulent intent, and he will be treated as having notice if the facts within his knowledge were such as devolved upon him the duty, as a prudent purchaser, of making inquiry, and the inquiry would have led to a knowledge of the fraudulent purpose.

In this case the mortgagor, who was the son-in-law of the mortgagee, was indebted far beyond his ability to pay. The mortgagee knew he was in debt, and if she did not know the extent of it she might have known by inquiry. She knew that the mortgage covered all of the property of the debtor.

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She says that her purpose in taking the mortgage and allowing the mortgagee to retain possession of the mortgaged property (a stock of goods) was to enable him to make a living, and that she allowed a part of the goods to be delivered to a creditor of the mortgagor without an account of sales. Held—That these facts were sufficient to give notice of a fraudulent purpose upon the part of the mortgagor, and conduce strongly to show that the mortgagee participated in a purpose to enable the debtor to make a living out of his property confessedly insufficient to pay his debts. Either conclusion supports the judgment setting aside the mortgage.

W. C. Ireland for appellant; John F. Hager for appellees.

FIREMAN'S FUND INSURANCE CO. v. GATEWOOD.

Filed April 18, 1888. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Fire insurance—The owner of a house built upon the land of another has an insurable interest, and where a policy issued to him recites the fact that the house is built upon the land of another it is valid.

2. Same—Where the insured property is sold or transferred without the consent of the company, the policy becomes void, if it is so stipulated therein.

Thomas Turner and C. Cyrus Turner for appellant; Peters & Tyler, L. Apperson, C. R. Brooks, H. Clay McKee and James P. Cassidy for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. HAWLEY.

Filed April 25, 1888. Appeal from Oldham Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Railroads—Carriers of live stock—Presumption of negligence—While railroads, on a contract to carry live stock, are not insurers, yet they are liable for loss resulting from their neglect, against which they can not be allowed to contract, and in determining the question of negligence public policy requires that they should be held to extraordinary diligence. And if the stock is lost or injured while in the custody of the company for transportation, the presumption of negligence arises, and the burden of proof is upon the company to rebut this presumption unless the contract provides that the owner or his agent may accompany the stock, and he does so. In that event the burden of proving negligence is on the owner, for the reason that he has care of the property and is presumed to know how the injury occurred. If, however, this reason for the change of the rule as to the burden of proof ceases, then the rule placing the burden upon the company applies.

In this case the negligence complained of consisted in the failure of the road to move this stock, a double-deck car load of lambs, at the time it was agreed they should be moved, and in suffering them to remain in the cars and away from destination twelve hours longer than is usual and customary. It is shown that the train, of which the car containing the stock was a part, was off the track, but why it was off, or what steps were taken to get it on, are not shown. Held—That considering the kind of stock, the hot weather, and the failure to transport them at night, as would have been done if the train had moved when it was advertised it would, and that there was no excuse offered for the failure, and none within the knowledge of the owner's agent, there was sufficient evidence to impose the burden upon the company to explain the delay, although the owner's agent was with the stock.

D. H. French and W. Lindsay for appellant; J. S. Morris for appellee.

LEYMAN'S ADM'R v. MORRISON, &c.

Filed April 25, 1888. Appeal from Grayson Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Motion for new trial—Where a jury is waived, and the law and facts submittted to the court, a motion for a new trial must be made within three days after the judgment is rendered in order to authorize this court to review the rulings of the lower court at the trial; and the time for mak-

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ing the motion can not be extended by reason of the fact that the court may not, within the three days, state its conclusions of law and fact, nothing appearing to show that the appellant requested such a statement.

2. Exhibits—In an ordinary action exhibits are not part of the record unless it shows that they were used on the trial.

George W. Stone for appellant; J. P. Hobson for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. EDWARDS.

Filed April 25, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Railroads—Presumption of negligence as to killing of stock—In this action against appellant to recover damages for the killing of a horse on its track by a moving train, there was evidence tending to show that the horse ran for about one hundred yards in front of the engine before being struck. There was one witness who estimated that the engine was seventy-five yards from where the horse was struck when he heard the call for brakes. The only witness who testified as to the time within which the train could have been stopped admitted that the train was in fact stopped within 150 yards after the call for brakes. Held—That, "allowing that the horse had seventy-five, or even forty yards, the distance fixed by the engineer, the start of the train, and that the train could have been stopped within 150 yards, and it is a reasonable inference that the injury might have been avoided," therefore, the jury did not flagrantly err in concluding that the legal presumption of negligence was not overcome.

W. J. Lisle for appellant; J. P. Thompson for appellee.

THOMPSON v. COMMONWEALTH, FOR USE, &c.

Filed April 25, 1888. Appeal from Lawrence Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. County levy bond—It is not necessary that the sheriff's county levy bond should be taken by the county levy court. The court presided over by the county judge alone is the proper court to take the bond.

2. Same—It is not essential to the validity of the bond that all the sureties should be present and sign at the same time, or on the same day.

3. Same—The bond is not invalid because executed before the levy was made, provided it was executed at the same term of court the levy was made.

4. County court—County levy—When the record shows the names of the justices that were present at the beginning of a term of the county levy court, and it appears that on the succeeding days of the term "the court met pursuant to adjournment," and that on one of those days the levy was made, there was a sufficient compliance with the statute requiring that the records show "by whom the court is holden," and "the names of the justices who take their seats," as it sufficiently appears that the court was composed of the same members when the levy was made as on the first day, the absence of none of them being noted.

Alex. Lackey for appellant; L. T. Moore for appellees.

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KENTUCKY COURT OF APPEALS.

CALVERT v. ALEXANDER, &c.

(Filed May 3, 1888—Not to be reported.)

1. Judicial sales—In judicial sales of land it is not indispensable that a full description of the land by metes and bounds should be set out by the commissioner either in the advertisement or in the report of sale by him.

2. Same—Where judicial sales are duly and legally made they should not be disturbed for inadequacy of price unless it is so great as to raise a presumption of fraud, or unless caused by the casualty or misfortune of a party interested in the sale.

In this case the land was sold for $1,715, and there is no evidence offered to show it did not sell for its fair value, or would at another sale bring a greater sum, except the advance bid of $2,000 by the party excepting, which is unaccompanied by any security or guaranty. It is stated by the party excepting that at the time of the sale her husband was sick and unable to do business, and has since died, but it does not appear that the land would have brought more if he had been well and present. Held—That it was error to set aside the sale.

W. L. Porter for appellant.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Lewis.

The exceptions to the report of the commissioner were filed by appellee, N. C. Alexander, one of the heirs at law of Fletcher Gatewood, who died owner of the land sold, and were based upon these grounds:

1st. Because no description of the land was given in the report.

2d. The land was not sufficiently described in the publication of the notice of sale, nor in the judgment of the court directing the sale.

3d. The land did not sell for its value, and in support of that objection an advanced bid for the land was offered by the party excepting.

The tract of land sold was fully described by metes and bounds in the petition for the sale and distribution of the proceeds amongst the heirs, and also in the judgment directing the sale.

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It has never been held by this court indispensable, nor is there reason for requiring a precise and full description by metes and bounds of the land, to be set out by the commissioner either in the advertisement or in the report of sale by him, although in this case he did actually amend his report so as to thus describe it.

The land was sold for the sum of $1,715, and there was no evidence offered on the trial that it did not sell for its fair value, or anything in the record conducing to show it would, at another sale, bring a greater sum, except the advanced bid of $2,000, by the party excepting to the report, which is unaccompanied by any security or guaranty.

So far as the record appears to us, the sale was duly advertised and publicly and fairly made by the commissioner. And as the price at which the land was sold does not appear so grossly inadequate as to raise the least presumption of fraud, we see no reason for sustaining the exceptions.

It is stated by the party excepting that at the time of the sale her husband was sick and unable to attend to business, and has since died; but it does not appear he would have bid for the land, or it would have brought more than it did if he had been well and present.

When judicial sales are duly and legally made they should not be disturbed for inadequacy of price unless it is so great as to raise a presumption of fraud, or unless caused by the casualty or misfortune of a party interested in the sale. An adherence to this rule is necessary to insure fair prices at judicial sales, in which the parties are directly interested, and a departure from it would generally have the opposite effect.

The judgment is reversed and cause remanded, with directions to overrule the exceptions and confirm the report of sale.

MINNIARD, &c. v. COMMONWEALTH.

(Filed May 8, 1888.)

Self-defense—Resistance of arrest—Upon the trial of appellants for murder it appeared that a constable, together with a large posse, went with a warrant to the house of one of the appellants for the ostensible purpose of arresting appellants, the defendants in the warrant. Appellants resisted the arrest and in the resistance one of the posse was shot and killed. Held—That if appellants believed, and had reasonable ground to believe, that the arrest attempted to be made was a mere pretext to enable the constable and the deceased and those acting with them to disarm the appellants and place them in their power for the purpose of inflicting upon them great bodily harm, then they, or any of them, had the right to resist such arrest by any means within their power; and although the member of the posse killed may have been acting in good faith, yet if appellants believed, and had reasonable grounds to believe, that he could not or would not protect them, and in attempting to kill the officer or such members of the posse as were not thus acting in good faith they used reasonable precaution not to kill or injure the deceased, but accidentally killed him, then appellants should have been acquitted, and the jury should have been so instructed.

D. K. Rawlings and John L. Scott for appellants.

P. W. Hardin for appellee.

Appeal from Leslie Circuit Court.

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Opinion of the court by Judge Bennett.

The appellants were indicted in the Leslie Circuit Court for the murder of Solomon Buckheart. They were found guilty of the crime of manslaughter and their punishment fixed at confinement in the penitentiary for two years each. They have appealed to this court.

It appears from the record that Isaac M. Day, a constable, together with a large posse, went to the house of Israel Napier, one of the defendants, with a warrant for the ostensible purpose of arresting the defendants for a supposed offense. The defendants resisted the arrest, and in the resistance Solomon Buckheart, one of the posse summoned by Day to assist in making the arrest, was shot and killed.

The appellants relied on self-defense, upon the ground that Day and his posse were the deadly enemies of the appellants, and that their coming to make the arrest, under the guise of a warrant, was a mere pretext to disarm the appellants and get them in their power for the purpose of doing them great bodily harm, and that the appellants, being apprised of said purpose, had the right to resist the arrest.

As the case is to be sent back for a new trial, we refrain from making any comment on the testimony, except to say that there is proof in the record that tends to show that Day and his posse, or the most of them, were unfriendly to the appellants, and that it was the purpose of Day to use the warrant as a pretext to get control of the appellants, in order to do them bodily harm, and that the shot that killed Buckheart was really fired at was Day, but missed him.

The court instructed the jury in substance that if the appellants believed, and had reasonable grounds to believe, that the arrest attempted to be made was a mere pretext to enable Day and the deceased, and those acting with them, to disarm the appellants and place them in their power for the purpose of inflicting upon them great bodily harm, then they, or any of them, had the right to resist such arrest by any means within their power, etc. The appellants complain of this instruction and other similar ones, for the reason that they require the jury to believe that the deceased was a party to the purpose of making the arrest as a pretext to disarm the appellants and place them in their power for the purpose of inflicting upon them great bodily harm.

We are constrained to the belief that these instructions did not go far enough. An additional instruction ought to have been given, to the effect that although they might believe from the evidence that the deceased was summoned by Day to assist in the arrest of the appellants, and that he believed that Day was proceeding in good faith to arrest the appellants for a public offense, and he, in good faith, was present for the purpose of assisting in making the arrest, yet if the appellants believed, and had reasonable grounds to believe, that Day and the other members of the posse, or any of them, were attempting to make the arrest, by virtue of the warrant, as a mere pretext to enable them to disarm the appellants and place them in their power for the purpose of killing them or of doing them great bodily harm, and that the deceased, and those of the posse acting from motives similar to his own, could not or would not protect the appellants from the unlawful purpose of Day and the other members of the posse, then they had the right to resist said arrest, and, if necessary, they had the right to kill Day, or such members of the posse as were engaged in such unlawful purpose,

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and if, in attempting to kill Day or such members of the posse, they used reasonable precaution, under the circumstances, not to kill or injure the deceased, but accidentally killed him while aiming to kill Day, or such of the posse as were thus unlawfully engaged, then the jury should acquit them. Instruction No. 7 is conceded to be error.

The judgment of the lower court is reversed, with directions to grant the appellants a new trial and for further proceedings consistent with this opinion.

BREWER v. COMMONWEALTH.

(Filed May 10, 1888—Not to be reported.)

1. Absence of accused during trial—It is wrong, in the absence of the accused, to submit a felony case to the jury to consider of their verdict, and unless it affirmatively appears from the record that such an error was not prejudicial to the rights of the accused he is entitled to a new trial.

2. Evidence—Upon the trial of appellant for murder, evidence which tended to show his feelings toward the deceased was competent.

3. Same—The Commonwealth was bound by appellant's answer to a question which related to a collateral matter, and had no right to contradict him.

P. U. Major and Scott & Violett for appellant.

P. W. Hardin for appellee.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted in the Henry Circuit Court for the murder of John T. Downey, and was convicted of the crime of manslaughter, and his punishment fixed at confinement in the penitentiary for the term of twenty-one years.

The argument of counsel was concluded about 10 o'clock at night; the case was not finally submitted to the jury that night: but in the absence of the appellant, and while he was in jail, the case was finally submitted to the jury on the following morning, to consider of their verdict.

It is the settled law of this State that it is error in a felony case to submit the case to the jury to consider of their verdict in the absence of the accused, and unless it affirmatively appears from the record that such error is not prejudicial to the rights of the accused he should have a new trial. (Allen v. Commonwealth, 9 Ky. Law Rep., 784, and authorities there cited.)

In this case it does not affirmatively appear that the appellant was not prejudiced by the final submission of the case to the jury in his absence; nor does it positively appear that he was prejudiced by such submission; but we must presume, in the absence of record evidence to the contrary, that he was prejudiced by such submission, which entitles the appellant to a reversal.

The instructions of the court are substantially correct.

The Commonwealth was permitted to prove, for the purpose of contradicting the appellant, that the appellant, a short time before the killing, becoming angered at Joe Downey, a brother of the deceased, for having hung a jack-o'-lantern on the yard fence, said that the Downeys were trying to

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run him off, but he intended to arm himself, and would not be run off. The appellant contends that this evidence was incompetent. We think, as the jury had a right to infer that the deceased was included in the remarks, that it was competent to go to the jury as original evidence, tending to show the state of the appellant's feelings towards the deceased.

The evidence of Tyre Gordon was not competent, for the reason that it did not tend to show the state of the appellant's feelings towards the deceased, and as it related to a collateral matter the Commonwealth was bound by the appellant's answer.

The evidence relating to the appellant's accusation against his wife, to the effect that she showed a preference for the deceased, was competent, because it tended to show the state of his feelings towards the deceased.

For the error in submitting the case to the jury in the absence of the appellant the case must be reversed, with directions to grant the appellant a new trial and for further proceedings consistent with this opinion.

COMMONWEALTH, FOR USE OF MORRIS, &c. v. NETHERLAND'S ADM'R.

(Filed May 1, 1888.)

1. Guardian and ward—Liability of county judge—If the county judge fails to take from a guardian a covenant, with surety, for the faithful performance of his duties, he is liable to the ward for any damage resulting therefrom; and while he is only required to exercise reasonable diligence in ascertaining whether or not the sureties are sufficient, he must know that surety has been taken, therefore, if the name of the proposed surety is signed by another for him, the county judge must know, at his peril, that the signing was authorized by the proposed surety in such a way as to bind him.

In this case the name of the person proposed as surety was signed by the guardian, who represented that he had the verbal authority of the proposed surety to sign for him. In an action on the bond the plea of non est factum was successfully interposed by the surety. In this action by the ward against the county judge, Held—That he is liable.

2. Limitation—This action having been brought by the plaintiff within one year after he arrived at age, he is within the saving of the statute.

3. Decedent's estates—Injunction—The fact that an injunction had been issued against creditors in an action pending to settle the estate of the defendant's intestate, did not prevent the plaintiff from bringing this action to settle his rights.

Samuel Avritt for appellants.

R. S. Montague for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Bennett.

On the 5th day of December, 1870, F. A. Netherland, as the presiding judge of the Taylor County Court, permitted D. S. Mitchell, on this own motion, to qualify as the guardian of the appellant, Samuel A. Morris, an infant.

D. S. Mitchell signed his own name to the bond, which was required by the statute, and F. A. Netherland permittted him to sign the name of R.

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E. Jeter to said bond as surety upon his statement that he had the verbal authority of Jeter to sign his name to said bond as surety.

Afterwards, Mitchell becoming insolvent, he was removed as guardian of the appellant. Morris, and another guardian was appointed in his stead. This guardian instituted an action on Mitchell's bond as guardian, for the purpose of recovering the sum in his hands belonging to the appellant, Morris.

To this action R. E. Jeter interposed the plea of non est factum, which was sustained by the circuit court; and this court, upon appeal, affirmed the judgment of the circuit court.

The appellant, Morris, having arrived at twenty-one years of age, being unable to make his money out of Mitchell, he seeks, by this action, to make the estate of F. A. Netherland, he having died, responsible for the money that went into the hands of D. S. Mitchell as his guardian. The circuit court having dismissed his petition, he has appealed to this court.

The proof is clear that D. S. Mitchell signed the name of R. E. Jeter to said bond without his authority, and that Jeter did not thereafter ratify the act.

As the bond was executed prior to the adoption of the General Statutes, the question of F. A. Netherland's liability must be tested by the Revised Statutes, then in force.

Section 3, article 1, chapter 43 of said statutes provided: "No guardian, except a testamentary one for nurture and education, can act until he has been appointed by the proper county court and given covenant, with good security, approved by the court to the Commonwealth, faithfully to discharge the trust of guardian."

Section 4 provided: "If the court fails to take such covenant, or accepts such person or persons for security as do not satisfy it of their sufficiency, the judges present, and so in default, shall be jointly and severally liable to the ward for any damages he may sustain thereby."

By the 3d section supra it was made the absolute duty of the court to take covenant, with good security, from the guardian.

The 4th section fixed the judge's liability for a failure to take such covenant.

By the first clause of said section the judge was made liable for any damage that the ward might sustain by his failure to take a covenant, with one or more sureties, from the guardian. If he took a covenant without security he would be liable for the damage resulting therefrom to the ward, because the 3d section was mandatory that he should take such covenant, and the first clause of the 4th section made him liable for the damage that the ward sustained by reason of the violation of the mandate; whereas, the second clause of said section only required the judge to satisfy himself that the surety was sufficient. To thus satisfy himself it was incumbent on him to use reasonable diligence in ascertaining whether the surety was sufficient; and if, after such diligence, he was satisfied that the surety was sufficient, he would not be liable in damages to the ward for an error of judgment. But the first clause made the judge liable to the ward if he failed to take a covenant, with surety, from the guardian; the simple failure to take surety was made sufficient to hold the judge liable for any damage that the ward sustained by reason of such failure. Under the second clause he could be heard to excuse himself for taking insufficient sureties upon the ground that he, after exercising reasonable diligence, satisfied himself that the sure-

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ties were sufficient, because it would be unreasonable to require him to ascertain the fact as to the sufficiency of the sureties with absolute certainty, hence said clause required him to exercise reasonable diligence only. But requiring him to know that the surety to the covenant taken was not unreasonable, for the reason that he could do so with absolute certainty; for he could require the surety to sign the covenant in person in his presence; or he could require the surety to authorize the signing of his name by a written power of attorney, authenticated in such manner as to leave no doubt of its authenticity. This could be done without any material inconvenience to the guardian, surety or judge, hence the first clause required that the judge should know that surety was taken; and for a failure to take such surety he was made liable to the ward for any damage that he sustained thereby, therefore, as F. A. Netherland, the county judge, allowed Mitchell to qualify as guardian of the appellant, Morris, without surety, he becomes liable to the later for the damage he sustained by reason thereof.

Besides, Netherland was guilty of gross negligence in receiving the name of Jeter upon the bond upon the assurance of Mitchell that he had Jeter's verbal authority to sign it, for it was the duty of the judge to satisfy himself that the surety was sufficient to secure the payment of the money that went into the guardian's hands. The joint ability of the guardian and surety was not sufficient; but the ability of the surety was required to be sufficient to secure the faithful performance of the guardian's trust. If Netherland had been acting as agent to loan Mitchell the money of his principal, with instructions to take such surety as was sufficient to secure the payment of the money, leaving out of view the ability of Mitchell, and he had loaned Mitchell the money upon the faith of the name of Jeter, signed to the note by Mitchell, upon the latter's assurance that he had Jeter's verbal authority to sign his name to the note, but in fact no such authority was given, would it not be conceded, at first blush, that Netherland had been grossly negligent? We think so.

The two cases are parallel; and it is clear that, upon the ground of negligence, Netherland's estate is liable.

The appellant brought his action within a year after his arrival at age, therefore, he is within the saving of the statute.

We think the lower court did right in refusing to dismiss the case on the ground of a want of affidavit and demand.

The fact that an injunction was issued against creditors in the case pending to settle Netherland's estate did not prevent the appellant from bringing this action to settle his rights.

The judgment of the lower court is reversed, with directions to reinstate the case and to ascertain the amount of F. A. Netherland's liability, and to render judgment for the same.

LOUISVILLE CITY RAILWAY CO. v. CENTRAL PASSENGER RAILROAD CO.

(Filed May 10, 1888.)

1. Street railways—Compensation to one company for use of track by another—The legislature may, after granting to one company a franchise to construct and operate a street railway, grant to another company the right to do a similar business in the same streets, either upon the track of the

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existing company or by the construction of other tracks: Provided, however, if the track of the existing company is used compensation must be made to it for the use of its track, but not for the value of its franchise.

2. Same—The city of Louisville having under its charter a voice in the regulation of street railways, entered into a contract with appellant, fixing the route of appellant's road and providing that the council should have the power at any future time to grant to any other company the right to occupy any track already laid down. Thereafter the appellee was chartered, its charter authorizing it to construct and operate its road upon such conditions as the general council might prescribe, the charter defining the route of the road, which was in part the same as that of appellant's road which had already been constructed. Thereafter appellee entered into a contract with the city, it being agreed that appellee should have the privilege of running its cars over a certain part of appellant's track "when the consent of said city railway company shall be obtained;" whereupon appellee entered into a contract with appellant for the use of appellant's track. Held—That the appellee did not derive its right to use appellant's track from the legislature, but by contract with the city and appellant, the city having the right to require that an arrangement should be made between appellant and appellee before appellee should be allowed to use appellant's track, and, therefore, the rights or equities of the parties must, to a great extent, be determined by the terms of the contract.

3. Same—The contract between appellant and appellee provided that appellee should pay to appellant a certain sum for the first year, it being further provided that the terms might be altered from year to year or at any time upon notice, the selection of arbitrators being provided for to determine upon an "equitable consideration" in the event the parties should be unable to agree. In 1881, the contract having been entered into in 1866, appellant gave notice that a change of terms was desirable, and the parties failing to agree, or to obtain arbitrators, applied to the chancellor to fix the compensation. Held—That while appellant is not entitled to the value of the use of the franchise, it is entitled to an equitable consideration, which must have some reference to the injury to appellant's profits resulting from the franchise, and not merely to the value of the use of the rails and ties.

As the parties regarded the use as worth $900 in 1866, it should be worth from June, 1881, as much as $1,500 per annum.

Alex. P. Humphrey and St. John Boyle for appellant.

Barnett, Noble & Barnett for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor.

This controversy is between the Louisville City Railway Co. and the Central Passenger Railroad Co. as to the value of the use of the railway track and the franchise on Fourth street, between Main and Jefferson streets. The power of the city of Louisville to authorize the construction of street railroads is derived from legislative grant, that confers on the general council the authority by contract to empower any corporation or company, etc., to construct street railroads, "the council reserving all rights to regulate and control the same."

The appellant, the Louisville City Railway Co., was chartered on the 15th of February, 1864, the second section of the charter providing:

"Section 2. The corporation is hereby authorized and empowered to construct, maintain and operate a single or double-track railway, with all necessary and convenient tracks for turnouts, side tracks and appendages, in the city of Louisville, and in, on, over and along such street or streets,

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highway or highways, within the present or future limits of the city of Louisville, as the general council of said city shall authorize said corporators so to do, in such manner and upon such terms and conditions, and with such rights and privileges as the said general council may, by contract or otherwise with said corporation, or any of them, prescribe as provided in an act entitled 'An act for the benefit of the city of Louisville,' approved March 2, 1863; but said corporation shall not be liable for any baggage carried on said railways, kept in and under the care of its owner, his servant or agent."

By virtue of its charter and the power conferred on the city council a contract was entered into between the city and this company for the construction of street railroads, the terms and conditions of which, or so much as is deemed material to this controversy, is as follows:

"1st. The general council of the city of Louisville hereby consent and agree that the Louisville City Railway Co. may construct and operate a street railroad or railroads, to be operated alone by animal power, on, over and along the following streets, and the right and privilege to construct and operate said railroad, or railroads, is hereby granted to said Louisville City Railway Co. by the general council of the city of Louisville, on, over and along the following designated streets, to wit: Commencing at or near Main and Twelfth streets, running through and along Main street with double track to or near Beargrass street, at the eastern end of Main street; also at Twelfth street to Jefferson street, through and along Jefferson to its junction with the Bardstown turnpike; also at Twelfth street and Jefferson street, through and along Twelfth street to Broadway, through and along Broadway to the city limits, in the direction of Cave Hill Cemetery; also from Main street through and along Sixth street to Broadway, with double track; also commencing on Preston street, near the Ohio river; thence over, along, and through Preston street to the city limits, in the direction of Bellview and Spring Gardens; and the said railway company shall have the right to connect any of said railways the one with the other.

"If the First and Second-street Horse Railroad Co. shall, within thirty days of the signing of this contract, file in the office of the mayor of the city of Louisville their consent to the rescission of their contract with the city, then, in consideration thereof, it is made a condition of this grant irrevocable without the consent of said First and Second-street Horse Railroad Co., that the Louisville City Railway Co. shall lay down, under the provisions of this agreement, a line of road from the corner of Fourth and Main streets, out Fourth to Jefferson, up Jefferson to Second, out Second to Breckinridge, within twelve months from the completion of this contract; said line to be extended up Breckinridge to First street, and out First street to the city limits, whenever the improvements in that part of the city shall render such extension proper, to be determined by the general council; and it shall not be a breach of this contract if this extension from Breckinridge street is not made in three years from the signing of this contract unless ordered by the general council; but the right hereby vested in the Louisville City Railway Co., as expressed in the foregoing clause, shall not confer on said company any right or power before given to the First and Second-street Horse Railroad Co. unless by the consent of said last-named company, evidenced by writing as aforesaid.

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"2d. The right of the Louisville City Railway Co., hereby vested in them to operate said railways, shall extend to the full term of thirty years from the date of this agreement, that being the term for which said company is vested with corporate privileges by the legislature; and at the expiration of said time the said railway company operating said railways shall be entitled to enjoy all of said privileges, on the conditions expressed, until the city of Louisville, by the general council, shall elect by ordinance or resolution for the purpose, to purchase said tracks or said railways, cars, carriages, station houses, station grounds, depot grounds, furniture and implements of every kind and description used in the construction and operation of said railways, and of the appurtenances in and about the same, and pay for the same in the manner hereinafter mentioned.

"3d. Such ordinance or resolution shall fix the time when the city of Louisville will take said railways and other property before mentioned, which shall not be less than six months after the passage of ordinance or resolution; and at the time of taking said railways and property, if the city shall so elect, before mentioned, the city of Louisville shall pay to the said 'Louisville City Railway Co.' a sum of money to be ascertained by three commissioners to be appointed for the purpose, as follows: One to be chosen by the general council from the disinterested freeholders of Jefferson county; one in like manner to be chosen by the said 'Louisville City Railway Co.,' and these two persons to choose the third in like manner from said freeholders of Jefferson county; but in making the estimate by the commissioners the city is not to be charged with the right of franchise or right of way over the streets herein granted to said railway company for any value, or supposed value, growing out of the same.

"9th. The said 'Louisville City Railway Co.' shall, for the franchise and privilege herein granted to construct and operate railways over the streets hereinbefore named, pay into the city treasury of the city of Louisville each and every year the sum of $25 tax or license for each and every car run upon their said railways, or such other sum as the general council may fix, not less than $25 and not to exceed $50, for each car so used by said company, so long as said company shall operate said railways, or so long as the same shall be operated by any other company.

"11th. The city council shall at any future time have the power, when the public good demands, to grant a second or third company or individual the right to occupy any track already laid down, provided the expense of laying and keeping in repair said track, so far as used by different companies or individuals, shall be equally borne by all those that use them; but the council shall not have the right to grant a permit to run upon any route already disposed of for a greater distance than one-tenth of the whole route; and provided, that no privilege or right shall be granted to any other company or individual to run to the same terminal point over the track of the Louisville City Railway Co., or such terminal point or points over their track, than the one-tenth of the whole route, but may run upon another street or line to any other point."

Under this contract the Louisville City Railway Co. constructed a line of double track street railway from Fourth and Main along Fourth street to Jefferson, with a stand at Fourth and Main streets.

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The appellee, the Central Passenger Railroad Co., was chartered in the year 1865, 29th December, and by the second section of the act was authorized to construct a street railroad as follows:

"Section 2. This corporation is hereby authorized and empowered to construct, maintain and operate a single or double track railroad, with all necessary and convenient tracks for turnouts, side tracks and appendages, in the city of Louisville, commencing at the intersection of Water and Second streets, and running south over and along Second street to Main street; thence west on Main to Fourth street; thence south over and along Fourth street to Oak street, and over and along Seventh street from Main street to southern limits of the city; also on Walnut street, from eastern to western limits of the city, with such further extension in the same or other streets in the city of Louisville as the general council of said city may authorize said corporation so to do, in such manner and upon such terms and conditions, and with such rights and privileges, as the general council may, by contract or otherwise, with said corporation or any of them, prescribe."

Under this charter, and by virtue of the power conferred on the city, the Central Passenger Railroad Co. contracted with the city, the first section of which is as follows:

"1st. That in consideration of the payments herein mentioned to be made, and the acts hereinafter stipulated to be done and performed by said Central Passenger Railroad Co., the city of Louisville hereby agrees that said Central Passenger Railroad Co. may construct and operate street railroads, to be operated alone by animal power, on, over and along Fourth and Walnut steets, as hereinafter shown, and the right and privilege to construct and operate said street railroads are hereby granted to said Central Passenger Railroad Co. by the city of Louisville on, over and along Fourth and Walnut streets as follows, viz.: Commencing at or near Fourth and Jefferson streets, running thence through and along Fourth street, with double track and the necessary turnouts, southwardly to Oak street; also over and along Walnut street, from Garden to Eighteenth street, with double track, the track to be laid beyond Kentucky street so soon as the street beyond Kentucky street shall be graded. It is further agreed that the said Central Passenger Railroad Co. shall have the privilege of running their cars to Main street, on Fourth street, over the track of the Louisville City Railway Co., as provided in section eleven of the agreement between said Louisville City Railway Co. and the city of Louisville, when the consent of said City Railway Co. shall be obtained."

On the 28th of June, in the year 1866, these companies, the Louisville City Railway Co. (appellant) and the Central Passenger Railroad Co. (appellee), entered into a contract for the use of appellant's tracks on Fourth between Main and Jefferson streets by the appellee as follows:

"This contract witnesseth: That the Louisville City Railway Co. of the first part and the Central Passenger Railroad Co. of the second part have this day entered into the following agreement: The first party is to permit the second party to have the use of their tracks on Fourth street, between Jefferson and Main streets, in the city of Louisville, for the purpose of running their cars over and along the same for one year from the date hereof, on the following terms and conditions, to wit: The second party is to use said road and run their cars thereon in strict compliance with the contract of the first party with the city, and are to keep said street and tracks in

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good repair, as is required by the contract of the first party with said city, at their own expense, during the continuance of this contract.

"The second party is to pay the first party, in cash, the sum of $913.18, which is 15 per cent. on the actual cost of the construction of the said tracks, the receipt of which is hereby acknowledged.

"The second party also covenants and agrees to pay the contractor with the city of Louisville, for bowldering Fourth street from Main to Jefferson, the sum of $500, being the sum agreed to be paid by the first party to said contractor, and the second party do hereby assume said contract for the first party, and agrees to carry out the same, and hold the first party free and harmless therefrom.

"The second party is to comply with all the ordinances and laws of the city of Louisville, and the contract of said party with said city in regard to said road and the operating the same, and in every respect to hold the first party free from damage or cost resulting from their failure to keep said road in order, or in not complying with said contract of the first party with the city or the laws and ordinances of said city.

"The second party is to have the use of the stand at Main street, but is not to use it or any part of said track so as in any way to interfere with or interrupt the first party in the free and full use of said road for their own purpose; and to prevent any interference on the part of the second party with the first party in using and operating said road, the second party is to be governed in their use of same by the time tables of the first party.

"Should any change of the tracks or stand be necessary in operating said road, said change is to be made at the expense of the second party, but under the direction and advice and with the consent of the superintendent of the first party.

"It is also understood and agreed that, in the use of said tracks by the second party, they are not in any way to interfere with the running of the cars of the first party on Jefferson street, and in crossing the Jefferson street tracks the cars of the first party are to have the preference, and the second party are to pay all damages to the first party, or to any one else, that may at any time occur by reason of the privilege hereby granted to the second party to cross Jefferson street with their cars.

"It is also hereby distinctly agreed that Main and Fourth streets is a terminal point of the road of the first party, and by this contract the second party claims no right to run over any other road or part of road belonging to the first party than they otherwise would have had had this agreement not been made; and by this agreement it is understood that the first party guarantees to the second party that they shall at all times have the uninterrupted use of said road, but to the extent only that they have the power to grant or can control the same as above set forth.

"The terms of this contract may be altered from year to year, or at any time after the expiration agreed on, upon notice of thirty days by either party. In the event of such notice, then new terms are to be agreed upon.

"Should the parties hereto be unable to agree, then each party is to select one person, and, these persons disagreeing, are to select an umpire to determine upon an equitable consideration for the privileges herein granted to the second party. Their decision then made shall be binding on both parties.

"Should the second party, at any time within ——— days after notified so to do, fail to fully comply with the terms of this contract, or any that may

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hereafter be made by the parties hereof, touching the privileges herein granted them, then the first party shall have the right to stop the second party from using said track and the other privileges herein granted.

"It is understood that the use of the tracks, as hereinbefore granted, is to be continued to the second party during the charter of the first party, but the terms therefor may be altered as hereinbefore provided for."

Under the terms of this contract it could be altered from year to year upon notice, as provided, and new terms agreed on, and in the event of a disagreement as to the terms resort was to be had to arbitration, the decision of the arbitrators to determine their respective rights.

The appellant, the City Railway Co., becoming dissatisfied with the terms of the contract or the rental value agreed on, gave the proper notice that a change of terms was desirable, and the parties failing to agree, and making ineffectual efforts to obtain arbitrators, applied to the chancellor to fix the compensation the appellant was entitled to for the use of its tracks by the appellee.

The chancellor on the hearing gave, as compensation annually, the sum of $172.08 as rental, and required the appellee, the Passenger Railroad Co., in addition, to pay three-fourths of the taxes and the annual cost of maintaining the track, which would amount in all to not exceeding $300. Of this judgment the City Railway Co. complains.

It is conceded by counsel for the appellant, or if not the authorities settle the question, that the grant of the franchise in the first instance to the appellant did not take from the legislature the right to permit other companies to go upon the same streets of the city or upon the track of appellant's railway and compete with the latter in the business of conveying passengers from one part of the city to the other. This may be done upon making compensation to the company whose railway track is used, and when not used, such grants not being exclusive, the right to construct other and competing tracks in the same street may be allowed without compensation. If the franchise is exclusive it only applies to the use of the track by the company owning it, and for this use, and not the value of the franchise, the company owning it is entitled to compensation as against a company claiming a like franchise, although of later date, from the sovereign power. This seems to be the doctrine recognized by Mr. Redfield in his work on Railways, and in the cases of the Metropolitan Railroad Co. v. Quincy Railroad, 12 Allen, 262, and the Metropolitan Railroad Co. v. Highland Street Railway Company, 118 Mass., 290.

The grant in this case to the appellee includes in it route Fourth street, between Main and Jefferson, and, having a like franchise, if unrestricted, would entitle it to use the track of the appellant on Fourth street, between Main and Jefferson, by compensating the latter for the use and wear of its tracks only, and no compensation should be allowed for the injury to the franchise or the profits resulting from it. It is urged by counsel for the appellee that such is the nature of its grant, and that under its charter the right was given not only to run on the street at the point in controversy, but to use the track of the appellant, and the chancellor below taking this view of appellee's charter rendered the judgment complained of. By the act of March, 1863, the general council of the city of Louisville was authorized to have constructed a railroad or railroads, with single or double tracks, on such streets as it might, by resolution, designate, etc. And further, that

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"the general council might, by contract, sale or bargain, empower any corporation or corporations, parties or company to construct said street railroads, the general council reserving all rights to regulate and control the same." Under this power vested in the city council the appellant entered into the contract for the construction of its railway, and obtained from the council a stipulation that no privilege or right shall be granted to any other company or individual to run to the same terminal point over the track of its railway. The council, however, reserved the right to permit other companies to occupy the track of the appellant already laid down upon the conditions prescribed. This contract has never been modified, either by the council or by any amendment to appellant's charter, and whether the exclusive privilege conferred on appellant in denying any other company the right to run to the same terminal point over appellant's track can be enforced as between the appellant and the city is not a question before us. That provision of the contract has not been violated so far as this record shows, but has been complied with. When the appellee entered into its contract with the city it knew the terms of the legislative grant to the appellant and the nature of the rights and privileges given it by the contract with the general council, and, therefore, it was provided in the contract with the appellee as follows: "It is further agreed that the said Central Passenger Railroad Co. shall have the privilege of running their cars to Main street on Fourth street over the track of the Louisville City Railway Co. as provided in section 11 of the agreement between said Louisville City Railway Co. and the city of Louisville, when the consent of said city railway company shall be obtained."

After this the contract between the two companies was entered into, and the consent of the appellant obtained upon the terms therein expressed. The contract is to continue until the appellant's charter expires, and by its terms the appellee is to pay the appellant $913.18 per annum, and keep the streets and track in good repair at its own expense, with the proviso that when either party became dissatisfied as to the terms the matter was to be referred to arbitrators for an adjustment on equitable terms. The contract was not to be cancelled as to the right of the appellee to the use of appellant's track, but the terms of the occupancy might be changed by arbitration in the event the two companies failed to agree.

The contention by the appellee that it derived its right to the use of the appellant's track from the legislature, and not by contract with the city or with the appellant, and, therefore, is only liable for the use of the rails and ties, can not be sustained.

In the first place, the charter of the appellee gives it no right unless, by implication, to use the rails and ties of the appellant. The right to the appellee to construct and operate a single or double track railroad along this route did not confer the right to use the appellant's tracks. The right to use the property of another without his consent, and without any provisions made for compensation, although for the public use, can not well arise from mere implication.

It is argued that, as the appellant already had double tracks on Fourth street, it is unreasonable to suppose the legislature intended to authorize the laying of two additional tracks on the same street of the appellee, and, therefore, the right to the use of the tracks already down must have been the legislative will. This view seems not only reasonable, but clear, when taken in connection with the power previously conferred by the legis-

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lature on the city council with reference to street railways. A general power to contract with companies for the construction of such railways had been previously given the city, with the right to regulate and control the same. Under this power the appellant had executed its contract, and when the legislature made the grant to the appellee, defining its line of railway, with the right to extend its line to other streets, the power was reserved to the city and the appellee to contract "in such manner and on such terms and conditions, and with such rights and privileges, as the general council may, by contract or otherwise with said corporation or any of them, prescribe." They did contract, and it is evident that the city, in prescribing the terms, recognized its obligation to the appellant, and required the appellee to obtain appellant's consent to the use of its tracks on Fourth, between Main and Jefferson. This view is in harmony with the legislation under which the appellee obtained its charter, and the previous legislation conferring on the general council the power to contract for the contruction of that railway. Both the legislature and the appellee looked to this power given the city, and from that source, and that only, under such a charter could the appellee have obtained the right to the use of appellant's tracks. Neither the law makers nor the appellee could have understood that appellee's charter gave it the right to use appellant's property, where there was no express authority given in the grant to that effect, without appellant's consent or that of the city council, but where, considering the legislation already in existence with reference to the city on the same subject-matter, the mode of obtaining the use was well understood. The consent of the city having been given that this use might be obtained by the appellee from the appellant, the contract between the two was entered into. The rights or equities of the parties must, to a great extent, be determined by its terms. This is not a case where the one company has the legal right to enter upon and use the track of another company by reason of legislative authority. It is true that the charter confers upon the appellee the right to lay down tracks on Fourth street, but the city having a voice in the regulation of street railways so essential to its interests, and having contracted with the appellant, required that an arrangement should be made between the two companies before the one should use the track of the other, and to accomplish this the contract regulating the compensation to be paid the appellant was entered into. The one was contracting for the use of so much of the other's tracks as lay in the most populous part of the city, and at a location where, as the proof shows, is the most desirable terminus. At no point can so many passengers be obtained. It is in the business part of the city, the lines of travel going in all directions from that point, and, as the proof shows, the appellee running four times as many cars as the appellant. These valuable contract rights that were granted to the appellee by the appellant during the existence of its charter were estimated by the two companies as worth, in June, 1866, the sum of $913 per annum, with the obligation on the part of the appellee to keep the streets and tracks in good repair. Neither party had the right to abandon the contract, but had the right, after notice, to fix upon new terms, and to call on abritrators if they failed to agree "to determine upon an equitable consideration for the privileges granted the appellee." If this use was worth in 1866 as much as $913, what was it worth in 1886, when this judgment was rendered, or at the end of the rental year next ensuing after the date of the notice? The population of the city had increased

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rapidly from the time of the contract made in June, 1866. The profit in conducting such a business becomes greater as the population increases. The value of the use of the franchise was, at the date of the notice, several thousand dollars annually, greatly more than any of the parties contemplated, and while the appellant is not entitled to the value of this use it is evidently entitled to an equitable consideration, and what that consideration should be is difficult to determine. If the parties regarded it as worth $900 in 1866 it should be worth, from June, 1881, the year ending after the date of the notice, as much as $1,500 per annum. The parties were evidently contracting with reference to an increase in population when the question of consideration was left open or could be changed upon notice given by the one party or the other. So if the profits of travel increased or diminished either company could avail itself of the advantage. Neither the value of the franchise nor the mere compensation for the use of the rails formed the basis of the contract stipulations. The two companies acquired contract rights that are capable of being enforced upon equitable terms. The appellant will not be allowed to say that it must have the value of its franchise, or the appellee that it will only pay $172 per annum as compensation. Neither view of the case would be equitable or within the true meaning of the joint obligation. The surrender of the use of appellant's tracks for near thirty years to the appellee, when the city had by its contract with the appellee left it voluntary with the appellant as to its consent to the use, and at a point where the life of the city as to travel existed, was something more than a mere nominal condition, and, therefore, it seems to us the compensation allowed by the chancellor is entirely inadequate.

The judgment is reversed and the cause remanded, with directions to fix the compensation at $1,500 per annum from the 26th of June, 1881, the other stipulations in the contract to be as binding on the parties as if no change in the compensation had been made.

RATCLIFF, &c. v. MARRS, &c.

(Filed February 23, 1888.)

1. The habendum of a deed yields to the granting clause where there is a clear repugnance between the nature of the estate granted and that limited in the habendum.

By the granting clause of a deed, executed prior to the Revised Statutes, land was conveyed to William, habendum: "To have and to hold said tracts of land with their emblements to said William aforesaid during his natural life, and after that to his heirs forever." Held—That William took the fee, and not merely a life estate with remainder to his children.

2. Same—A deed executed prior to the adoption of the statute providing that if an estate be given by deed or will to any person for life, and after his death to his heirs, the same shall be construed to be an estate for life only in such person, and remainder in fee simple to his heirs, must be construed without reference to the statute. (Revised Statutes, chapter 80, section 10; General Statutes, chapter 63, article 1, section 10.)

C. M. Parsons, Stewart & Stewart and Thomas H. Hines for appellants.

R. T. Burns and J. M. York for appellees.

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Appeal from Pike Circuit Court.

Opinion of the court by Judge Bennett.

The deed construed in this case is as follows:

"This indenture made and entered into this 16th day of September, A. D., 1848, between William Ratcliff, Sr., and Martha Ratcliff, his wife, of the county of Pike, and State of Kentucky, of the first part, and William Ratcliff, son of said Wm., Sr., and wife, of the same county and State, of the other part, witnesseth: That the said Wm. Ratcliff, Sr., hath bargained and sold, and doth hereby convey unto Wm. Ratcliff, two certain tracts of land." (Here follows description of land.) "To have and to hold said tracts of land, with their emblements, to said William aforesaid during his natural life, and after that to his heirs forever, free from the claim of said William, Sr., or any person claiming under, by or through him, but from no other title, claim or interest whatever."

The appellants instituted this action in the Pike Circuit Court against the appellees to recover the possession of a tract of land which they claimed the appellees wrongfully withheld from them.

The appellants are the heirs of Wm. Ratcliff, Jr., deceased. They base their claim to the land in controversy upon a deed made by Wm. Ratcliff, Sr., to Wm. Ratcliff, Jr., in 1848, which deed, they contend, conveyed to Wm Ratcliff, Jr., a life estate only in said land, with remainder to them in fee simple. On the trial of the case in the lower court that court held that under said deed Wm. Ratcliff, Jr., took an absolute title to the land, and, therefore, gave the jury a peremptory instruction to find for the appellees. The jury having returned their verdict in accordance with the instruction, and the court having overruled the appellants' motion for a new trial, they have appealed to this court. If the construction put upon the deed by the lower court is correct the case must be affirmed.

By the granting clause of the deed the land, in consideration of $500 paid by Wm. Ratcliff, Jr., was conveyed to him in fee simple. No conditions, restrictions or limitations whatever are annexed to the conveyance in the granting clause, but the habendum apparently limits the estate to a life estate in the grantee, and then to his heirs generally. In the premises of the deed there is no language used expressing an intention, on the part of the grantor, to limit the nature of the estate granted in the habendum; nor is there any language used in the habendum expressly limiting the nature of the estate granted in the granting clause. It is a well-settled rule that if there is "a clear repugnance between the nature of the estate granted and that limited in the habendum, the latter yields to the former," for the reason that a granting clause, or its equivalent, is indispensable to convey title to real estate, whereas the habendum is not indispensable for any purpose whatever. Thus, if an estate be granted to A in fee simple, and in the habendum to him for life and thereafter to his heirs generally, this restrictive clause is inoperative because it contradicts and defeats the grant unless it can be gathered from the whole instrument that the grantor intended that the restrictive clause in the habendum should control the granting clause. There is nothing in the deed indicating that the grantor intended that the habendum should limit the estate granted to a life estate in the grantee. On the contrary, the deed, when considered as a whole, manifests an intention on the part of the grantor to convey, as is expressed in the granting clause, a fee simple title to the land. And the expression in the habendum apparently limiting the estate to a life estate in the grantee, was

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not so intended by the grantor; but he simply intended to emphasize the grantee's right to use and enjoy the estate.

The judgment of the lower court is affirmed.

To a petition for rehearing Judge Bennett delivered the following response of the court June 16, 1888:

The case of Henderson, &c. v. Mack, 82 Ky., 379, is not in conflict but in harmony with this case. In that case the habendum read as follows: "To have and to hold the same, with all the appurtenances thereon, to the second party, his heirs and assigns, forever, with covenant of general warranty during his natural life, and after his death to go to and belong absolutely to Belle Mack, she paying the unpaid purchase money, as aforesaid." This court held in that case that as the habendum set forth the fact that Belle Mack had paid the unpaid purchase money for the land, and that in consideration thereof the remainder interest was expressly conveyed to her, it was manifest that the grantor intended the habendum to control the granting clause.

In the case of Brown v. Ferrell, &c., 83 Ky., 417, a deed made since the General Statutes went into effect was construed according to the provision of section 10, article 1, chapter 63 of said statutes. The deed in this case was made in 1848, at which time there was no statutory rule similar to that contained in said section and chapter, therefore, the deed under consideration must be construed without reference to said section and chapter; the construction placed upon it in the opinion we still adhere to.

The petition for a rehearing is overruled.

SUTTON, &c. v. SUTTON, &c.

(Filed May 10, 1888.)

1. Right of legitimate children of bastards to inherit—The statute providing that bastards of the same mother shall be "capable of inheriting and transmitting an inheritance on the part of each other" places them upon the footing of legitimate brothers and sisters as to each other; and the statute of descents applicalbe to legitimate brothers and sisters applies between them and to their legitimate descendants, therefore, the legitimate children of a bastard take what he, if alive, would have taken from an illegitimate brother of the same mother.

2. Construction of statutes—The rule of the common law that statutes in derogation thereof are to be strictly construed, by an express provision of the General Statutes, does not apply to that revision.

John Young Brown, Thos. E. Ward and Edward W. Hines for appellants.

Yeaman & Lockett, S. B. and R. D. Vance, Cissell & Dudley and John T. Handley for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

This appeal presents but one question. Can the legitimate children of a bastard inherit from the bastard brother of their parent, who dies after the death of such parent?

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At the common law a bastard is nullius filius. Blackstone says that he is of kin to no one; derives no inheritable blood from any one, and can, therefore, neither be heir to any one, or have heirs, save of his own body. It was provided, however, by our statute of descents in 1796: "Bastards also shall be capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother." (1 M. and B., 565.) This was the first innovation upon the common law rule in this State. It was copied verbatim from the Virginia statute of 1785; and in the case of Stevenson's Heirs v. Sullivant, 5 Wheaton, 207, where bastards claimed to inherit from a legitimate brother, the Supreme Court of the United States construed it as meaning only that bastards "shall have a capacity to take real property by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants, in like manner as if they were legitimate."

This court considered it in 1834 in the case of Scroggin v. Allan, &c., 2 Dana, 363. Henry Edgar, a bastard, died, leaving a legitimate child, to whom his land descended, but who died in infancy. The mother of the bastard was also dead, and the question was whether his legitimate brothers and sisters, or his wife, took the estate. This court followed the Supreme Court, holding that the statute only permitted the bastard to inherit from the mother, and transmit an inheritance to his own issue; and while to this extent quasi legitimate, yet in all other respects he was a bastard, the mother being unable to take from him, and he being in law without father, brothers or sisters. Thus the law remained until 1840, when another change was made. The act then passed provides: "That the mother shall be, and is hereby, rendered capable to inherit and take by descent or distribution as heir or distributee of her bastard child; and brothers and sisters of the same mother, born out of wedlock, shall be capable to inherit, and take by descent or distribution from each other, as though born in wedlock, and as brothers and sisters of the whole blood." (Lough. Digest, page 211.)

In Remington v. Lewis, 8 B. M., 606 (1848), it was said that the statute, as thus amended, permitted the mother to inherit from her illegitimate child, and her illegitimate children from each other; but the question there was whether the legitimate brother of the bastard, or the latter's wife, should take; and it was held that it did not operate to establish a right, either in the illegitimate children to inherit from the legitimate, or in the legitimate to take from the illegitimate. The bastard, under this construction, has, under the law of descent, no brothers or sisters save the illegitimate children of the same mother.

The acts of 1796 and 1840 were in substance incorporated into the Revised Statutes (1852), and also into the present General Statutes. The provision is the same verbatim in each, and reads thus: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother; and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such bastards were born in lawful wedlock of the same parents."

It was said, in Allen v. Ramsey's Heirs, 1 Met., 635 (1858), that this statute embraces all the provisions of both the act of 1796 and that of 1840 so far as they relate to bastards; but the question in this case was whether a bastard (his mother being dead) could take as the heir of the mother's brother; and the claim was rejected.

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In Berry v. Owen's Heirs, 5 Bush, 452, O. survived his sister and her only child, an illegitimate daughter. It was decided that B., the son of the illegitimate daughter, could not inherit from O., who died intestate, and without descendants. The record in this case was an imperfect one; and doubtless, owing to this fact, some portions of the opinion are not only wanting in that clearness of statement for which the writer was justly distinguished, but go beyond the question presented. It is evident, however, that the case now presented is unlike it.

In Jackson v. Jackson, 78 Ky., 390, it was held that a bastard can not inherit through his mother from her ancestors or collaterals.

We have briefly noticed the above cases by way of calling attention to the fact that they are unlike the one now before us. In the most of them the right of a bastard to inherit was in issue. Here the legitimate heirs of parents, who, if alive, would take, are asserting a right to the inheritance. We must not confound the law applicable to bastards with that applicable to the legitimate children of a bastard. If the appellees in this case were bastards, undoubtedly they could not inherit from the brother of their deceased parents; but being legitimate, why do they not succeed to all the inheritable rights of their parents. The latter and the intestate were all bastards by the same mother. This being so, they could, by the express language of the statute, inherit from each other. It says: "Bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other as if such bastards were born in lawful wedlock of the same parents." It is urged that the bastardy of the parents stopped the current of inheritable blood. While this is true at common law, yet the statute has declared that it shall flow on as between bastards by the same mother, and that they shall inherit from each other. It legitimates bastard children by the same mother, first, as to their mother, and, second, as to each other. It puts them upon the footing of legitimate brothers and sisters as to each other; and the statute of descent applicable to legitimate brothers and sisters therefore applies as between them and to their legitimate descendants. It follows from this, in our opinion, that the legitimate child of a deceased bastard may inherit from the bastard's mother; and that such a child succeeds to the parent's right of inheritance from a bastard brother or sister. The legitimate child of a bastard has all the rights of any child as to the parent; and the bastard parent can transmit to his or her legitimate child all the rights he or she has, equally with any other parent. Among them is the right to inherit from a bastard brother or a bastard sister; and if they are brothers and sisters in contemplation of law, it follows, logically, that the legitimate child of a deceased one should succeed to the inheritance that would have belonged to the parent were he or she alive. This is equitable.

It is contended that the statute is in derogation of the common law; that it should, therefore, be construed strictly; and that while it permits bastards by the same mother to inherit and transmit an inheritance "on the part of each other," that yet the legitimate children of one of them can not take what the parent would have inherited, if alive, because the statute does not expressly say so. Section 16, chapter 21 of the General Statutes, however, provides: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, is not to apply to this revision; on the contrary its provisions are to be liberally construed, with a view to promote its objects."

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To say that the legitimate offspring of a bastard shall not take what he would have inherited, if alive, would not only be unjust but unreasonable. If, as we think, the effect of the statute be to make bastard children by the same mother legal brothers and sisters as to inheritance from each other, then it follows that not only the spirit, but even the letter of our statute of descents gives to the legitimate children of one of them per stirpes, the portion the parent, but for his or her death, would have inherited.

Judgment affirmed.

KENTUCKY LUMBER CO. v. GREEN, &c.

(Fied May 12, 1888.)

1. A patent calling to run with the meanders of a navigable stream passes the title to the bed of the river to the middle of the stream unless the terms of the grant clearly limit the grantee's right of property to the margin of the stream; also the usufruct of the water to the middle of the stream is the property of the grantee, subject to the public easement of navigation and to the usufruct rights of other proprietors above and below.

2. Corporations—Ultra vires—Under appellant's charter which authorizes it to purchase timber lands or any other lands that may be necessary or convenient for the purpose of transacting its business, the fact that a part of a tract of land purchased by it was cleared and used for farming purposes does not show that its purchase was ultra vires, as it does not follow that the remainder of the land was not covered with timber suitable for appellant's business.

Wm. Lindsay for appellant.

Smith & Lester for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Bennett.

The appellees having erected a pier on the bed of the Cumberland river, between the middle of the stream and the river bank, for the purpose of fastening thereto a sheer to a log boom, the appellant claiming to own and possess the adjacent shore and to the middle of the river brought this action in equity against the appellees for the purpose of quieting its title to the bed of the river to the middle of the stream, and of compelling the appellees to remove said pier, etc. The circuit court adjudged that the appellant's title did not extend to the middle of the river, and dismissed the petition. It has appealed to this court.

The patent under which the appellant claims is older than the patent under which the appellees claim, and calls to run with the meanders of the river, while the appellees' junior patent calls for the bed of the river from shore to shore.

The controlling question in this case is, does the patent under which the appellant claims, calling to run with meanders of the river, carry the appellant's title to the bed of the river to the middle of the stream.

The grant of land as bounded by the Cumberland river, or lying upon the side of it, passes the title to the bed of the river to the middle of the stream unless the terms of the grant clearly limit the grantee's right of property to the margin of the river; also the usufruct of the water to the middle of the stream is the property of the grantee, subject to the public easement of navigation, and subject, of course, to the usufruct rights of other proprie-

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tors, above and below. (Williamsburg Broom Co. v. Smith, 8 Ky. Law Rep., 369, opinion by Judge Holt; Luce v. Carley, 24 Wend., 451; King v. King, 7 Mass., 196; Jackson v. Louw, 12 Johns., 252.)

Section 4 of the appellant's articles of incorporation authorizes it to purchase timber lands or purchase any other lands that may be necessary or convenient for the purpose of transacting its business. The demurrer to the paragraphs of the appellee's answer, which alleged that the appellant's purchase of the land in controversy was ultra vires, and, therefore, void, was properly sustained, for the reason that it does not appear that said land was not timbered land as well as farming land. It may be true that a part of the land was cleared and used for farming purposes; but it does not follow that the remainder of the land was not covered with timber suitable for the appellant's business.

The appellant was entitled to a judgment quieting his title to the bed of the river to the middle of the stream, compelling the appellees to remove their pier therefrom.

The judgment of the circuit court is reversed and the cause is remanded, with directions for further proceedings consistent with this opinion.

PEPPER v. DONNELLY.

(Filed May 15, 1888.)

1. Judgments—Bar—A former judgment to be a bar must have been upon the merits, and the burden is upon the party relying upon the bar to show that the merits of the case were considered.

2. Same—Where a demurrer to the petition was overruled, and the case was then heard upon the law and facts and the petition dismissed, it will be presumed, in the absence of any rebutting circumstance, that this was a trial upon the merits, but the presumption is not conclusive, as a ruling upon a demurrer does not prevent the court from again considering the legal question presented by it.

3. Same—Where a judgment, which has been affirmed upon appeal, is relied upon in bar of another action, the ground of the affirmance must be taken as the ground upon which the judgment was rendered, and resort must be had to the opinion of the appellate court to determine whether there was a decision upon the merits, especially when the judgment of the lower court was silent as to the ground upon which it was based.

As it is manifest in this case that the defense to the former suit was not a valid one and the judgment of dismissal was affirmed upon the ground that the petition was insufficient, that judgment is not a bar to another action.

4. Where a personal representative gives a new bond when ruled to do so by the court, on motion of a surety, the former surety is not released from liability for any act theretofore done by his principal. He may be indemnified as to such liability by a covenant in the new bond to that effect, but not released.

W. K. Benton for appellant.

Hallam & Myers and McKee & Finnell for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

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The appellee, Charles Donnelly, in 1876, became the surety of the administrator of John Pepper. In 1880 the appellant, William Pepper, as the distributee, brought an action upon the bond. A general demurrer to the petition having been overruled the appellee relied upon the execution of a new bond in June, 1879, with other surety, as releasing him from all liability. The answer presented nothing else as a defense, and its averments in no way aided the petition. A demurrer to it was also overruled, and a reply then filed, denying that the execution of the new bond, which contained a covenant of indemnity to Donnelly as to his suretyship, operated to release him or that this was its legal effect. An amended reply averring that the administrator had received the assets before the execution of the new bond was tendered and rejected. By agreement the law and facts were submitted to the court, and it, after hearing the testimony, dismissed the action as to Donnelly. The judgment does not show the ground upon which it was based. A motion for a new trial was overruled; a bill of exceptions filed, showing that all the assets came to the hands of the administrator prior to the execution of the new bond; an appeal was then taken and the judgment affirmed by the Superior Court. Its opinion, fairly interpreted, put the affirmance upon the ground that the petition was defective. It substantially, if not in so many words, says so. After this the appellant proceeded against Donnelly again in this action. The answer relies upon the former suit and judgment therein as a bar. It contains no averment that issue was joined in the former suit or that it was heard upon the merits. There was no demurrer to it, however, and it was aided by the reply which substantially avers that the first action was dismissed upon the ground that the petition did not state a cause of action and could not, therefore, have been tried upon the merits. A properly certified copy of the record of the original suit was referred to in the reply, and by agreement made a part of the record. A demurrer having been sustained to the reply, the plea in bar was held good, and the action dismissed as to Donnelly.

The question presented upon this appeal is, what effect is to be given to the judgment in the former action? In rendering it the court did not state its conclusions of law and fact, and there is no averment that the record of that suit does not show all that occurred. We must, therefore, look to it alone to determine whether it was considered upon the merits or disposed of upon technical grounds.

An estoppel by a former judgment is based upon public policy. It demands that when a fact has been judicially and finally determined between the same parties it should be at rest. Interest rei publicæ ut sit finis litium. It is, however, equally well settled that a former judgment to be a bar must have been a decision upon the merits. Thus a judgment for want of jurisdiction or by reason of a technical defect in the pleadings or as to parties or upon any ground not going to the merits will not prevent a second action. It does not determine the rights of the parties. This is true of a judgment of nonsuit. (Hughes v. United States, 4 Wall., 232; Smith v. McNeal, 109 U. S., 426; Kendall v. Talbot, 1 A. K. M., 321; Insurance Co. v. Broughton, 109 U. S., 125.) Were it otherwise one would be deprived of his "day in court" and justice be defeated, and while rules are necessary to the administration of law they should not be so technical or procrustean as to deform it, and hamper justice by a sort of judicial jugglery.

Where a party relies upon a former judgment as a bar the burden is upon him to show that the merits of the case were considered. This must appear

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from the record or by evidence allunde where it is admissible. (Vaughan v. Obrien, 39 Howard Pr. Rep., 515.) In a case like this one, where the record shows a demurrer to the petition was overruled and the case then heard by the court upon the law and the facts, this might be presumed in the absence of any rebutting circumstance. In such a case these facts would purport a trial upon the merits. They would not be conclusive, however. A ruling upon a demurrer does not prevent the court from again considering the legal question presented by it. (Post v. Pearson, 108 U. S., 418.) It may hear the entire case and then dispose of it upon some technical question, as, for instance, a defect in the pleadings.

In this instance it is manifest that the defense presented in the former suit was not a valid one. The execution of the new bond with a covenant of indemnity did not, under the then and now existing law, release Donnelly from liability for any act theretofore done by his principal. Formerly the county court had the power by its order to accept one bond in lieu of another, and thus release the sureties upon the first bond of an administrator in toto. This left the question to the order and action of the court. It was too varying and uncertain. The law was, therefore, changed, and provides: "If a personal representative shall give a new bond when ruled to do so by the court, on motion of a surety, his former surety shall not be bound for any act of his done after the execution." (General Statutes, chapter 39, article 2, section 13.) In another chapter the statute also provides for the release of the surety from future and indemnity as to past liability. It says: "If a new bond be given it shall operate a discharge of all the sureties making the motion, from all liability for the acts of the principal thereafter done, and if the object be so specified the bond shall contain a stipulation or covenant to indemnify the said sureties against any loss, cost or damage legally incurred by reason of such suretyship." (General Statutes, chapter 104, sections 1, 3, 6.)

The surety under these statutory provisions can not be released from responsibility for the acts of the principal done prior to the execution of a new bond. If it contains a clause of indemnity, he may look to it to reimburse himself. In this instance the appellant's petition averred the execution of the bond by the appellee as surety. It set forth when the assets were received by the administrator, to wit, prior to the change of surety, and the only fact presented by way of defense was its execution. It was claimed that it operated to release the appellee from all claim by the heir or distributee for the acts of the administrator theretofore done. Under this state of case to presume that the judgment of dismissal was rendered upon the merits is to convict the lower court of error. We are unwilling, therefore, to so suppose, if the record authorizes any other conclusion. It is clear that the judgment did not necessarily involve a determination of the merits of the case. The Superior Court upon appeal affirmed it because the petition (as it held) failed to state a cause of action. It would be improper now to inquire whether it was right or wrong in this opinion. It was final, and must be regarded as correct. It did not affirm the judgment upon the merits of the case, but upon a ground that did not constitute a bar to another action. If the judgment of the lower court was rendered upon technical grounds, then, according to the opinion of the Superior Court, it was correct. We are inclined to the opinion that it must control. Suppose the conclusion of the lower court be correct, but based upon improper grounds, that will bar another action. Upon appeal the judgment is affirmed, but

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upon other grounds that do not constitute a bar. Which is to prevail? An affirmance by the appellate court is of course not necessarily an affirmance of the grounds upon which the lower court bases its judgment. If they are incorrect and yet must prevail, although the appellate tribunal, in affirming the judgment, has assigned the true grounds, then it follows that the inferior court is the superior one. The judgment is valid by reason of the affirmance. It should, therefore, be governed in its effect by the extent of the affirmance or the opinion delivered upon the appeal. It certainly is the law of the case, and should control in construing the judgment below. In another action the ground of the affirmance must be taken as the ground upon which the judgment was rendered, and resort must be had to the opinion of the appellate court as to its extent and limitation. We think this the true rule, and in harmony with the reason and theory of our court system.

In any event, however, where the judgment of the lower court is silent as to the ground upon which it is based, it should be presumed that it was founded upon the reason given for its affirmance upon appeal, and especially so when a different conclusion will convict the lower court of error.

According to the presumption which, under such circumstances, should exist as to the judgment below, according to the opinion also of the appellate tribunal, the appellant has never had a trial upon the merits of his case. If he attempts to look to the surety in the second bond he will doubtless respond that the act of which you con plain occurred during the existence of the first one, and although the bond, to which I am a party, contains a clause of indemnity to the surety in the former one yet he has not been damnified, and I am not, therefore, liable. If this be true, it results that unless the appellant can have a trial upon the merits of his case as to the appellee he is remediless.

The demurrer to the reply related back to the answer, and raised the question of its sufficiency. Considered in connection with the exhibit of the former suit it did not present a defense, and the demurrer to the reply should have been sustained to the answer.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

BARNARD v. COMMONWEALTH.

(Filed May 15, 1888—Not to be reported.)

1. Self defense—Upon the trial of appellant for murder the court qualified an instruction embracing the law of self-defense by telling the jury that if the accused provoked the difficulty and placed the deceased in danger of bodily harm, he was necessarily guilty of either murder or manslaughter.

Held—That under the evidence the qualification to the instruction ought not to have been given without an instruction for the defense embodying the idea that although the accused may have intended by his conduct to provoke an assault, still if the assault had been abandoned by him and the deceased, with pistol in hand, then advanced upon him for the purpose of taking his life or inflicting on him greatly bodily harm, the accused had the right to defend himself from the impending danger.

2. Instructions—The court erred, under the facts of this case, in telling the jury that they should give to the testimony of each witness such weight as they might deem it entitled to, and that they were the sole judges of the

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weight of the evidence. It is better to leave the jury free to consider the testimony without any suggestion from the court as to the manner of weighing it.

Alvin Duvall for appellant.

P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Samuel Barnard, was indicted in the Laurel Circuit Court for the murder of Frank Harris, the trial resulting in a conviction for manslaughter, and the punishment fixed at ten years in the State prison.

The testimony conduces to show that the deceased had been prosecuted by the Commonwealth for the commission of a public offense, and the appellant had testified as a witness against him. The deceased then became hostile to the accused, and made threats of a serious nature against him, and on the day of the killing was on his way to the distillery of the appellant with a musket in his hand and a pistol in his pocket, making inquiry as to whether the appellant was at home, and remarking that it would be well enough for him not to be there, or words to that effect, and then continued on his way to appellant's premises. The latter was informed of what had been said by the deceased, and advised not to go to his still house, but persisted in going, saying that he had the right to go to his own premises. When he reached the place, several persons being present, he passed the deceased, who was standing with his musket by his side, and, as he passed, snatched the musket from him and told him to leave, and not to be standing around with a loaded gun to kill him. The deceased then turned from the accused, going behind some tubs with his hand in his pocket, and, passing around them, approached the accused with his pistol drawn, when the accused shot him with the gun. This is the testimony in substance of all the witnesses present but one, who testifies for the Commonwealth that the accused pointed the gun at the deceased as he left and kept it leveled toward him until he fired. This witness also testifies that the accused had a pistol buckled around him at the time. The fact of the accused having a pistol around him at the time is denied by him, and in this he is corroborated by other witnesses. It is further shown by the Commonwealth that the deceased went to the still house for the purpose of trading his pistol with some one of the hands for brandy.

At the close of the testimony the court gave instructions in regard to murder and manslaughter that were proper, but erred to the prejudice of the accused by qualifying an instruction in regard to self defense and in refusing an instruction asked by the accused. The instruction complained of embraced the law of self-defense, but was qualified by the court to the effect that if the accused provoked the difficulty, and placed the deceased in danger of bodily harm, he was necessarily guilty of either murder or manslaughter.

If the threats and purpose of the deceased, in going on the premises of the accused, had been communicated to him, and he had reasonable grounds to believe they would be carried into execution, he had the right to take from the deceased the gun in order to avoid the danger. If done in good faith, to save his own life, he was justifiable, but if taken from deceased without any other cause than to provoke the difficulty that he might take the life of the deceased, he would be guilty of murder. The uncontradicted testimony

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shows, however, that when he seized the gun he made no effort to shoot the deceased, although the latter was going from him, nor did he fire until the deceased had turned and was approaching him with pistol in hand. Under the evidence the qualification to the instruction as to self-defense ought not to have been given without an instruction for the defense embodying the idea that if the accused intended to provoke an assault, and was not acting in good faith, that is, to protect his own person, when he snatched the gun, still, if the assault had been abandoned by him, and Harris then advanced with pistol in hand on the accused for the purpose of taking his life or inflictng on him great bodily harm, then the accused had the right to defend himself from the impending danger.

The court also erred on the facts of this case in telling the jury that they should give to the testimony of each witness such weight as they might deem it entitled to, and that they were the sole judges of the weight of the evidence. As an abstract proposition of law this is unobjectionable, and, ordinarily, will not influence the finding, still we perceive no reason for giving such an instruction in any case. The brother of the accused was an important witness for the defense. The court permits such evidence to go to the jury on either side as is competent, and, after hearing that evidence, the jury, in considering it, will attach to it that importance they may think it deserves.

The manner of the witness, his conduct in the jury box, his relation to the parties in interest and the plausibility of his statements are facts and circumstances necessarily considered in weighing the testimony of each and every witness. The trial judge, however, may perceive something in the manner of the witness when testifying, or a peculiarity in his statement of facts, impressing him with the belief that the witness is testifying falsely, while the jury, or some member of it, may attribute the conduct of the witness to no improper motive, and in cases where the witness, from motives of friendship or from family ties, makes statements favorable to those in whom he is interested, the suggestion by the court in an instruction that they should give to the testimony of each witness such weight as they may deem it entitled to, is in effect saying to the jury that the statement of such a witness is entitled to less weight than statements made by those entirely disinterested in the result. While this may be true in most cases, it is also true that juries will generally, if not always, scrutinize closely the testimony of those who are directly interested in the result of the litigation, but when their attention is particularly called to this mode of weighing testimony by the trial court, it leaves the jury to conclude that as a matter of law they must give more weight in the particular case to the testimony of a stranger to the controversy than one interested in the result; or, if not, that the judgment, from the instruction, must believe that some witness has been making false statements. It is better, therefore, to leave the jury free to consider the testimony without any suggestion from the court as to the manner of weighing it.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

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COVINGTON SHORT ROUTE TRANSFER RAILWAY CO. v. PIEL.

(Filed May 24, 1888.)

1. Eminent domain—Compensation—Neither the State, nor a corporation, under its authority, can be permitted to take private property for public use without first making compensation to the owner; and the execution of a bond of indemnity to the owner is not such compensation as is contemplated by section 14 of article 13 of the Constitution, therefore, so much of the act of April 11, 1882, providing for the condemnation of private property for railway purposes, as permits the company to take possession of the property upon execution of a bond to perform the judgment of the court, is in violation of the Constitution of Kentucky.

2. Same—Measure of damages—In the condemnation of property for railway purposes, where the property taken is the home or place of business of the owner, the jury, in estimating the value, are not confined to the market value of the property, but may take into consideration the inconvenience and loss resulting to the owner from being deprived of his home or place of business.

In this case, the court having instructed the jury to find for the owner the real value in money of the premises, it was not error for the court to refuse to instruct them not to take into consideration any consequential injury or inconvenience to the defendant in the taking of his property, as the only damages the defendant could have sustained in addition to the value of the property was the inconvenience and loss resulting from being deprived of his home and place of business.

Hallam & Myers for appellant.

Wm. Goebel for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

This proceeding was had on the application of the appellant, the Covington Short Route Transfer Railway Co., asking for the appointment of commissioners to assess the damages resulting from the condemnation of appellee's house and lot in the city of Covington for railroad purposes.

The commissioners appointed proceeded to value the property under the act approved April 11, 1882, and assessed the damages at $7,750, and each party excepting to their award, a jury was empaneled in the county court and a verdict rendered in favor of appellee for $8,000. The case was then carried by an appeal to the circuit court, and a verdict rendered for $8,250, and is now in this court on an appeal from the circuit court. The appellant, the railway company, declining to pay or tender the amount of the judgment because it regarded the sum allowed as excessive, executed a bond, with surety, to the appellee, in accordance with the 7th section of the act of April 11, 1882, for double the amount of the damages assessed, conditioned to perform the judgment of the circuit court, or that of any court to which the case might thereafter be appealed, and, on motion, was awarded a writ of possession.

The 7th section of the act is as follows: "Upon the confirmation of the report of the commissioners by the county court, or the amount of damages by said court, as herein provided, and the payment or tender to the owner of the amount due, as shown by the report of the commissioners when confirmed, or as shown by the judgment of the county court when the damages are assessed by said court, and all costs adjudged to the owner, the railroad

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company shall be entitled to take possession of said land or material, and to use and control the same for the purpose for which it was condemned as full as if the title had been conveyed to it. But when an appeal shall be taken from the judgment of the county court by the railroad company it shall not be entitled to take possession of the land or material condemned unless it shall execute to the owner a bond with surety, to be approved by the county court, in double the amount of the damages assessed, conditioned to perform the judgment of said court, and of any court to which the case may thereafter be appealed, which bond shall be filed with the papers in the case." (General Statutes, edition 1887, page 281.)

When the case reached this court the appellee prayed a cross appeal, and although a bond had been executed by the railway company, as provided by the 7th section of the act of 1882, was permitted by this court to execute a supersedeas bond, having the effect to stay the writ of possession until the case was disposed of on the appeal. The right of the appellee to supersedeas on his cross appeal is one of the questions raised and to be disposed of on the final hearing. It is insisted by the appellee that so much of the 7th section of the act of April 11, 1882, as permits the railway to take possession of his property and apply it to the use of the company upon the execution of a bond of indemnity only is in violation of section 14 of article 13 of the Constitution, providing that "no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." While the statute does not, in express terms, deny to the owner the right to supersede the judgment in a case like this, it provides that the corporation, when taking the appeal, may take possession of the property upon executing a bond to the owner in double the amount of the damages assessed, excluding necessarily his right to prevent the public use by superseding the judgment, and thereby delay the progress of the work until the end of the litigation.

This 7th section gives the right of entry upon the payment or tender of the money to the owner when the company proposes to abide by the judgment, and to afford the company a remedy by an appeal when it may deem the award of damages exclusive, it further provides the execution of a bond with surety, that the owner is compelled to accept if approved by the court, with the right of the company, after its execution, to enter and apply the property to its use. This latter provision of that section the appellee maintains is unconstitutional, and if so, there is no reason why the supersedeas should have been withheld by this court.

It is essential in taking private property for public use that compensation should first be made. "It is," says Mr. Mills, "in the nature of a compulsory purchase of the property of a citizen for the purpose of applying it to a public use;" and whether the corporation desiring that use can have the property valued and then take it from the possession of the owner by executing a bond that may have the effect to reduce the value, and at the same time compelling the owner to risk the solvency of the parties to the obligation, is the question presented here.

In considering this question no reported case is to be found in this State where a private corporation has appropriated the property of the citizen to its use upon the execution of a bond containing a mere promise to pay the damages sustained at the end of a litigation by which the value of the property is to be determined. This court has held, in more than one case where

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property was condemned for the benefit of a municipality or for county purposes, that if the owner was made secure by the execution of a bond with surety, it was such compensation as was contemplated by the Constitution. In the case of Gashweller's Heirs v. McIlvoy, 1 Marshall, 64, the damages were secured by a direction to pay the sum allowed out of the county levy. In the case of Jackson v. Winn's Heirs, 4 Littell, 332, the property was taken for an incorporated town, and in Duncan v. Mayor of Louisville, 8 Bush, 98, the mayor was authorized to sell bonds to pay the value of the property condemned. There is a distinction recognized by many authorities between a taking by a municipal subdivision of the State and a taking by a private corporation. The reason given is that in the one case the owner may resort to the public treasury of the State or the municipal government for his money, with the power in the State, if the treasury should be empty, to cause, by taxation, a sum sufficient to make the compensation, while as to a private corporation the owner is compelled to risk the solvency of the parties to the bond, with no other remedy for the value of his property taken than a suit at law in the event of their failure to pay. This early doctrine, "that compensation need not precede the taking," was established, says Mr. Mills, in his work on Eminent Domain, for the reason that the property was taken mainly for the State, and the payment to be made out of the public treasury. Whether or not this reason controlled the decision of this court in the earlier cases is not now necessary to inquire, for it is manifest that a mere security in the bond of a corporation can not be regarded as just compensation previously made the owner, within the spirit and meaning of the Bill of Rights; that the citizen would be more likely to receive compensation from the State out of an abundant treasury, and by reason of its power to enforce payment by exactions from its citizens in the form of taxation, than from a private corporation owning its corporate property or the individual security given by it, will be readily conceded, but in what manner this protects the citizen who has been deprived of his property in his constitutional rights it is difficult to comprehend. The security may be more ample in the one case than in the other, and still his right of property has been destroyed in its appropriation to a public use without just compensation previously made, and all that is left him, whether due by the municipality, county or corporation, is the right, if a voluntary payment is not made at the end of the litigation, to take coercive measures for the recovery of the value of his property to which he was clearly entitled from the municipality or the private corporation before either could use it for public purposes. Viewed in any aspect of the case, whether taken by the sovereign or by the corporation under sovereign authority, it is a destruction of the constitutional guaranty for the protection of private property to appropriate it, without the consent of the owner, to a public use without first making compensation to him in money for the value of the property of which he has been deprived. We are aware that in the condemnation of private property for the construction of railroads serious injury must often result to the public by a delay in the progress of the work until the question of compensation is determined by litigation. The necessity for an immediate entry in all such cases is apparent, still it could not have been intended by the framers of the Constitution that a mere security for payment should be deemed equivalent to payment in fact. That just compensation previously made authorized the corporation, under legislative authority, to take private property upon a

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credit by executing a bond payable at the end of a litigation, is a doctrine that can not be sanctioned by this court.

The language of the Bill of Rights does not admit of such a construction. In this case the homestead of the owner had been condemned, and the appellant, not satisfied with the amount of damages, is permitted, by the act of 1882, to take possession of his dwelling, his business house and the lot upon which they stand, with no other compensation than the bond of the company, that may or may not be paid when the litigation terminates. He may be compelled to sue on the obligation to recover the compensation that the Constitution, in express terms, provides he shall have before his property is taken. If the Bill of Rights provided that the citizen should be made secure before his property could be appropriatred to public use, there might be some reason in requiring him to look to a bond of indemnity for his compensation, and the earlier cases seem to have proceeded on the idea that this security was what had been guaranteed to the citizen, and nothing more; when it is plain, we think, from the language used in that instrument, that just compensation previously made means the payment in money to the owner of the value of his property, whether for the sovereign, a municipality, county or corporation, before it can be taken from him. Where the damages are assessed under the act of 1882 the money may be paid or tendered to the owner, and if he declines to receive it, his own act entitles the company to enter and appropriate the property condemned for the public use. "The legislature might as well declare a bond to be good compensation at the end of the condemnation proceedings as at the beginning, hence possession can not be given simply on an offer to give or on the giving of a bond." (Mills on Eminent Domain, page 136, 2d edition.)

Mr. Cooley, in his work on Constitutional Limitation, says: "It is not competent to deprive him (the citizen) of his property and turn him over to an action at law, against a corporation which may or may not prove responsible, and to a judgment of uncertain efficacy." (Con. Lim., 562.)

This court, in the case of Arnold v. the Covington Bridge Co., reported in 1 Duvall, 372, speaking through Chief Justice Robertson, said: "But the Constitution constructively requires an impartial assessment by a judicial process of the actual value in money, and full payment, before private property shall be appropriated to public use." Authorities might be given sustaining a like construction of constitutional provisions similar to ours, and to require the citizen to look to a mere written promise to pay the compensation to which he is entitled is, in our opinion, a perversion of the plain meaning of the Bill of Rights.

Objections were made in the court below to an instruction given at the instance of the appellee, and also exceptions taken to the refusal of the court to give instructions asked by the appellant. The court told the jury: "They must find, from the evidence, the real value in money to the owner of the premises, as they were actually situated on the 12th of July, 1887, and they will find for the owner the value aforesaid." The appellant asked the court to say to the jury that they should not take into consideration any consequential injury or inconvenience to the defendant in the taking of his property. The last instruction the court refused to give, but gave the instruction asked by the appellee. The appellee owned no property adjacent to the property condemned, and the damages he sustained, if any, in addition to the value of the property taken, was the inconvenience and loss resulting

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from his being deprived of his home and place of business, and to say that no such facts should enter into the estimate of value would be unjust to the owner, and place him in a condition where he had sustained actual injury other than the mere market value of his property without affording him any remedy for the wrong. This character of case is unlike an appropriation of a strip of land where the mere market value is the criterion, the taking working no other injury.

Here the owner and his family have been deprived of their homestead; his place of business taken from him, and to allow him simply what such property is worth or would bring in the market would not compensate him for the injury sustained. The instruction for the appellee was proper, and while the jury might have been told that a mere ideal value placed on the premises by the owner should not control them in their verdict, yet it is evident that, in ascertaining the damages, the value of his home and business house to the owner, under the circumstances, should have entered into the estimate. It is not certain, however, from this record that the jury did more than to give the owner the marketable value of his premises. The witnesses for the railway company fixed the market value at from $5,000 to $7,000; those for the appellee fixed the market value as high as $9,761. The jury returned a verdict of $8,500. The appellee was allowed to show that in addition to the market value proven he had sustained other loss, in having to abandon his place of business, to the extent of $2,000 or $3,000. We perceive no objection to this testimony. The location of appellee's business house, its convenience for his labor and those who patronized him, were facts tending to enhance the value of the property to the appellant, and of which he ought not to have been deprived. There have been in effect three different verdicts in this case fixing the value of appellee's property. The commissioners fixed the value at $7,750; the jury in the county court at $8,000, and the jury in the circuit court at $8,250. After so many findings on the one issue, with such a small difference in each verdict, we see no reason for disturbing the judgment in the absence of any evidence tending to show that either finding was excessive. The only question made by the appellee on his cross appeal was his right, as the company had appealed, to supersede the writ of possession. This he was allowed to do. And perceiving no error to the prejudice of the appellant, the judgment is now affirmed. The 10 per cent. damages will be denied as the appellee has, by his supersedeas, stayed the writ and enjoyed the use of the premises for the value of which the judgment was rendered. No reversal is asked on the cross appeal.

KENTUCKY SUPERIOR COURT.

LOUISVILLE HOTEL CO. v. TAYLOR.

(Filed March 28, 1888.)

1. Pleading—Limitation—If the defendant relies upon the statute of limitation, it must be pleaded specially. The facts which show that the action is barred should be alleged, therefore, it is not sufficient, under the Code, to deny, in answer to a petition on an account, that defendant has prom-

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ised, within five years next before the institution of the action, to pay the account or any part of it.

2. Pleading—As the general issue is abolished by the Code, an answer denying that the defendant is indebted to the plaintiff is not good.

A. C. Rucker for appellant.

R. J. Elliott and Wm. Lindsay for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour.

This is an action by the appellant upon an account for board, lodging, etc., furnished to the appellee between the month of October, 1877, and November, 1878. The petition, it is conceded, presents a good cause of action. The defendant, in the first paragraph of his answer, simply denied that he was indebted to the plaintiff; this is clearly bad. In the second paragraph he denied that he had promised, within five years next before the institution of the action, to pay the account or any part of it. And in the third paragraph he averred that he had not, within five years next before the bringing of the suit, nor since October, 1878, promised to pay the account or any part of it. The only question for our consideration is whether the second and third paragraphs, or either of them, properly present the plea of the statute of limitation. We are of opinion that neither does. Under the former system of pleading at common law there were two modes of pleading the statute of limitation: The one that the defendant did not promise within five years, and the other that the cause of action did not accrue within that time.

In Banks v. Coyle, 2 A. K. Mar., 564, the court said: "The latter is equally applicable to every case, but the former, which has been adopted in this case, is, in many cases, insufficient; for if the cause of action accrued within five years it is immaterial when the promise was made, because the statute operates as a bar only from the time when the cause of action arose, and not from the time of making the promise. As if a promissory note were made seven years ago to pay money within three years, the statute is no bar; so if it were made seven years ago to pay money within three months, though the statute would be a bar, yet the defendant must not plead that he did not promise within five years, for that would be bad, but the plea must be that the cause of action did not accrue within five years, etc. "Under the old system the general issue was allowed in almost every form of action. In assault and battery cases, ejectment, trespass and trover, the defendant was allowed to plead, in general terms, that he was not guilty of the grievances alleged. In assumpsit, he was permitted to plead, in general terms, that he did not assume or promise to pay; in detinue, the general plea that the defendant did not detain; in debt, that he did not owe, etc., were allowed." (Newman on Pleading, 500.) The object of the Code is to avoid these general issues, and bring the parties on both sides, as far as practicable, to a statement, in ordinary and concise language, of the facts intended to be relied on. Section 95 of the Code provides that an answer may contain, first, a traverse; second, a statement of facts which constitute an estoppel against or avoidance of a cause of action stated in the petition; third, a statement of facts which constitute a set-off or counterclaim; fourth, a cross petition. The answer in this case is certainly not good as a traverse, for the general issue is abolished by the Code, nor is it a good

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answer under the third or fourth subdivision. It can, therefore, only be sustained, and we understand counsel as insisting that it is sustainable under the second subdivision, upon the ground that it presents a statement of facts in avoidance of the cause of action stated in the petition, i. e., that it pleads the statute of limitation. This we can not think, for it is contrary to the whole theory of the Code pleading. If the defendant relies upon the statute, it must be pleaded specially. The facts which show that the action is barred should be alleged. The answer should have averred that the plaintiff's cause of action did not accrue within five years next before the commencement of the action, etc., and to this answer the plaintiff might have replied a new promise, absence from the State, etc.; but instead of pleading the statute, the defendant has simply pleaded the non-existence of a promise which might have taken the case out of the statute.

The statute of limitation being regarded as a matter of strict defense, must, if relied on, be pleaded affirmatively by the defendant in all actions, unless the petition shows that the action is barred by time, and that the plaintiff is not within any of the exceptions contained in the statute prescribing the limitation. And there can now be no reason for making the distinction, which was made under the former system of pleading, between a case where the cause of action arose immediately upon the making of a promise, and a case where the cause of action did not accrue until after the expiration of a stated time from the promise.

The case was submitted to the lower court for judgment upon the pleadings. Wherefore, the judgment dismissing the petition is reversed and the cause remanded for further proceedings.

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SUPERIOR COURT ABSTRACTS.

PEAK v. WELLER & CO., &c.

Filed May 2, 1888. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Attachments were issued against appellant and another jointly upon debts contracted by them as partners, the firm which they composed having been dissolved a short time before the institution of the suit. One of the grounds of each of the attachments was that the defendants did not have property subject to execution sufficient to satisfy the debt, and that its collection would be endangered by delay. Held—That as the defendants together owned sufficient property subject to execution to satisfy any one of the debts, the ground of attachment against appellant, who alone complains, was not made out.

2. Exemptions—Under the act of May 17, 1886, as to exemptions, no provision is made for setting apart other personal property or money in lieu of exempted articles not on hand except in two cases. Forty dollars for each member of the family may be set apart for wearing apparel and provisions to sustain the family for a year; and $70 may be set apart to furnish provender for live stock. In this case, as the family of one of the defendants consisted only of himself and wife, and he had no live stock, he was entitled to an exemption of only $80 in lieu of exempted articles on hand.

3. Same—No part of the proceeds of land can be set apart in lieu of exempted articles not on hand. This substitution, if made at all, must be made out of personal property or money; there is no provision allowing it to be made up in land or by a sale of land.

4. Attachments—Upon the dissolution of a firm one of the partners sold his interest in the partnership property to the other, who was to pay the partnership debts. With a part of the proceeds the retiring partner paid a debt secured by a mortgage upon his real estate, and the balance, of about $50, he expended for clothes and food for his family. Held—That there was nothing in his conduct that was fraudulent within the meaning of the statute authorizing an attachment upon the ground that the defendant has fraudulently disposed of his property, etc.

Geo. S. Fulton for appellant; Wm. Johnson for appellees.

FAHRENHOLTZ v. ECLIPSE SEWING MACHINE CO.

Filed May 2, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Practice—An objection to the sufficiency of a pleading does not arise during the trial, and, therefore, such a question need not be made a ground for a new trial in order to authorize this court to consider it.

2. Pleading—In an action to recover the price of machines alleged to have been sold to defendant, the answer alleged that the machines were delivered to defendant as plaintiff's agent, and that the plaintiff had agreed not to sell machines in defendant's territory, which agreement, it was alleged, plaintiff had violated. The damages alleged to have resulted from the violation of that agreement were pleaded as a counterclaim. The reply denied the contract of agency. Held—That this was a denial of the consideration for the alleged agreement of plaintiff, and it was, therefore, not necessary to deny the agreement.

A. G. Root for appellant; John S. Ducker for appellee.

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ENDERS, EX'OR v. TASCO.

Filed May 2, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Bowden, reversing.

Construction of devise—Trusts—A testator, after devising all his estate to his wife, in the event she survived him, used this language:

"And in the event of her surviving me it is my desire that it may suit her pleasure, and if so I request (but without intending to create any trust therefor) that she allow and pay Ann Tasco, a mulatto, who has been sometime in our service, the sum of $15 per month, at the end of each month, so long as said Ann may live, to be used and applied toward her maintenance and support." By another clause of his will the testator provided that if his wife should not survive him all his estate should go to their foster daughter, but that the estate so devised should "be subject to a charge of $15 per month, to be paid or caused to be paid by her at the end of each month to Ann Tasco, the person named in the second item of this will, so long as she may live, and for the purposes named in said second item." The testator's wife survived him, and this suit was brought against her by Ann Tasco to enforce the trust which it is claimed was created in her favor by the will, the widow having refused to pay her anything. Held—That no trust was created by the devise to the widow. There is a marked difference between the language used with reference to the plaintiff in the devise to the widow and that used with reference to the same matter in the contingent devise to the testator's foster child, which can not be explained except by holding that no trust was intended in the former case.

Simrall & Bodley for appellant; Marc Munday for appellee.

BOULIER v. COMMONWEALTH.

Filed May 2, 1888. Appeal from Louisville City Court. Opinion of the court by Judge Bowden, reversing.

1. The mere act of letting a house for the purposes of prostitution is not an offense if the house is not actually used for such purposes.

2. An indictment for letting a house for the purposes of prostitution must aver that the defendant was the owner or controller of the property when it was let.

The indictment in this case charges that the defendant, being the owner and having the possession and control of a certain house, "in the city of Louisville, on the 19th day of April, 1887, and within six months next preceding the finding of this indictment, for profit and gain, unlawfully did rent," etc., and that "between the 19th day of October, 1886, and the 19th day of April, 1887," the house was used for purposes of prostitution. Held—That if the indictment is to be taken as averring that the letting was on the 19th day of April, 1887, it is defective because it appears that the unlawful use was prior to that date, whereas it is essential to the offense that such use was subsequent. And if the indictment is to be taken as meaning that the defendant owned the house at the date, named and that the letting was within six months before the finding of the indictment, then it does not appear that the defendant owned the house at the time it was let, so, in either event, the indictment is defective.

Aaron Kohn for appellant; W. R. Abbott for appellee.

MASON v. BEAZLEY.

Filed May 2, 1888. Appeal from Garrard Circuit Court. Opinion of the court by Judge Barbour, reversing.

Imbeciles—Appointment of committee—Void judgment—No person, even though the court may be of the opinion that such person is incompetent on account of imbecility or otherwise, should be deprived of the right to manage and control his or her property without being offered an opportunity to be heard.

In this case a judgment, upon the verdict of a jury declaring appellant incompetent to manage her estate and appointing a committee to take charge of her estate, was void, and a motion to set it aside should have pre-

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vailed, there having been no service of process upon the appellant and no appearance by either in person or by attorney.

W. O. Bradley for appellant; Anderson & Herndon for appellee.

MASON v. BRUNER'S ADM'R.

Filed May 2, 1888. Appeal from Hancock Circuit Court. Opinion of the court by Judge Barbour, affirming.

It is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less probable.

In this case the issue submitted to the jury was whether or not the plaintiff was induced to sign a sheriff's bond in consideration of the agreement of the defendant, another surety, to indemnify him against loss on account of such suretyship. After testifying to the agreement himself the plaintiff proved by another surety in the bond that the sheriff and the defendant, sometime before the plaintiff became surety, came to the witness' house to induce him to go on the bond, and that defendant told witness "that everything he had should go before the sureties in the bond should suffer." Held —That this evidence, in connection with the admitted fact that defendant was to act as deputy, exhibits the interest he had in the execution of the bond, and, therefore, bears upon the probability of plaintiff's story, and for that reason was competent.

Geo. W. Williams & Son for appellant; Miller & Morrison for appellee.

CONN v. CRABB, &c.

Filed May 9, 1888. Appeal from Henry Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Contract—Partnership—J. delivered to W. a stallion, it being provided by a written contract between them that W. should take the horse and keep him at his own expense and own one-half of him, J. the other half; W. to stand the horse and pay to J. one-half of the net amount realized from each season the horse makes, and in the event of a sale of the horse the gross proceeds arising from the sale to be equally divided between them, neither party to have the right to sell the horse without the consent of the other, J. not to be responsible for any expenses incurred in keeping, licensing and grooming the horse. Held—That J. and W. were merely joint owners of the horse, and not partners, and that attaching creditors of W. have a lien upon his half interest in the horse superior to the lien thereon asserted by J. for his share of the earnings collected by W.

2. Mistake—As the evidence does not show that the paper was written otherwise than as the parties understood it to be, or that anything was left out which they had ordered to be inserted, the allegation that there was a mistake of the draftsman is not sustained by the proof.

Wm. Lindsay for appellant; Wm. Carroll for appellees.

PRESBYTERIAN MUTUAL ASSURANCE FUND v. LOTZ.

Filed May 9, 1888. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Bowden, reversing, Presiding Judge Ward concurring in a separate opinion.

Benefit societies—Recovery of premium paid under mistake—The charter of appellant, a benevolent society, permits a member to designate, as beneficiary, a relative, but instead of providing for the designation of another upon the death of the named beneficiary, it declares who shall take in that event. Appellee, a member, after the death of his wife, whom he had named as beneficiary, told the managing officer of the appellant that he would not continue his membership unless he could designate his children as beneficiaries, and the officer told him it could be so arranged. It is conceded that but for this advice he would not have paid the dues which, by this action, he seeks to recover as having been paid under mistake. Held—That he can not recover. As long as he remained a member the association was liable to him for sick benefits and to the person entitled under the

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charter for the amount of insurance agreed to be paid, which was a sufficient consideration for the payments made.

E. F. Trabue for appellant; A. E. Willson for appellee.

TRIBBLE v. DEATHERIDGE.

Filed May 9, 1888. Appeal from Garrard Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Appeals—Amount in controversy—The costs which are to be excluded in estimating the amount in controversy upon an appeal are the costs of the action in which the judgment appealed from was rendered, and not the costs included in an execution sought to be enjoined, where the appeal is from a judgment dismissing the petition and dissolving the injunction.

2. Failure to return execution—Assignment of judgment—Conceding that an execution which is issued upon a judgment pending a motion for a new trial is void, and that the sheriff who receives it to execute incurs no liability for a failure to return it within the proper time, still, if believing he is liable, the sheriff voluntarily pays it, and the judgment plaintiff thereafter assigns the judgment to him, he has the right to control the judgment for his own benefit, just as would any third prson who might buy it.

W. O. Bradley for appellant.

COLSTON v. SHOTWELL.

Filed May 9, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Appeals—This court dismissed a former appeal by appellant from the same judgment now appealed from upon the ground that the amount in controversy was not sufficient to give this court jurisdiction, an amended counterclaim offered by appellant and rejected not being made a part of the record upon that appeal. The judgment appealed from was rendered December 10, 1886. The former appeal was dismissed January 17, 1887. On the 25th of January, before the expiration of the sixty days during which the Louisville Chancery Court has control over its judgments, the appellant filed a bill of exceptions, embracing the rejected counterclaim, and now prosecutes this appeal upon the perfected record, which shows that this court has jurisdiction. It is contended by appellee that the lower court had no jurisdiction to entertain the motion to file the bill of exceptions for the reason that the former appeal was still pending, thirty days not having expired from the time of the judgment of dismissal, and that, therefore, this appeal should be dismissed. Held—That as this court had no jurisdiction of the former appeal as the case was then presented by the records, the lower court had the same control over the case, and the same right to make orders in it, as it would have had if no appeal had been prosecuted.

2. Mortgages—Attorney's fees as penalty—A provision in a mortgage executed to a trustee for the beneficial owner of the debt secured by the mortgage, to the effect that in the event the debt is collected by legal proceedings the mortgagor will, in addition to the principal and interest agreed to be paid, pay a reasonable attorney's fee and commissions to the trustee, is against public policy and not enforcible. The fact that a trustee intervenes does not furnish a reason for refusing to apply the rule which applies to ordinary mortgages.

Joseph Prevost Carr and Wm. S. Vance for appellant; O'Neal, Jackson & Phelps for appellee.

SPALDING, &c. v. COMMONWEALTH.

Filed May 9, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, reversing.

Taxation—Where the owner of the property subject to taxation is known the assessment must be made against him. It is only where the person in possession can not or will not disclose the name of the owner that the property must be assessed to him. Especially should a master commissioner,

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who is merely the custodian of the court, and subject at all times to its orders, not be required to list an estate in his hands.

In this case the estate which the lower court required the master commissioner to list belongs to the representatives of a decedent—the personal representative or the heirs, as the case may be—and upon the showing of the summons itself those representatives or heirs should have been brought before the court and the property assessed to the one or the other, as the right may be.

Samuel Avritt for appellants; Sam T. Spalding for appellee.

CENTRAL PASSENGER R. R. CO. v. SPIETH, &c.

Filed May 9, 1888. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Ward, affirming.

Appeals—Reversible errors—The court can not consider any errors committed during the trial which are not mentioned in the grounds for a new trial.

In this case, as the action of the court in refusing to the defendant the burden of proof and the concluding argument to the jury was not assigned as ground for a new trial, there can be no reversal for that alleged error.

Kohn & Barker for appellant; C. H. Gibson and John Barrett for appellees.

COLLINS v. DUCKWORTH.

Filed May 9, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Pleading—Consideration for note—In this action upon a promissory note the defendant, by the first paragraph of his answer, averred that the note was executed by him solely for a surgical operation, which plaintiff pretended to have performed upon the wife of the defendant, when the plaintiff well knew that he had not performed the operation at all. By the second paragraph of his answer the defendant sought to recover money paid to plaintiff for boarding defendant's wife at plaintiff's hospital upon the ground that he was induced to place his wife at said hospital upon the false and fraudulent representations of plaintiff that it was necessary for her to be kept there in order to prepare her for an operation which plaintiff well knew was unnecessary. The plaintiff, by his reply, set forth the disease with which defendant's wife was suffering; averred that the operation was performed, and that it was necessary. The rejoinder did not deny that the wife was diseased and affected as alleged. By the instructions the plaintiff was required to prove that a disease existed which made an operation necessary, and that the operation was performed.

Held—That this was error, as, under the pleadings, plaintiff was only required to prove that an operation was performed.

2. Instructions—Facts admitted by the pleadings should not be submitted to the jury, as such a course is calculated to mislead.

J. M. Collins for appellant; M. R. Lockhart for appellee.

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The Kentucky Law Reporter

EDITOR:

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KENTUCKY COURT OF APPEALS.

CROCKETT v. COMMONWEALTH.

(Filed March 15, 1888—Not to be reported.)

Criminal law—Revesible errors—Alleged undue influence upon the jury by reason of a remark made by the jailer in the presence of one of the jurymen can not be considered upon this appeal because—

1st. It could have been considered by the lower court only upon motion for new trial, and decisions upon motions for new trial are not subject to exception.

2d. The misconduct of the jury is not an error of law, for which this court can reverse a judgment of conviction.

J. E. Hays for appellant.

P. W. Hardin for appellee.

Appeal from Casey Circuit Court.

Opinion of the court by Judge Lewis.

The principal ground relied on for reversal of the judgment of manslaughter in this case is that the jury, having up to that time been unable to agree, was influenced to find a verdict of guilty by a statement of the jailer in presence of one of the jurymen, that the accused preferred a conviction and punishment for a short time in the penitentiary to have the jury disagree.

The alleged undue influence upon the jury could have been considered by the lower court only upon motion for a new trial, and as section 281, Criminal Code, expressly provides that decisions upon such a motion shall not be subject to exception, this court is precluded considering it on this appeal. Moreover, the misconduct of the jury is not, in the meaning of section 340, an error of law for which this court can reverse a judgment of conviction, but seems, like kindred subjects, to have been intentionally left to the sole judgment of the trial court.

The evidence in this case shows that, although the deceased assaulted and stabbed appellant, he immediately retreated from the place where it was done about thirty steps into the house, where an election was being held, whither appellant pursued him, armed with a pistol and knife, and then,

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without any pretext of being then in danger, killed him, the deceased having three wounds from a pistol shot and one stab. A general exception to the instructions of the court to the jury was made, but counsel does not attempt to specify wherein the court erred in giving or refusing to give them. Nor do we perceive that the court, in that respect, erred to the prejudice of the substantial rights of the appellant.

Judgment affirmed.

[The opinion in this case, in so far as it affected the city of Louisville, was set aside June 14, 1888, by the following order:

"City of Louisville v. Kaye, &c.

"The court being sufficiently advised, it is considered that the judgment herein be set aside."]

CITY OF LOUISVILLE v. KAYE, &c.

KAYE v. MOODY.

(Filed April 5, 1888—Not to be reported.)

1. Judicial sales—The purchaser of property sold under decree having failed to pay the purchase price, he and his surety surrendered the property to be sold to satisfy their bonds. It brought less at the last sale than at the first. Held—That the surety in the bonds executed at the first sale became liable for the difference.

2. The failure to issue an execution on the sale bonds did not release the surety, as the delay was at his instance and for his benefit, and, besides, he agreed in writing to remain bound.

3. Judicial sales—City taxes—The sale to the last purchaser was confirmed and an order made, reciting that the city taxes due were to be deducted from the purchase price. Enough of the purchase price to pay the tax claim was left in court for the protection of the purchaser. This fund the city, although not a party to the action, withdrew from the court upon the assertion merely that the claim existed, and had been established. By rule the court required the city to pay back the money thus withdrawn. Held—That this was proper. While the order of court recites that it was agreed that the taxes should be deducted from the purchase price, this should not be done unless the city shows a right to enforce payment.

4. Final order—The order on the rule requiring the money to be paid back was such an order as may be appealed from.

Eli H. Brown and Jas. Harlan for Kaye.

Hargis & Eastin for Moody.

L. N. Dembitz for city of Louisville.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

The facts of the record establish beyond controversy the liability of Rodman, the surety, to Moody for any deficit arising from the second sale of the property. The lot sold in the first place for a sum sufficient to pay the Moody debt and the taxes. Rodman was surety on the bonds of the purchaser, and the latter failing to pay, the lot was surrendered by Kaye and his surety, to be sold to satisfy Kaye's bonds. It brought less on the last sale than the first, and the surety on the bonds executed at the first sale be-

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came liable for the difference. The failure to issue an execution on the sale bonds did not release the surety even if the appellee, Moody, was entitled to have it issued, because the delay was at the instance of the surety, and for the purpose solely of relieving him from liability or give to him an opportunity to contest the claim of the city for back taxes alleged to be unpaid on the property sold, and for the additional reason that by a writing executed by the surety he agreed to remain bound or to pay the debt. The sale to Levy, the last purchaser, was confirmed and an order made by which the taxes due were to be deducted from the purchase price. All the purchase money had been paid on the second sale except a sum sufficient to cover the tax claim. That fund was in court subject to the direction of the chancellor, and about which the parties had the right to litigate.

The city of Louisville was not a party to the action, and while the taxes may be due and owing, had no right by an attorney, or otherwise, to withdraw the fund upon the assertion merely, without being a party, that the claim for taxes existed or had been established. All parties consented that these taxes should be paid if properly owing, and such was the meaning of the order. The surety was liable to Moody, and the fund or the balance of it left in court for the protection of Levy, the purchaser, in order that the taxes might be paid and the claim of the city upon the property removed.

The order of June 6, 1877, recites that counsel on both sides agreed that the taxes should be deducted from Levy's purchase; this, however, should not be done unless the city shows a right to enforce payment. The surety, as he has the deficit to pay, may assign some reason for having the fund paid to Moody and not the city. What reasons may be assigned do not appear in this record, but the city, when not a party to the action, having withdrawn the money without the consent of the sureties as well as the parties, prevented the surety or those interested from contesting the tax claim. The court, therefore, very properly required the city to pay this money back for the purpose of having the right of the city as to this fund determined. The city may, by proper pleading, assert its right, and if the taxes are due the purchaser, Levy, should be protected by an order requiring the fund to be applied to the payment of such of the taxes as the property may be liable for. The judgment making the rule absolute as to the security is affirmed, and the judgment on the rule against the city is also affirmed.

We understand that the disposition to be made of the fund has not been decided, but an order or judgment entered only requiring the city to pay this money back that the rights of the parties may be ascertained. The order on the rule requiring the money to be paid back is such a judgment as may be appealed from.

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THE BOARD OF TRUSTEES OF THE TOWN OF CAMPBELLSVILLE v. BORDERS.

(Filed May 17, 1888—Not to be reported.)

1. Right of town marshal to collect taxes—Bond—Even if under the provisions of the charter of the town of Campbellsville the town marshal is, in virtue of his office, entitled to collect the taxes, a question not necessary to be determined, he has no right to do so without warrant of the trustees, and they may withhold such warrant and appoint another person, unless he in due time executes a bond for the faithful discharge of his duties as such collector, just as the sheriff is required to execute a revenue bond distinct from his official bond.

In this action by the town marshal for a mandamus ordering the trustees of the town to make out and deliver to him a fair copy of the assessor's books for certain years, and to authorize him as marshal of the town by their warrant to collect the taxes assessed for those years, the bond filed with the petition purports to have been executed by him in the county court, and is a covenant with the Commonwealth binding him to discharge the duties imposed upon a constable, the charter investing him with the powers and imposing upon him the duties of a constable and requiring him to execute bond in the county court. Held—That this bond does not bind him to the faithful discharge of his duties as tax collector. The bond for the faithful discharge of such duties was intended to be a covenant with the board of trustees and subject to their approval, and, having failed to execute such a bond, he was not entitled to the relief sought.

2. Same—Presumption—As it is alleged in the answer that the board of trustees had, when this action was commenced, already appointed a collector other than the plaintiff, and taken bond from him, it must be presumed to have been done after the time had passed when it was plaintiff's duty to tender a bond, as it does not appear from the record at what time the collection is required.

Collins & Montague for appellants.

Thomas H. Hines, H. S. Robinson, J. A. Woolford and Chas. Patteson for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Lewis.

Appellees instituted this action September 17, 1887, for a mandamus, ordering appellants to make out and deliver to him a fair copy of the assessor's book of the taxable property of the town of Campbellsville for the years 1886 and 1887, and to authorize him, as marshal of said town, by their warrant, to collect the taxes so assessed.

In his petition he states that, in pursuance of the several acts of the general assembly mentioned and referred to by him, he was, on the first Monday in August, 1884, duly elected marshal of said town for the term of two years, and having executed bond and been qualified in the Taylor County Court, entered upon the discharge of the duties of the office; that no election was held in August, 1886, to fill said office, but he held it under the election of 1884 until August 11, 1886, when the board of trustees of said town, by an order duly made, appointed him marshal until August, 1887, and on the same day made an order allowing ten per cent. for collecting taxes, and he entered upon his duty as such under said appointment; that at a regular election, held the first Monday in August, 1887, and in pursuance of an

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order of said board of trustees, he was again elected marshal of said town, and on the —— day of that month was, by an order of the Taylor County Court, duly qualified, and executed the bond required by law, a copy of which is filed with the petition. He further states that he has been the regular and acting marshal since 1884, and so recognized by said board of trustees, and that, according to the acts referred to and in virtue of said office, he was and is collector of taxes for said town, and has the right to collect them for the years 1886 and 1887. To the petition a demurrer and answer were filed, and there was also filed a demurrer to the answer. But without formally trying the demurrers or the issues of fact the lower court rendered judgment in substance that, as no bond had been executed by the plaintiff for the collection of taxes for the year 1886, the defendants were not bound to deliver to him the tax books for that year, and the mandamus asked, requiring them to do so, was denied; that the plaintiff, by virtue of his office of marshal, is entitled to collect the taxes levied and assessed for the year 1887, and the defendants should have delivered to him for collection the tax books for that year, and they were adjudged to levy and assess the taxes and deliver to the plaintiff within ten days a copy of the assessor's book for that year, showing the amount of tax to be paid by each individual taxpayer, and, by their warrant, direct him to collect such taxes.

It is contended for the appellants that the lower court exceeded its power in ordering them to levy and assess the taxes for the year 1887. That part of the judgment, though clearly erroneous, does not prejudice appellants, and, therefore, is not sufficient reason for reversal, for it seems to be admitted by both the parties in their pleadings that a large assessment had already been made when the action was commenced, and the real issue was as to the right of the plaintiff to have delivered to him a fair copy of the assessor's book, accompanied with an order of the board of trustees authorizing him to collect the taxes.

Whether he was entitled to the remedy sought depends upon the construction of the various acts of the legislature referred to and relied on by him as conferring the right to collect the taxes. The first act was approved March 24, 1851. (Volume 2, page 524.)

Section 5 of that act provides that it shall be the duty of the trustees of the town of Campbellsville to appoint a treasurer, clerk and such other officers as they may deem necessary, and take from them, respectively, bonds with approved security, payable to the board of trustees of Campbellsville, and their successors in office, in such penalty as said trustees may direct, conditioned for the faithful discharge of their reespective duties, etc. Section 6 provides for the election of a police judge and town marshal. And in section 10 it is provided that it shall be the duty of the marshal to serve all process and precepts to him directed from said police judge and make due return thereof; collect all taxes of said town, executions and other demands which may be put into his hands to collect, and account for and pay over the same to those entitled thereto, under the same rules and regulations required of sheriffs in the collection of taxes and constables in the collection of executions or other demands; and for a failure of any of the duties required of him he shall be subject to the same proceedings and penalties which may be had against sheriffs or constables in similar cases. Said marshal shall have the same power and be entitled to the same fees for collecting the town tax that sheriffs have for collecting the county levy and revenue tax, and in all other cases the fees allowed constables for similar services. Section 15 is as follows: "That it shall be the duty of the clerk of the board of trustees to

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make out and deliver to the collector a fair copy of the assessor's book, with the amount of tax to be paid by each individual and take his receipt therefor; and the trustees shall, by their warrant, authorize and direct the collector to collect the same, and shall make said clerk, assessor and collector such compensation as they may deem proper." Section 23 provides that for any tax to be levied there shall exist a lien in favor of the trustees for said tax, and in case the owner of property subject shall fail to pay such tax on or before the 1st of September in each year, it shall be lawful for said trustees, by their town collector, to sell, at the October County Court, so much real estate as will pay the tax due thereon, etc. Section 4 of an act approved February 22, 1860, volume 2, page 134, provides: "That said town marshal shall give bond in the Taylor County Court in the same manner and conditioned in the same way as constables of this State are required to do and perform." February 18, 1867 (Acts, volume 2, page 16), an act was passed providing for filling, by the trustees of the town, any vacancy that may occur in the office of town marshal, but that before the person so appointed should enter on the discharge of the duties of his office he shall execute bond with sufficient security to faithfully discharge the duties of his office according to law.

We do not deem it necessary or proper to inquire into and decide the question raised by appellants whether appellee was, when he commenced the action, marshal de jure.

By section 10 of the act of 1851 it is provided the marshall shall have the same fees for collecting the town taxes that sheriffs have for collecting the county levy and revenue tax. But section 15 provides that the board of trustees shall make the clerk, assessor and collector such compensation as they may deem proper. The only way to harmonize the two sections is upon the idea it was intended to give to the trustees the power to appoint the collector of taxes and to fix his compensation in case he be a person other than the marshal. And this conclusion is fortified by mention of the person empowered to collect the taxes as the collector, and by the provision requiring a warrant from the trustees in order to authorize the collector to act, whether he be the marshal or other person. Whether this power to appoint a collector was intended to be a discretionary power, to be exercised by the board of trustees in every state of case and to the exclusion of the marshal, it is not necessary to determine. But it seems to us clear that whether the marshal is or is not, in virtue of his office, entitled to collect the taxes, he has no right to do so without warrant of the trustees, and that they may withhold such warrant and appoint another person unless he, in due time, executes a bond for the faithful discharge of his duties as such collector, just as the sheriff is required to execute a revenue bond distinct from his official bond.

The simple inquiry then is whether appellee did, within the time required by law, execute such bond.

The bond filed with his petition, purporting to have been executed August 24, 1887, in the Taylor County Court is nothing more in its terms and effect than an official bond, such as a constable is required to execute, and binding him to discharge only the duties imposed upon a constable, which does not at all include the collection of taxes. The marshal, by section 10 of the act of 1851, is invested with the powers and required to perform the duties of a constable, and it was, therefore, provided he should execute a bond in the county court. Hence the bond executed by him in this case is a covenant with the Commonwealth of Kentucky. But being also empowered to collect

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taxes in the town of Campbellsville the bond for the faithful discharge of such duty was intended to be a covenant with the board of trustees and subject to their approval, and the power to require such bond is, we think, given by section 5 of the act of 1851. It does not appear from this record at what time the collector shall execute bond. But it is alleged in the answer that the board of trustees had, when this action was commenced, already appointed a collector, other than appellee, and taken the bond from him, and it must be presumed it was done after the time had passed when it was appellee's duty to tender a bond as collector. But, be that as it may, he had no cause of action against the defendants, not having tendered a bond as tax collector.

Judgment reversed and cause remanded, with directions to dismiss the petition.

To a petition for rehearing Judge Lewis delivered the following response of the court May 26, 1888:

Whatever right or authority the marshal may have to collect taxes in the town of Campbellsville is conferred by section 10 of the act of 1851, which provides, amongst other things, that it shall be his duty to "collect all taxes of said town, executions or other demands which may be put into his hands to collect." That section does not, in terms, make it any more obligatory upon the board of trustees to put the tax books in his hands and authorize him to collect the taxes than upon a plaintiff or other individual creditor to put executions or other demands into his hands for that purpose, and it is by no means clear that the trustees can be legally coerced to do so. But we have not deemed it necessary to decide that question, for assuming he has the right, in virtue of his office, to collect the taxes, the trustees are still not bound to deliver to him the tax books and authorize him by their warrant to collect the taxes until he has executed a bond, with security approved by them, conditioned for the faithful discharge of the duty of collector. The power of the trustees clearly exists under the statute of 1851 to take such bond from the marshal or other person appointed collector, and if it was not exercised by them then no bond for the collection of town taxes was taken at all previous to the statute of 1859, when authority was first given to the Taylor County Court to take a bond from the marshal. The only bond the county court was empowered by that statute to take from the marshal is one given "in the same manner and conditioned in the same way as constables in this State are required to do and perform." But as the law does not authorize or require a constable to collect any taxes whatever, nor empower the county court to take from him a bond for that purpose, it is manifest the legislature did not intend by the statute of 1859 to divest the trustees of the power and confer it upon the county court to take from the marshal bond for the collection of taxes in the town of Campbellsville, the fiscal affairs of which the county court has neither appropriately anything to do with nor adequate knowledge of.

The bond given by appellee in the county court is in the precise form of the bond required by law of a constable, and contains no express or implied undertaking by him to collect and account for nor mention of taxes. It is purely an official bond executed by him as marshal, and not in the nature of a bond as collector of taxes, nor binding upon him or his sureties as such.

Petition for rehearing overruled.

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CLEMONS v. HOLTHEIDE.

(Filed May 19, 1888—Not to be reported.)

Judicial sales—Mistake in deed—Relief may be afforded against fraud or mistake in the procurement and execution of deeds under judgment of court as well as in a private transaction.

At a sale of land made to satisfy a judgment in favor of a married woman against the estate of her former guardian, her husband became the purchaser and the purchase price was paid by crediting the amount on the judgment in favor of the wife. The deed was executed by the commissioner to the husband, who has since died. In this action by the wife against the only child of the deceased husband, alleging that the conveyance was made to the husband through negligence or mistake, and seeking to have the title conveyed to her. Held—That the relief should be granted, as it appears that the husband paid no part of the purchase price, and that the wife believed that the title would be and had been conveyed to her, otherwise she would not have consented to have the land paid for with her means.

John C. Walker for appellant.

Marc Mundy for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

As appears from the petition in this case, the allegations of which are sustained by the proof, the plaintiff (appellee) was the granddaughter and ward of M. Kean at the time of his death, and in an action for the settlement and distribution of his estate it was ascertained and adjudged he was indebted to her in the sum of about $11,000; that to satisfy that and other demands against his estate certain real estate in the city of Louisville was adjudged to be sold, and at said sale J. J. Clemons, the husband of the plaintiff, bid for and became the purchaser of four lots described in the petition and judgment in this action, the purchase price of which was paid by entering credit therefor upon the amount found due by her guardian to the plaintiff. But the plaintiff states that through negligence, carelessness or mistake her husband received the commissioner's deed for said lots, of which she was not aware until since his death, which occurred suddenly, and while he was away from home.

It is clearly shown, by the evidence in this case, that the deceased husband of the plaintiff paid no part of the purchase price of the lots in question, but the whole of it was paid by reducing to that extent the amount of her judgment against the estate of her late guardian, which was done by order of the court, the judgment being at the time existing and unsatisfied. It also appears that the plaintiff was at the time just about twenty-one years of age and had no experience in business, and the management of her business was intrusted to her husband, and she believed the title of the lots purchased by him at the sale would be and had been conveyed to her, otherwise she would not have consented to have them paid for with her means. J. J. Clemons left at his death one child, Maggie Judge Clemons, the defendant, an infant, also child of the plaintiff. We think the deed was made by the commissioner to J. J. Clemons through mistake, and without the knowledge or consent of the plaintiff, and, as has been heretofore held by this court, relief against fraud or mistake may be afforded as well in the procurement and execution of deeds under judgment of court as in a private

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transaction, and the circumstances under which the deed in question was executed make this a case deserving the interposition of the chancellor.

We are, therefore, of the opinion the judgment correcting the mistake and directing the title of the lot conveyed, in exchange, by judge, as well as the other three, to be vested in the plaintiff is proper, and must be affirmed.

COMMONWEALTH v. PATTERSON.

(Filed May 24, 1888—Not to be reported.)

1. Bills of exceptions—A statement by the judge appended to the bill of exceptions after he has approved and signed it can not be considered by this court.

2. Judicial notice—The court and jury have the right to take cognizance of the county in which public cities and towns are situated without proof aliunde of that fact. Upon a trial, in Washington county, for larceny, the prosecuting witness testified that the stolen property was taken in Springfield. Held—That the court and jury had the right to presume that reference was made to Springfield, the county seat of Washington county, the presumption being that they knew that Springfield is the county seat of Washington county, and situated in that county.

3. Evidence—Venue—After the Commonwealth's attorney announced through with his evidence the question was made that the venue was not proved. He then offered to recall the prosecuting witness to prove that the crime was committed in Washington county, but the court would not allow him to do so, and instructed the jury to find for defendant. Held—That it was the duty of the court to allow the evidence for the purpose of determining the jurisdictional question, in order that the court, if it had not jurisdiction, might transfer the case to the court having jurisdiction. (Criminal Code, section 250.)

P. W. Hardin for appellant.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Bennett.

The appellee having been indicted in the Washington Circuit Court for grand larceny, he was put upon his trial, and upon the announcement of the appellant that it was through with its evidence the circuit court, upon the motion of the appellee's attorneys, instructed the jury to find for the appellee.

The bill of exceptions shows that Vancleave testified that the watch, which the appellee is charged with having stolen, was taken from his house in Springfield. The bill of exceptions also shows that another witness testified that Vancleave lived in Springfield, Washington county. The bill of exceptions concludes as follows:

"The foregoing bill of exceptions having been tendered and examined by the court and corrected, is now approved and signed and ordered to be made part of the record herein.

"WM. E. RUSSELL,
"Judge 18th Ky. District."

Following the bill of exceptions and the official signature of the presiding judge is a written statement signed by the said judge to the effect that there was no evidence before the jury showing that the appellee committed the

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crime with which he was charged in Washington county, and that, for that reason, he gave the jury a peremptory instruction to find for the appellee.

Subsection 3 of section 337 of the Civil Code provides as follows "If the bill of exceptions be approved by the judge he shall sign it, and it shall be filed as a part of the record, but not spread at large upon the order book. If not approved, he shall correct it or suggest the correction to be made, and sign it." The remaining portion of the section provides how either party objecting to the correctness of the bill of exceptions as signed by the judge may proceed. The bill of exceptions shows that the judge corrected it, and then approved and signed it. If the bill of exceptions fully and correctly set forth the evidence it was the duty of the judge to sign it. If it did not correctly set forth the evidence it was his duty to correct it so as to make it conform to the truth, and then sign it. This he did, and having done so, the bill of exceptions became an official paper, and the only official paper that we can consider. His susbequent written statement was unauthorized and unofficial, therefore, we can not consider any statement made in it. But if the written statement was considered it does not contradict that part of the bill of exceptions that represents Vancleave as testifying that the watch was taken from his house in Springfield from which statement the jury had the right to presume that reference was made to Springfield, the county seat of Washington county. The court and jury have the right to take cognizance of public cities and towns within their jurisdiction, without proof aliunde of the particular county in which they are situated; they are presumed to have knowledge of that fact; for instance, the court and jury are presumed to know that Springfield is the county seat of Washington county, and that it is situated in that county. This presumption is judicial, and no proof aliunde is required of the fact. The burden, threrefore, was on the appellee to show that the offense was committed in some other jurisdiction.

After the Commonwealth's attorney announced himself through with his evidence the question was made that the venue was not proved; he then offered to recall the witness, Vancleave, for the purpose of proving that the crime was committed in Washington county, but the court would not allow him to do so, and instructed the jury to find for the appellee. This evidence was not offered as tending to show that the appellee was guilty of crime, but it was offered merely for the purpose of establishing the jurisdiction of the court. Section 230 of the Criminal Code provides: "If, during the trial, it shall appear that the offense was committed out of the jurisdiction of the court, but within the jurisdiction of some other court of this State, the court shall stop the trial, discharge the jury and take the proceedings in the case directed in sections 166 and 167." The appellee was charged with the crime of grand larceny, and there was proof tending to show that he was guilty of that crime. And it was the duty of the court to allow the evidence for the purpose of determining the jurisdictional question in order that the court, if it had not jurisdiction, might transfer the case to any other court in the State having jurisdiction.

As the appellee has been acquitted the case can not be reversed; the clerk of this court is, therefore, directed to certify this opinion to the court below.

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TAYLOR v. COMMONWEALTH.

(Filed May 24, 1888—Not to be reported.)

Criminal law—Evidence of accomplice—As the conviction of appellant was obtained principally, if not wholly, upon the evidence of an acknowledged accomplice, the accused was entitled to an instruction given in the language of section 241 of the Criminal Code. Therefore, the court erred in omitting from its instruction the latter part of that section which provides that "the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof," and the error was, in this case, prejudicial.

D. K. Rawlings for appellant.

P. W. Hardin for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Lewis.

Appellant was indicted for the offense of housebreaking, and stealing therefrom, and the only evidence connecting him with the commission of it, besides that given by an avowed accomplice, was that a bottle of whisky, identified by the owner of the storehouse broken, was found where it is probable the accused hid it. But that fact was explained by him and by his mother and sister in a manner calculated to relieve him from the charge, for these two witnesses testify not only that the accused purchased the whisky from the person who acknowledged his own guilt, and yet testified as a witness, and hid it because his father was opposed to the use of whisky by his son, but they also state facts tending strongly to establish an alibi. It is, therefore, clear that the conviction of appellant was obtained principally, if not wholly, upon the evidence of an acknowledged accomplice, and the accused, as has been repeatedly held by this court, was entitled to an instruction to the jury given in the language of section 241, Criminal Code, which is as follows: "A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show that the offense was committed and the circumstances thereof." The lower court omitted from the instruction, given on its own motion, the last part of the section which we have quoted, and refused to give an instruction asked for in behalf of the accused in the language and embodying the entire substance of that section.

It is not difficult to perceive how a corroboration by another person of the testimony of an accomplice as to the commission of the offense and the circumstances under which it was committed might be regarded, by an ordinary jury, as tending to connect the accused with it, even in the absence of other evidence in fact having such tendency or reasonable effect. And hence the necessity of clearly, fully and explicitly instructing the jury what evidence, according to law, they may, and what they may not, consider sufficient to connect the defendant with the commission of the offense. Besides, the legislature has deemed it necessary to prescribe the condition upon which the testimony of an accomplice may be received, and the rule by which juries are to be governed in determining the credibility of such testimony, and courts are not authorized to disregard the conditions or relax or impair the rule.

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For that error, which we consider prejudicial to the substantial rights of the accused, the judgment is reversed for a new trial.

KENTUCKY CENTRAL R. R. CO. v. ACKLEY.

(Filed May 24, 1888.)

1. Master and servant—Respondeat superior—Servants in the employ of a railroad company controlling and directing the movements of one train are, with reference to those in the same company upon another train, to be regarded as the agents of the company, and not the agents of each other. And where a servant of one train is injured by the negligence of a servant upon the other, the maxim respondeat superior applies, and the company is liable.

In this case, in which the engineer upon a passenger train seeks to recover of the company for injuries received in a collision of his train with a freight train, it is held that there was evidence tending to show that the injury was caused by the willful neglect of not only the engineer, but the conductor of the freight train, who had the power to direct its movements, and, therefore, the court did not err in refusing a peremptory instruction.

2. Compensatory damages for personal injuries when death does not ensue are confined to the expense of cure, value of time lost, and a fair compensation for the physical and mental sufferings caused by the injury, and for any permanent reduction of the power to earn money.

The court in this case instructed the jury that if they heliveed that by reason of plaintiff's injuries "he was temporarily or permanently disabled from labor at his business in whole or in part, and that said injuries were the result of willful negligence of plaintiff's employes, * * * they shall find for him such damages as he sustained, not exceeding the amount claimed in the petition." Held—That this instruction restricted the inquiry of the jury in assessing damages to the reduction of the plaintiff's power to earn money, and, therefore, the failure to give another instructon as to the criteria of compensation - calling attention to other elements of damages—was not prejudicial to defendant. Moreover, as to physicians' bills and lost time, the plaintiff's attorneys having announced on the trial that he made no claim on that account, and the jury having heard the disclaimer, it is not to be presumed that they considered them.

3. Punitive damages—The jury were not authorized by the instruction to find punitive damages. The direction to find such damages as the plaintiff sustained is entirely distinct from the idea of punitive damages.

L. T. Applegate and G. C. Lockhart for appellant.

Cowan & Ferris, John H. Fryer and J. W. Peck for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Lewis.

Appellee brought this action to recover damages for personal injuries, resulting from a collision of a passenger train of cars, upon which he was acting as engineer, with a freight train, both being at the time operated upon appellant's road.

The collision, which it is in the petition alleged was caused by the willful negligence of appellant and its servants, occurred a short distance south of the end of the side track at Catawba station, but at a curve in the road where those in charge of the respective trains could not perceive the danger in time to prevent it. It appears from the evidence the passenger train was at the time going from Covington south, and was due at Catawba at 9.10 p.

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m. and at Falmouth at 9.18 p. m. There is a slight difference in the testimony of the engineer and the local agent at Falmouth in regard to the precise time the freight train left that station, bound north, but we think it is satisfactorily shown it did not leave soon enough, going the allowable rate of speed, to arrive at Catawba and get upon the side track in ten minutes, the time prescribed by the rules of the company, or any length of time, before the passenger train was due there. And as the latter train was as near on time as is generally practicable, and was entitled to the track, it is evident the collision was caused by those in charge of the freight train, which was four or five hours behind time, leaving Falmouth when a collision would be probable, if not inevitable. We, therefore, think there was evidence tending to show, if not clearly showing, the injury to appellee was caused by the willful neglect of not only the engineer, but conductor of the freight train, who had the power to direct its movements, and ordered, or improperly permitted, the departure from Falmouth, and the lower court did not err in overruling the motion of the defendant for a peremptory instruction to the jury, if the maxim respondeat superior be applicable to a case like this. And that it should be thus applied has been settled by this court in L., C. & L. R. R. Co. v. Cavens' Adm'r, 9 Bush, 559.

In that case the action was instituted by the personal representative of an engineer whose life was destroyed by reason of a collision of the train he was on with another freight train. The two trains were not in that case, as in this, moving in an opposite direction, but the one upon which the decedent was acting as engineer was in rear of and ran into the other, that was at the time, and had been for a half an hour or more, stationary at the foot of an up-grade, or vainly trying to ascend it. But notwithstanding the evidence showed the train dispatcher was also negligent, yet the question of the liability of the company for the negligence of the conductor of the train in front in failing to give any signal or warning by which those on the coming train might have been advised of the danger of a collision, was directly considered and determined in the affirmative. It was argued in that case that the rule should be applied that when a number of persons contract to perform service for another, the employes not being superior or subordinate to each other in its performance, and one is injured through the negligence of another, they are to be regarded as the agents of each other, and no recovery can be had against the employer. But it was held that a different rule prevails when the employment is several, and when one is subordinate to the other or occupies such a position in the service with reference to his co-laborer as precludes him having any control over his actions or right to advise even as to the manner in which the service is to be performed. And the court used this language: "If Cavens, the person killed, had been on the same train with Armstrong, the negligent conductor, and in a condition, by reason of his equality with him as an employe, to watch over and provide against his negligence, the reasons, then, for refusing to make the company liable would apply; but where on different trains, and with no opportunity to exercise this watchful care over each other, the reason for releasing the company from responsibility ceases to exist, and in such case those controlling and directing the movement of one train with reference to those upon another train must be regarded as the agents of the company." It is useless to add to what was said in that case, because the rule there adopted is clearly applicable in this, and is reasonable and just.

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The next, and only other, question made, in argument for appellant arises on instruction No. 1, given at the instance of appellee, as follows: "If the the jury believe, from all the evidence, that the plaintiff was in the employment of the defendant as engineer of passenger train No. 6, known as the fast line on said defendant's road, and was so in charge of said train on the evening of the first day of December, 1882, and that said train collided with local freight train No. 13, belonging to said defendant, on the said road, near Catawba Station, on said road, and that thereby said plaintiff received injuries on his head, shoulders, hip and spine, or either and that from said injuries he was temporarily or permanently disabled from labor at his business, in whole or in part, and that said injuries were the result of the willful negligence of defendant's employes in control of said freight train No. 13 at said time; they shall find for the plaintiff such damages as he sustained, not exceeding the amount claimed in the petition, unless they shall further believe from the evidence that said plaintiff contributed by his own negligence to bring about said collision and injuries, and but for said plaintiff's negligence he would have escaped the injuries, in which latter case they should find for the defendant." The objections made by counsel to that instruction are that it authorized the jury to give compensatory damages, without being informed by the court of the criteria by which it was their duty to be governed in fixing the amount, and in directing them, in case they believed the injury was the result of willful neglect, to find punitive damages, instead of leaving such finding to their discretion.

Compensatory damages for personal injuries where death does not ensue, as held by this court, is confined to the expense of cure, value of time lost, a fair compensation for the physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money. (L., C. & L. R. R. Co. v. Cavens' Adm'r, 9 Bush, 728; Muldraugh's Hill, C. and C. T. Co. v. Maupin, 79 Ky., 101.)

Neither the expense of cure, value of time lost, nor mental and physical suffering are referred to in the instruction as elements of damages sustained by the plaintiff and to be assessed by the jury, but the language used by the court restricted their inquiry to the extent of his disability to labor at his business, that is, reduction of his power to earn money.

It appears that during the examination of the plaintiff as a witness he was asked if the defendant did not pay his physicians' bills and also pay for his lost time, whereupon the attorneys for the plaintiff announced he made no claim for expenses on account of medical attention or loss of time. We must, therefore, presume the lower court, as was its duty, purposely omitted to mention in the instruction either of those two elements of damages, and that the jury, having heard the disclaimer, did not, in the absence of an instruction to that effect, take them into consideration in assessing the amount. As the jury had the right, and it was their duty, to consider the mental and physical suffering caused by the injury, the failure of the court to instruct them to do so was certainly not prejudicial to the defendant.

We do not think the jury could have regarded themselves authorized by the instruction to find punitive damages. The language is: "They shall find for the plaintiff such damages as he sustained," which is entirely distinct from the idea of exemplary or punitive damages; that might have been given to or found for, but could not, in any sense, have been sustained by, him.

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There is some contrariety in the testimony as to the character and extent of the injury done to the plaintiff. But there was evidence before the jury conducing to show his sufferings were great, and the injury of a serious and permanent nature. And we are not, therefore, authorized to say the verdict was the result of passion or prejudice, or that the amount of damages fixed is so excessive, compared with like cases heretofore passed on by this court, as to justify a reversal.

Judgment affirmed.

ATKINSON, &c. v. GOWDY'S ADM'R, &c.

(Filed June 5, 1888—Not to be reported.)

Homestead—A mortgage executed by the husband alone does not operate to deprive either him or his wife of the homestead exemption right in the land mortgaged, nor deprive the husband of the power to sell and pass a complete title to the purchaser of such land of the value of not exceeding $1,000, and invest the proceeds in another homestead.

In this case, the husband having executed a mortgage on land to which he was entitled as a homestead, the wife not uniting in the mortgage, it was error to decree a sale of the land for the satisfaction of the mortgage debt, subject to the homestead right, the land being of less value than $1,000; and the purchaser, at the commissioner's sale, having acquired nothing by his purchase, the sale should have been set aside.

Thomas H. Hines and J. R. Robinson for appellants.

G. W. Craddock and R. E. Puryear for appellees.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Lewis.

The judgment rendered in this case is in substance that the plaintiff, in virtue of the mortgage executed by the husband alone, the wife not uniting, has a lien on the land for the payment of the debt sued on, and the right to have so much of it as may be necessary sold subject to the homestead interest of Elizabeth, the wife, and R. N. Atkinson, the husband and debtor, the land being of less value than $1,000. It is not clear, from the transcript before us, whether it was intended by the lower court to adjudge that both of them, or only the wife, is entitled to the homestead exemption, for which the sale is directed to be made subject to the interest of both of them. The homestead is directed to be allotted to her only.

Under that judgment the commissioner, as he reported, sold the land, subject to the dower and homestead interest of Elizabeth Atkinson, for the sum of $200, the tract having been appraised at $687.50, the plaintiff, who is personal representative of the mortgagee, now dead, becoming the purchaser.

And the exceptions filed to the report of sale by Atkinson and wife were, at a subsequent term of court, overruled and the sale confirmed.

Section 13, article 13, chapter 38, General Statutes, provides that "no mortgage, release or waiver of such exemption, homestead, shall be valid unless the same be in writing, subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate." And it has been often held by this court that a mortgage, in which the wife does not join, does not pass the homestead right of either of them.

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(Thorn v. Darlington, 6 Bush, 648; Wing v. Hayden, 10 Bush, 276; Long v. Effort, 80 Ky., 152.)

The purport of the judgment in this case is that the effect of the mortgage was to divest the husband of his homestead right, and the commissioner, so construing it, sold the land, subject only to the dower and homestead right of the wife. And consequently, if that judgment stands, the purchaser, upon the death of the wife, would own and be entitled to the possession of the entire tract, although the husband might be still living and a bona fide housekeeper with a family.

A mortgage executed by the husband alone does not operate to deprive either him or his wife of the homestead exemption right in the land mortgaged, nor deprive the husband of the power to sell and pass a complete title to the purchaser of such land of the value of not exceeding $1,000, and invest the proceeds in another homestead.

We think the court erred in subjecting any part of the land or interest in it to sale to satisfy the mortgage debt, and as the purchaser at the commissioner's sale acquired nothing, the sale ought to have been set aside, and so the action, so far as it seeks a sale of the land, is dismissed without prejudice.

Judgment reversed for further proceedings consistent with this opinion.

MAXWELL v. BRYANT.

SAME v. SAME.

LUDLOW v. MAXWELL.

(Filed June 16, 1888—Not to be reported.)

1. Appeals—Right to dismiss—Appellant transferred his interest in the property in controversy to M. for a monied consideration and upon the further condition that M. was to pay certain counsel fees and costs. M. and the appellees come now and move the court to dismiss the appeals. This motion is objected to by appellant and his counsel. Held—That a compliance with the terms of settlement must be shown before this court will dismiss the appeal over the objection of appellant and his counsel.

2. Same—In a proceeding to divide land M. obtained a judgment favorable to her interest and against that of L., who prosecutes an appeal. Pending the appeal M. has died, leaving two children. C., one of them, has conveyed her interest to a trustee, who unites with the other child of M. and with L., the appellant, in a motion asking this court to reverse the judgment. C. by counsel, opposes the motion, saying that the trust deed is void, and that she has employed counsel to have it cancelled. Held—That C. has the right to be heard on the appeal.

O'Hara, Bryan & Cleary for appellees.

Hallam & Myers for Ludlow, &c.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

In the first two cases of Maxwell v. Bryant it appears that Maxwell, the appellant, had transferred his interest to the property in controversy to McCoy for a monied consideration paid and upon the further condition that

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McCoy was to pay the attorneys' fees of counsel for Bryant and all costs. McCoy and the appellees in those cases come now and move the court to dismiss the appeals. This motion is objected to by Maxwell and by his counsel, O'Hara, Bryan & Cleary. No tender has been made of the attorneys' fees or offer to pay, and a compliance with the terms of settlement must be shown before this court will dismiss the appeals over the objection of the appellant and his counsel.

In the case of Ludlow v. Maxwell, it appears that this was a proceeding in the court below to divide a valuable tract of land and lots in the county of Kenton; that Mrs. Maxwell obtained a judgment below favorable to her interest and against that of Ludlow, who prosecutes the appeal. Mrs. Maxwell is now dead, having left two children. One of them, Mrs. Connor, conveyed her interest in this land to a trustee, who now unites with Ludlow, the appellant, and with the other child of Mrs. Maxwell in a motion, asking this court to reverse the judgment below, with directions to dismiss the petition. Mrs. Connor, by her counsel, opposes the motion, and says that the trust deed in void, and she has employed counsel to have it cancelled. Her counsel is the same employed by her mother to bring the original action for a division. If the statement of counsel be true, the beneficiary, Mrs. Connor, has a direct interest in the controversy, and if this action was pending below she could be made a party and allege her complaint. She has the right to be heard here, and, therefore, the motion in each case is overruled.

HENSLEY v. COMMONWEALTH.

(Filed June 16, 1888—Not to be reported.)

1. Bribery—Arrest of judgment—The only ground upon which a judgment in a criminal case can be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

As the indictment in this case for vote selling is direct and certain as to both the party and the offense charged and the place of commission, the matters stated constitute a public offense, although the indictment does not state who gave the bribe.

2. Evidence—The only witness for the Commonwealth says that he heard a conversation between the defendant and another as to voting, but instead of detailing it states what he "thinks" the defendant was to do and the inducement. Held—That the defendant's objection to this testimony should have been sustained.

J. H. Tinsley for appellant.

P. W. Hardin for appellee.

Appeal form Harlan Circuit Court.

Opinion of the court by Judge Holt.

The only ground upon which a judgment in a criminal case can be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. (Criminal Code, section 276.)

This indictment for vote selling is direct and certain as to both the party and offense charged and the place of commission.

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In setting forth the circumstances it does not state who gave the bribe, but it charges that the appellant, at precinct No. 9, in Harlan county, in consideration of one in money, voted at the August election, 1886, for one Huff for county court clerk of said county.

There was no demurrer to the indictment. It is not, therefore, a question whether an offense was defectively stated, but whether one was stated at all.

In our opinion the matters stated in the indictment did, if true, constitute a public offense.

But one witness for the Commonwealth was introduced. He stated, as the bill of exceptions recites, "that at the August election, 1886, in Harlan county, he heard some talk between Leander Skidmore and Gilbert Hensley (the defendant) about voting. He thinks that Gilbert and his brother, Andy, who was drunk, was to vote for W. C. S. Huff for clerk and Wilson Hensley for jailer, and some other candidates, but that it would take $15. He afterwards gave said Skidmore $5, and Skidmore said he had $10."

The appellant objected and excepted to the above testimony.

The witness further stated that Gilbert and Andy Hensley voted for Huff and Hensley at the election; that he did not know whether the appellant got any money or not; that he did not give him any, and that he (the appellant) was for Huff all the time.

The accused testified that he voted for Huff and Hensley, and was for them all the time, and did all he could for them; that Skidmore gave him $15 to procure his brother, Andy, to vote for them, and he gave him the money, and he did vote for them; that he kept none of the money himself; did not agree to take any of it, nor did he vote for any bribe or by reason of the offer of any.

No other testimony was offered upon the trial.

It is manifest that the jury based their verdict upon the testimony of the witness for the Commonwealth that was objected to by the appellant. It was incompetent. The witness says that he heard a conversation between Skidmore and the accused as to voting, but instead of detailing it he states what he "thinks" the latter was to do and the inducement.

A conviction in a case like this deprives one of a right which should not only be highly prized by the citizen, but the proper exercise of which is important to the State.

It should only be had in a case where, upon proper testimony, the accused is proven guilty beyond a reasonable doubt.

It is unnecessary to consider the other questions presented, as for the error indicated the original judgment and attempted amendatory one must be and are reversed, and the cause is remanded, with directions to grant the appellant a new trial.

ELDRIDGE v COMMONWEALTH.

(Filed June 16, 1888.)

1. Punishment at hard labor for nonpayment of fine—In order to authorize the punishment at hard labor in lieu of imprisonment for nonpayment of a fine, as provided by the act of April 10, 1878, the jury must say in terms whether the defendant shall be put at hard labor. It was not sufficient in this case for the jury to say in their verdict: "The working statute applied." It was the duty of the court to instruct the jury what was the nature and meaning of the statute, and for them to fix in their verdict the character and extent of the punishment, if any, they intended to inflict under it.

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2. Same—No offenses for which a greater or other punishment than fine and imprisonment can be inflicted are contemplated by the statute. Therefore, the punishment of hard labor can not be imposed in addition to the punishment of exclusion from office and suffrage.

John Dishman for appellant.

P. W. Hardin for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge Lewis.

The offense charged in the indictment against appellant is receiving a bribe for his vote at an election, denounced by section 11, article 12, chapter 33, General Statutes, the punishment for which is a fine from $50 to $500, and exclusion from office and suffrage.

But under an instruction of the court the jury returned a verdict of guilty, fixing the punishment at $50, exclusion from office and suffrage, and, in the language used, "the working statute applied." And thereupon the court rendered judgment for the fine, for excluding him from office and suffrage; and further, that, having failed to pay or replevy the fine and the cost of the prosecution, he be placed in the custody of the jailer and worked in the public streets and roads of Harlan county the period of fifty days of eight hours each, under the supervision of the jailer, and when not at work to be kept in jail.

The "working statute," as it is called in the verdict, and under which the judgment of the court was in part rendered, is one approved April 10, 1878. (General Statutes, new edition, page 464.)

By section 2 of that statute it is provided that if part or all of a penalty for a misdemeanor, prescribed in chapter 29, General Statutes, "be a fine, it shall be in the discretion of the jury fixing the amount of the fine to say in its verdict whether, if the fine and costs are not immediately paid or replevied by the defendant, he shall be put at hard labor in lieu of imprisonment for nonpayment of the fine; and if such be the verdict of the jury the court shall direct that the defendant be placed under the control of the jailer at hard labor for the benefit of the county," etc.

There are two sufficient reasons why the judgment rendered in this case is erroneous and illegal:

1st. The statute gives to the jury discretion to say, and to authorize any judgment of the court in regard thereto, it seems to us, requires the jury to say, in terms whether the defendant shall be put at hard labor.

It is not, in our opinion, sufficient for the jury to say in their verdict merely "the working statute applied." It was the duty of the court to instruct the jury what was the nature and meaning of the statute, and for them to fix, or not to fix, in their verdict the character and extent of the punishment they intended to inflict under it.

2d. The offenses for which it was intended by the statute to prescribe the punishment of hard labor are manifestly such as may be punished under chapter 29 of the General Statutes merely by fine and imprisonment in the county jail, and such as, by reason of the punishment, are denominated misdemeanors, as distinguished from crimes and high misdemeanors, for which, under section 4, article 8 of the Constitution, a person may be excluded from office and from suffrage.

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Section 1 of the statute relates to cases where a part or all the penalty prescribed is confinement in the county jail, while section 2 relates to cases where part or all the penalty is a fine, the punishment by hard labor being authorized in the discretion of the jury under both sections. And section 3 is as follows: "If the penalty for a misdemeanor prescribed in said chapter be both fine and imprisonment, the principle of section 1 shall govern as to the imprisonment, and that of section 2 of this act shall govern as to the fine."

It is thus made clear that no offenses for which a greater or other punishment than fine and imprisonment can be inflicted are contemplated by the statute, and that the punishment of hard labor can not be imposed in addition to the punishment of exclusion from office and suffrage.

In our opinion the judgment rendered in this case is unauthorized and void, and consequently must be reversed for a new trial.

PEARCE v. COMMONWEALTH.

(Filed June 16, 1888—Not to be reported.)

1. Presentment of indictment—The orders in this case show a substantial compliance with section 121, Criminal Code, which provides that the indictment must be presented by the foreman in the presence of the grand jury to the court and filed with the clerk and remain in his office as a public record.

2. Prejudicial errors—There can be no reversal for the admission of incompetent testimony which could not have prejudiced the defendant.

3. Evidence—Conspiracy—Upon the trial of appellant for murder the court properly refused to allow defendants jointly indicted with him to testify in his behalf, a conspiracy between the defendants being charged, and there being evidence tending strongly to show the existence of the alleged conspiracy.

4. Evidence—Although the killing with which appellant was charged seems to have been the result of a feud, the court properly refused to allow a witness to state what he heard the leader of one of the factions say in regard to the killing.

5. Withdrawal of incompetent evidence—Although a copy of an indictment against appellant and others was improperly permitted to go to the jury as evidence, yet as it was withdrawn by the court, and the jury were told they had no right to consider it for any purpose, the court has no right to presume that appellant was prejudiced by the reading of the indictment to the jury.

J. H. Tinsley for appellant.

D. J. Little for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Lewis.

Section 121, Criminal Code, provides "that the indictment must be presented by the foreman in the presence of the grand jury to the court and filed with the clerk and remain in his office as a public record."

The transcript before us shows an entry of record in this case in these words: "The grand jury appeared in open court and by and through their

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foreman made the following report," which was followed by the entry of the style of an indictment for murder against appellant and the others indicted jointly with him.

At the same time the following entries were also made: "On the back of said indictment is the following endorsement, viz., a true bill, William Worth, foreman," and "received from the foreman of the grand jury in the presence of the grand jury and filed in open court."

It seems to us the Criminal Code has been, in every respect, substantially complied with, for there can be no uncertainty or doubt of the indictment under which appellant was tried, having been duly presented to the court and filed with the clerk.

Howard Monroe was, about a half hour after dark, shot through a window of the house of John Myers, where he was at the time a visitor, and killed, and appellant, T. J. Henderson, Joseph Henderson and Alvis Turner were jointly indicted for the murder, a conspiracy between them being charged.

It appears there had for sometime previously existed in the county of Bell, where the crime was committed, a feud between two factions, the leaders of which were respectively Jack Turner and Sanders, by reason of which several persons had been killed, Jack Turner being one of them, having been shot in the town of Pineville from the house of Alex. Monroe, an uncle of Howard Monroe. The four defendants were cousins, three of them being nephews, and one a son of Jack Turner, and all of them partisans of the faction of which he was the leader until his death. But the deceased was not a member of either faction, had not taken part in the feud, nor, so far as the evidence shows, had there ever been any enmity or even intercourse between him and appellant before he was killed. The only one of the four persons indicted who, it appears, had any ill-feeling at all against him or personal reason or motive for taking his life was T. J. Henderson, who, the evidence tends in some degree to show, was jealous of him, by reason of attentions paid by him to a young lady. But it seems to be conclusively shown that he did not actually commit the deed, being, at the time the shots were fired, in another part of the Myers house, where he lived, eating his supper. Nor did either Joseph Henderson or Alvis Turner, according to the evidence, do the shooting, for they likewise established an alibi by a witness introduced by the Commonwealth. Appellant also was away from the scene of killing, acording to the testimony of his relatives, but the jury seems to have disbelieved them.

If appellant be guilty, the motive or incentive for the deed must have been the remorseless and blood-thirsty spirits which had been engendered by the feud between the two factions, or that he was hired by T. J. Henderson, which seems to be the theory of the prosecution, and in support of which there was evidence regarded by the jury sufficient to authorize conviction. The evidence is, the four defendants had been sometime associating and going together armed, and were seen in company on the premises of Myers the day Howard Monroe was killed, though he was at the time absent, in company with the young lady referred to, and they were together at the same place next day after the killing. Two men were seen near the house of Myers a short time before the killing, who, from the suspicious circumstances detailed by the witnesses, were anxious to avoid recognition, and a witness testifies one of them looked like T. J. Henderson, and stated facts tending to show it was him. And one witness, John Crook Turner, who

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had belonged to the Jack Turner faction, testified the appellant confessed to him he had killed Howard Monroe, firing two shots at him, and that T. J. Henderson had agreed to give him a suit of clothes, $20 and a pistol to do the deed. And that testimony was corroborated by the evidence of another witness who testified that on Saturday, the day of the killing, he loaned his pistol to T. J. Henderson, who offered to buy it, and asked him what he would have to pay if it was not returned; that the next day he saw the pistol in the possession of appellant, who told him he had bought it from Henderson, whom he would have to see about it; that he went with appellant to where Henderson was, and, insisting upon the return of his pistol, appellant, after having a private conversation with Henderson, did return it, but gave him two less cartridges than Henderson had got from him, and appellant then had in his possession a $20 bill.

The Commonwealth was permitted to prove, the appellant objecting, that the next day after the crime was committed T. J. Henderson was hunting cartridge hulls, giving his opinion as to where, near Myers' house, they should be found, and that he did pick up one which, the witness stated, he did not think had been recently fired.

It was proved that Joe Henderson was also, on the day after the killing, hunting cartridge hulls of calibre 45. And one witness testified that he gave to him some shells which he, witness, had sometime before picked up and carried home, and that he next saw them at the examining trial of the parties charged with killing Howard Monroe.

It is true the conversation and conduct of the two Hendersons took place after Monroe was killed and without the presence of appellant. But it does not appear what the object of the prosecution was in introducing the evidence, nor do we see how it could have affected appellant one way or another. The only effect it could have had was to create a suspicion that T. J. and Joseph Henderson themselves were the guilty parties, but we do not perceive how even that could have been, because it does not appear to us how the cartridge shells could be used to fix the identity of the assassin. The evidence, though incompetent, did not, therefore, we think, prejudice the substantial rights of appellant.

The copy of an indictment for killing Thomas, against appellant and others, which was in the Bell Circuit Court, though improperly permitted to go to the jury, was subsequently, and before the conclusion of the evidence for the Commonwealth, withdrawn by the court, and the jury was told they had no right to consider it for any purpose in making their verdict.

We have no right, therefore, to presume that appellant was prejudiced by reading that indictment, for to do so requires the assumption that the jury disregarded their duty in their oath to try the accused according to the evidence.

It was not competent to prove by the witness called for the defense what he heard Sanders, the leader of one of the factions, say in regard to the killing of Monroe, and the objection of the attorney for the Commonwealth was properly sustained. Nor did the evidence introduced by the prosecution, as to where Sanders and his gang were when the killing took place, render hearsay evidence in behalf of the defendant competent.

We think there was evidence tending strongly to show that not only T. J. Henderson, but also Joseph Henderson, conspired with appellant to murder Monroe, and the court did not, therefore, in our opinion, err in refusing to mit them to testify. And as to T. J. Henderson's complicity with ap-

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pellant in the killing, we think the evidence was such as to satisfy the court. Moreover, Alvis Turner was introduced as a witness for appellant, and accounted for the way in which the two cartridges were used that appellant failed to return to the owner when the pistol was given up, and that is the only fact exculpatory of appellant that it is contended in argument Joseph Henderson would or could have testified to, having such bearing, for he was not present at the time the killing was done.

No objection is made to the instructions of the court to the jury, nor do we see any. In our opinion no error of law prejudicial to the substantial rights of appellant occurred at his trial, and the judgment of conviction must be affirmed.

RICHEY v. COMMONWEALTH.

(Filed June 16, 1888—Not to be reported.)

1. Continuance—Evidence—Appellant was tried and convicted for forging certain letters of recommendation which the prosecuting witness stated appellant had exhibited to him. Appellant asked a postponement of the case to enable him to procure the attendance of witness from another State, to prove the genuineness of certain letters which he introduced in evidence as the letters that he exhibited to the prosecuting witness. Held—That the court did not err in refusing to postpone the cause, because these letters were proved beyond question to be genuine. Besides, appellant was not convicted of forging these letters, but certain other letters which appellant denied having received or exhibited.

2. Submission to jury in defendant's absence—Where a jury is put in charge of a sheriff when a case is submitted to them, and remain in his charge until they return their verdict, there is but one submission, although the jury may from time to time adjourn from the consulting room to the hotel for the purpose of taking their meals, or to their meals, or to their sleeping apartment, and then return to their consulting room. It is not necessary, therefore, that the defendant should be present each time when they return to their consulting room.

Scott & Violett for appellant.

P. W. Hardin for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted and convicted in the Franklin Circuit court of the crime of forgery. He has appealed to this court. The three letters of recommendation—two from Gibson, the cashier, and one from Evans—which he introduced in evidence as the letters that he exhibited to Mr. Pepper were proven beyond question to be genuine. Therefore, the refusal of the court to postpone the case for the purpose of allowing the appellant to procure the attendance of witnesses from the State of Missouri to prove the genuineness of these letters was not prejudicial to the rights of the appellant. Besides, he was not convicted for forging these letters. He was convicted for forging two other letters purporting to have been written by Evans and Gibson, and addressed to Mr. Pepper, in which the appellant was commended as a man of wealth, and financially good for any contract that he might make. The

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appellant, in his evidence, denied having received or presented these letters to Pepper. Pepper says that he did. Therefore, as it was an admitted fact by the appellant that said parties had written no such letters, we fail to see what good the proposed proof would do him. Therefore, the court did not err to his prejudice in refusing to postpone the case.

The appellant also contends that the case was submitted to the jury to consider of their verdict in his absence, which he assigns as an error to his prejudice. The case was not submitted to the jury in the appellant's absence. When the case was submitted to the jury they were put in charge of the sheriff, and remained in his charge until they returned their verdict. Their adjournment from the consulting room to the hotel for the purpose of taking their meals, or to their sleeping apartment, and then returning to their consulting room, can not be considered a resubmission of the case every time they may do these things. They all constitute but one submission.

The case of Allen v. The Commonwealth and Brewer v. The Commonwealth are unlike this.

The judgment of the circuit court is affirmed.

VINCENT, GOBLE & PRITCHARD v. McALPIN & CO.

(Filed June 16, 1888—Not to be reported.)

1. Assignments by operation of law—Sales of personal property—J. entered into a written contract with appellants, reciting that he had sold to them five hundred trees that he had purchased of certain persons, naming them, the price per foot and the time and place of delivery being fixed in the contract. On the same day a verbal contract was made for the sale of other timber, and subsequently another contract was made for still other timber. Under these contracts appellants were to make advances to enable J. to pay for this timber, which they did, and the timber was delivered prior to the time fixed in the contracts for its delivery. J. being insolvent, the transaction is attacked as being within the act of 1858. Held—That the relation of vendor and vendee, and not the relation of debtor and creditor, was created by the contract, and the delivery of the timber in compliance with the contract was not a preference within the statute. The fact that the contract was not enforcible by reason of the fact that the timber was not identified is immaterial, as the contract was completed by the delivery of the timber. Nor is it material that it was delivered at a different place from that fixed in the contract or that a different measurement from that originally agreed on was adopted.

2. Same—To the extent that timber was delivered in payment of an old debt there was a preference within the meaning of the statute, and to that extent appellants must account for the timber delivered, but for nothing more.

W. C. Ireland and K. F. Pritchard for appellants.

Wm. Lindsay, Moore & Brown and Alex. Lackey for appellees.

Appeal from Boyd Circuit Court.

Opinion of the court by Chief Justice Pryor.

M. H. Johns, on the 21st of March, in the year 1884, made an assignment for the benefit of his creditors. In April, 1884, George W. McAlpin & Co. and other creditors instituted this action to have certain transactions between Johns, the debtor, and the appellants, Vincent, Goble & Pritchard,

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declared fraudulent as being made in contemplation of insolvency and with the design to prefer them as creditors. The appellants had, for many years, been engaged in conducting the business of purchasing what is known as round timber in the town of Catlettsburg, Ky. Johns, the debtor, was engaged in buying and selling timber in the same part of the State, and for years prior to the transactions adjudged to be within the act of 1856 had sold and contracted to sell to these appellants large quantities of timber, the appellants advancing him the money to purchase the timber, fell it in the forests and prepare it so as it could be rafted to the appellants at their place of business or at points where they desired it to be delivered. In August and September, in the year 1883, there was a written and also verbal contract made between Johns and these appellants for timber. On the 8th of August, 1883, they made a written contract with Johns, as follows:

"I have sold to Vincent, Goble & Pritchard five hundred trees that I purchased of Blankenship, Wm. Conly, Clay Farly and others, on Little Rockcastle, a tributary of Wolf creek, in Martin county, at 2 cents per lineal foot, and agree to deliver it at Catlettsburg, Ky., June 17, 1884, for 15 cents for twenty inch timber at the top, forty feet long, and 1 cent off or on. No raft to be less than seventeen inches in diameter.

"M. H. JOHNS."

On the same day a verbal contract was made for an inferior article of timber, and in September, 1883, a verbal contract was made for the purchase of certain oak timber. Under these contracts Johns, in February and March, 1884, delivered timber of the value of near $7,000 to these appellants, the money for which had been paid to Johns by the appellants in advance to enable him (Johns) to pay for the timber, paying his hands, furnishing them provisions and to enable him to comply with his contract. It is alleged, and not denied, that these appellants were under the agreement with Johns to make him three advances, and that such was the agreement, regardless of the averment in the pleadings, is clearly inferable from the proof. The contracts are clearly established, and the money actually advanced is made manifest by the proof, and the sole question is, Johns being insolvent when the contract was made and the moneys advanced, did the delivery of this timber in payment of the advances made bring the transactions within the act of 1856? The chancellor so held, and of this the appellants complain. It seems that at the date of the contracts the timber sold was in trees then not severed from the ground, with no marks or other identification, so as the title passed to the purchaser. The contracts were purely executory. The appellants, to make advances to enable Johns to cut the timber and deliver it, in compliance with his undertaking. The timber, however, was cut and delivered to these appellants, and it is, therefore, immaterial whether the title passed at the time of the sale or not. It was perfected by the delivery, and made that valid which could not have been enforced. The money was advanced on the faith of this executory contract, and in pursuance of an agreement to advance, and it is certain that it was advanced and used for the purpose of preparing this lumber for the market. It was not merely a loan of the money, but an advance of the funds to be paid for in this identical timber. It was a purchase of the timber that was made complete by its delivery, and the fact that it was delivered at a different place or a different measurement adopted than that provided by the contract can make no difference. Such facts would only be evidence to show that no such contract as that alleged was ever made, but that it was made there can be no doubt.

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The relation of creditor and debtor did not exist between these parties prio to June, 1884, when this timber purchased was to be delivered. and was in fact delivered. There never was any refusal on the part of Johns to perform his part of the contract, but, on the contrary, he delivered to his vendees the timber they purchased from him, but because the contract was enforcible we are asked to determine that no purchase was made, and the relation of debtor and creditor only existed. This would not be just or equitable, and, we might add, would prevent the parties from complying with a contract they were not only willing to comply with, but had in fact executed. It is questionable whether these appellants, prior to June, 1884, when timber was to have been delivered, although they had advanced large sums of money on their contracts, could have demanded payment in anything else but in the timber they had purchased; or if they could have sued at once for the money, being vendees and having received the timber, this relation and no such relation as debtor and creditor ever existed. They were no such creditors of Johns in any aspect of the case as brought them within the act of 1856, and no preference was desired or contemplated when the timber was delivered. In Napper v. Yager, 79 Ky., 241, creditors sought to set aside a deed executed by one of the parties as was alleged in contemplation of insolvency, &c. Napper had executed a deed to Ludwick under a parol agreement by which Ludwick had advanced to Napper several hundred dollars for which he was to convey the land; it was held that the transaction did not create the relation of debtor and creditor and that Ludwick could not be regarded as a creditor until the parol contract had been repudiated by Napper. In the present case the facts refute the idea of any intention to prefer, and the fact that an account was exhibited by the appellants, showing the state of accounts between them with credits and debits, does not affect the question involved. The appellants had to keep an account of moneys advanced, and, because kept in the usual way, did not create the relation of creditor and debtor and destroy the relation of vendor and vendee that existed by virtue of the contracts between the parties. It is attempted to be shown by A. K. Goble that one of the appellants denied having purchased any timber from Johns, and while this may be so it is plain that it was purchased, and much of it had been delivered before the alleged consideration (that is denied) took place. We perceive no reason for disturbing those contracts or requiring appellants to account for the value of the timber purchased under them. There is a question remaining, however, that brings the branch of the case within the insolvent act. Some $408 of the claim paid in this timber was the balance due on an old account or for advances made on other timber. It was a plain indebtedness, and the promise to pay it in timber or money under the circumstances, with an actual payment made in 1884, was a preference, and must be so construed. The payment on timber was the preference, and this the appellants must account for, but nothing more, as the timber purchased and upon which the advances were made can not be construed as a preference within the meaning of the statute.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

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ASHER v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed June 16, 1888.)

1. Eminent domain—Compensation—The Constitution requires that in the taking of private property for public use just compensation must be previously made the owner by the payment in money of the value of his property before the writ of possession can be issued. Therefore, as much of the act providing the mode of condemning private property for railroad purposes as authorizes the company to enter into possession upon the execution of a bond of indemnity is unconstitutional.

2. Same—Measure of damages—In arriving at the just compensation which the Constitution requires shall be made to the owner before entry, the value of the land taken for actual use is to be considered in its relation to the entire tract, and must include the actual injury to the improvements and every direct damage tending to diminish in value the entire tract by reason of the use and appropriation of the land taken, all of which enters into the estimate of compensation, and must be paid for before entry. And from this amount nothing can be deducted by reason of the benefits and advantages that may reasonably be anticipated from the construction and operation of the road.

Under the act of April, 1882, it is only the ordinary inconvenience and damage that results from a prudent operation of the road against which such benefits and advantages may be set off, for if the "incidental damages" from which the act provides such benefits and advantages may be deducted includes anything more, the act is to that extent unconstitutional.

3. Same—Verdict—In this case the jury under instructions fixed the value of the land taken at $600, and the damages to the adjacent land, including dwelling house, barn, orchard, etc., at $2,543.85. Held—That the instructions and verdicts show that the last-named sum must have been for the diminished value of the property from the injury that would result to the dwelling, etc., from the construction of the road. Therefore, the company can not be allowed to take possession upon the payment of the $600 alone.

Thomas H. Hines and W. M. Beckner for appellant.

Wm. Lindsay, John H. Wilson and D. K. Rawlings for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee, the Louisville & Nashville R. R. Co., in the construction of the Cumberland and Valley Branch of its road, in the county of Bell, found it necessary to condemn a strip of the appellant's land for that purpose. The questions presented here arose out of the proceeding to condemn under the act of April 11, 1882. The award of the commissioners not being satisfactory to the parties, exceptions were filed in the county court, and a jury empanelled to fix the value of the land taken, and assess the damages, and from the verdict of the jury an appeal was presented to the circuit court by the railroad company that is now pending and undetermined. When the appeal was taken the company executed its bond, that was approved by the county court, in double the amount of the damages assessed in value to the right of entry for the purposes of construction, and obtained in the circuit court its writ of possession. From the judgment awarding the writ the appellant, Asher (the owner of the land), has appealed, insisting that he is entitled to his compensation by the payment in money of the damages awarded before he can be deprived of his land.

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This court, in the case of the Covington Short Route Transfer Co. v. Piel, decided at the present term (ante, page 246), held that section 14 of article 13 of the Bill of Rights required that, in the taking of private property for public use, just compensation must be previously made the owner by the payment in money of the value of his property before the writ of possession can issue, and it follows, therefore, that the judgment must be reversed, with directions to set aside the order granting the writ. Other questions have been made in the case as to the constitutional rights of the owner, as well as the rights of the corporation on the return of the case. The land condemned is a part of a small tract on which stands the dwelling of the appellant, his outhouses and other improvements, with the line of the road running in close proximity to his dwelling. The act of April, 1882, makes it the duty of the commissioners to award to the owner the value of the land or material taken separately from the damages, if any, resulting to the adjacent lands of the owner, but shall deduct from such incidental damages the value, if any, of the advantages and benefits that will accrue to such adjacent lands from the construction and prudent operation of the railroad proposed to be constructed. (General Statutes, edition 1887, page 282.) On the trial of the case the court told the jury that in estimating the damages they should take into consideration the location of the defendant's dwelling house, orchard, barns, well, etc., and the damage to the same resulting from the construction of appellee's road, and in another instruction told the jury that the benefits and advantages, if any, to the adjacent land by the construction of the road should be deducted from such damages.

The jury, under these instructions, fixed the value of the land taken at $600, and the damages to the adjacent land, including dwelling house, barn, orchard, etc., at $2,543.75. They also said that the owner would receive no advantage or benefits from the operation of appellee's road. The corporation asks that on the return of the case it be allowed to pay the $600, the value of the land condemned, and enter into the possession, insisting that this court must assume that the $2,543.75 was for the incidental damages sustained. The instructions given by the court below, as well as the verdict rendered, show that such damages must have been for the diminished value of the property from the injury that would result to the dwelling, barn, orchard, etc., from the construction of the road, and, therefore, should have entered into and formed a part of the just compensation to which the appellant was entitled for the taking. It was error to tell the jury that the damage to the dwelling, barn, etc., should be lessened by reason of the benefits, if any, received by the owner from the construction of the road, and if the incidental damages mentioned in the statute is made up of the diminution in value of the adjacent land in the same tract, or the injury to the dwellings thereon, it must be held to be in violation of the constitutional rights of the appellant. The benefits received by the owner can in no instance reduce the value of the land or material taken, or lessen the actual and direct damage resulting from the act by which the owner is deprived of his property, and the title vested in the corporation. It is manifest in this case that the jury, by their verdict, gave to the appellant what they conceived to be the value of the property actually taken, and regarded the damage to the dwelling, barn, etc., as merely incidental, when it was in fact a part of the compensation to which appellant was entitled, and subject to no set-off whatever in the way of benefits; and, therefore, this court can not authorize an entry by the corporation upon the payment of the $600.

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The doctrine with reference to the right of entry, and particularly the question of compensation, differ widely in many of the States from the decision of this court. We have been unable to find a more just criterion for compensation than is in the case of the Elizabethtown & Paducah R. R. Co. v. Helm's Heirs, 8 Bush, 681. It is impossible to define every character of damage that is direct, and that naturally results from the act of appropriation, and still the more difficult to define the meaning of the words incidental damage, as used in the statute. The rule in the case cited is: First, to ascertain, in a case like this, a part of the land being taken first, "the value of the entire tract of land, excluding the enhancement resulting from the improvement, then what will be its value after the appropriation of such part of it as may be proposed to be taken. The difference in value thus found (still excluding this enhancement) is the true compensation to which the owner is entitled." How much less is the land worth after the taking than before the taking? This constitutes the true estimate. The value is not reached by determining the value of the strip taken for actual use, but its value, when considered in its relation to the entire tract, which includes the actual injury to the dwellings and improvements, and every direct damage tending to diminish in value the entire tract, by reason of the use and appropriation of the strip for the purpose contemplated, all of which enters into the estimate of compensation, and must be paid for before entry.

The diminution in value of the entire tract is as much a taking, within the meaning of the Constitution, as the land upon which the roadbed lies. The owner must be placed in the same condition, in a pecuniary point of view, that he would be if the land was not condemned. When the owner is thus compensated for his property the corporation becomes invested with title to the actual boundary of that part of the land condemned, and the ordinary inconvenience and damage that results from a prudent operation of the road may be set off by the benefits and advantages, if any, that may reasonably be anticipated from the construction and operation of the improvement. Such is the language used by this court in the case of Helm's Heirs, and no such meaning can be attached to that decision as gives to the corporation the right to set off the value of benefits to the owner against the diminished value of the adjacent land forming a part of the same tract caused by the construction of the road.

Judgment reversed and remanded for proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

STAFFORD v. BRUCE & CO.

(Filed April 4, 1888.)

1. Negotiable instruments—A note, although made negotiable and payable at a bank, is, under our statute, only an ordinary promissory note if never discounted at a bank.

2. Liability of assignor of note—The liability of any person who indorses an ordinary promissory note is that of an assignor, and when one thus becomes an accommodation endorser or assignor the consideration for the contract of assignment is that which passed from the payee to the maker.

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3. Same—The delay of the assignee of a note to sue for nine days after suit might have been instituted in the Jefferson Court of Common Pleas was unreasonable, and was such laches as released the assignor from liability, and an agreement made thereafter by the assignor to remain bound if the assignee would forbear to sue the maker was without consideration, and, therefore, does not estop him from relying upon the want of diligence.

4. Same—The assignor of a note may agree, before the note becomes due, that he will remain liable upon his contract of assignment without suit to establish the insolvency of the maker, and where there are several notes of a series, some due and others not due, one such agreement may be made to apply to all.

5. Same—The assignor of several notes, after his request of the assignees not to sue the makers, wrote a letter to the assignees asserting that he was not liable, but calling upon them to unite with him in an effort to make the notes out of certain property mortgaged to him by the maker of the notes to indemnify him against loss. Held—That this letter was but the expression of a willingness to trust the equity proceeding as the only suit which could be instituted, or was at all necessary, to ascertain what sum could be coerced out of the makers of the notes, and was not a withdrawal of his previous request not to sue.

6. Same—Where the assignee has failed to obtain judgment the assignor, if he has not waived diligence, is released from liability unless the assignee shows that a judgment could not have been rendered against the maker because of his removal from the State before suit could have been instituted, or his death, or that he had been adjudged a bankrupt, or was incapable of making the obligation by reason of coverture or some other legal disability.

A. E. Willson for appellant.

C. H. Gibson for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Presiding Judge Ward.

The Louisville Express and District Telegraph Co. executed five promissory notes to Bruce & Co., which were endorsed by appellant, Hugh Stafford. They were executed in Louisville, Ky., negotiable and payable at the Third National Bank. None of said notes were discounted at said bank or any other bank in this Commonwealth; they were, therefore, under the statute of this State (section 21, chapter 22, General Statutes), ordinary promissory notes, and the liability of Stafford upon said notes was that of an assignor. (Section 14 of chapter 22.) He being an accommodation endorser or assignor, the consideration for the contract of assignment was that which passed from Bruce & Co. to the makers. (Krachts' Adm'r v. Obst, &c., 14 Bush, 84.)

Said notes matured as follows: One December 28, 1884; one December 30, 1884; two February 28, 1885; one April 28, 1885.

Suit was instituted against the maker on the four notes which first matured on the 15th day of April, 1885, and due and legal diligence was exercised after the institution of the suit to pursue the maker of the notes to insolvency, as established by a return of nulla bona on the execution, which was made June 11, 1885.

On the note which matured April 28, 1885, suit was instituted May 6, 1885: summons executed May 18, 1885; judgment rendered June 20, 1885. After this there was legal diligence in prosecuting the maker to insolvency.

It is claimed for appellant Stafford that he is released from liability for lack of diligence in not instituting suit sooner on the first notes for the

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same reason as to the second suit, and for the additional reason that judgment might have been rendered in that case June 18, or one week sooner than it was.

By an act to amend an act establishing the Jefferson Court of Common Pleas, approved February 9, 1867, Session Acts, 1867, volume 1, page 35, it was provided:

"1st. That there shall be no appearance terms of the Jefferson Court of Common Pleas, and the 5th section of the act to establish said court is repealed.

"2d. That the said court shall always be open, and all summons executed in any action in said court twenty days, if executed in Jefferson county, or thirty days, if executed in any other county of the State, shall be sufficient to authorize the plaintiff or defendant to set the action on the trial docket for hearing or trial."

By section 3 of an act, approved February 5, 1866 (Myers' supplement, page 770), said court was authorized to "establish rules for the proper expedition of the business of said court," and said court has established a rule, which requires all parties wishing to have cases heard to set them at rules, which may be done on any Monday, twenty days after the summons has been executed, and on the Saturday following the rule day judgment may be rendered by default.

Speaking of the notes in the order they matured it is evident, from the face of the papers, that suit might have been instituted on Nos. 1 and 2 for three and a half months, and on 3 and 4 forty-four or forty-five days, and on No. 5 seven days, before they were instituted, and that in the suit on No. 5 the case might have been set at rules one week before it was.

Nothing else appearing, we do not see how it could be claimed that the holder of the notes was not guilty of such laches as would discharge the assignor, and we do not understand counsel for appellee as contending that the payee of the notes exercised the degree of diligence required by law in the absence of some fact which would excuse that diligence. But appellee assigns several reasons for the failure to exercise legal diligence. These we will now consider.

It is claimed that the failure was caused by the request of the assignor not to sue, and his promise that he would pay the notes without suit being instituted against the maker of the notes.

As to this matter the jury, by special verdict, found substantially the following facts: That on or about the 9th of January, 1885, the defendant agreed with the plaintiff that he would pay or satisfy the notes without suit being instituted thereon against the maker, and requested that suit should not be brought: that plaintiff relied upon the promise to pay, and in consequence thereof did not sue; that defendant did not, at any time thereafter, before plaintiff brought suit on said notes, request suit to be brought thereon, or notify plaintiff to sue thereon; that plaintiff received from defendant on the 20th of March, 1885, a letter, read in evidence, which was written March 19; that defendant, by his conduct up to March 19, induced the plaintiff to believe that he would satisfy said notes without suit being brought thereon against the maker; that nothing was said or done by defendant after the 19th of March to induce plaintiff, or by which plaintiffs were induced, to further delay in commencing suits upon said notes against the maker.

Appellant contends that these findings do not excuse the failure to sue: First, because the defendant was already released as to notes 1 and 2; second, the request could not apply to notes not then due; third, the request was withdrawn March 19, and there was laches after that as to all the notes.

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The rule as to the diligence required of the assignee or holder of the paper, in order to fix the liability of the assignor, it is said, was fixed by the opinion of the Court of Appeals in the case of Smallwood v. Woods, 1 Bibb, 542, and has been adhered to ever since. It is therein stated as follows: "The assignee ought to take every compulsory process of the law against the debtor until his insolvency is established, or the suit and its incidental remedies prove insufficient to coerce payment."

In Francis v. Grant, &c., 80 Ky., 190, the court, after a careful review of the cases, says:

"The doctrine of that case (Smallwood v. Woods) has been followed so long by the decisions of this court that it may now be regarded as among the fundamentals of the law, and the rule is now well settled, in the absence of some agreement, that before the assignee can recover of the assignor in a case like this he must institute his action at the first term of the court, obtain his judgment, have execution issued and a return of no property found without any unreasonable delay. * * * A failure to bring the action at the first term of the court, when there is reasonable time after the assignment in which to institute it, or a failure to have the execution issued within a reasonable time, are such delays as will release the assignor from responsibility."

So the question, as to notes Nos. 1 and 2, is whether the failure to institute suit on these notes from December 28 and 30, respectively, till January 9 was unreasonable. If the assignor would have been released because of this failure, had suit been instituted on that day and prosecuted with diligence thereafter, then it is clear that the request not to sue, and the agreement to be bound, was, as to these notes, without consideration.

There is no fact alleged or found which excuses the failure to sue before the 9th of January, or which can aid the court in determining whether the delay was reasonable. It must be determined in view of the length of time alone. Under the statute, as hereinbefore recited, any delay which extended over eight days, even though there was a legal holiday within that time, in addition to the Christian Sabbath, would necessarily delay the rendition of the judgment at the first term, or at the first term the court might render judgment thereon. We have been unable to find any case which holds such delay reasonable, three days being the longest held to be reasonable (Green, &c. v. Page, &c., 80 Ky., 368) that we have been able to find. Seven days has been frequently held to be unreasonable delay in issuing an execution after judgment. To establish a rule that a delay to sue for nine days was not an unreasonable delay would, in a great measure, destroy the rule itself, or at least fix a standard of diligence so uncertain in character as to leave the rule of little or no practical value. We are, therefore, of opinion that the assignor was released from liability as to notes Nos. 1 and 2 when the agreement was made and that as to them the agreement was without consideration and no recovery can be had under the verdict on those notes.

As to notes 3, 4 and 5 it may have been unreasonable to provide that suit should not be brought on them as they were not due at the time of the established agreement; but considering them as a part of a series, some of which were due and as to which the parties evidently contemplated there was a liability, then it is reasonable that one agreement should apply to all and provide that suit need not be brought upon any; that all would be paid without suit, to establish the insolvency of the maker. That such agree-

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ments may be made by assignors in advance of the time when suit would otherwise have to be instituted in order to fix the liability is now well settled. The finding applies to all the notes, those due as well as not due, and this finding excused the holder from the ordinary rule of diligence unless it was revoked and there was a want of diligence thereafter. The jury found that there was no notice or direction to sue until the suits were brought, but this finding must be taken in connection with the letter, the dates of the writing, and receipt of which are found by the jury and admitted by the pleadings. So unless this letter shows a direction to sue there was none.

It is difficult to tell what this letter does mean more than that it was an appeal to the holders of the notes to unite with Stafford in an effort to make the notes out of certain property which had been mortgaged by the maker of the notes to Stafford to indemnify him against loss by reason of his endorsement of the maker's notes, these among the number. In this respect the invitations of the letters were urgent, and proffered aid to that end was assured. On the other hand, the expression was made without qualification that Stafford was released from liability on the notes, and the fact that he was released was given as a reason why he could not protect Bruce & Co. under his mortgage. It is hardly to be presumed that an assertion that one is not liable is an invitation or notification to take steps to make him liable. It is in one sense a term of defense which might induce men to act to test the value of the declaration, but in law it can not mean "if you claim that I am liable you are notified to proceed to fix that liability." It is true that the urgent request for Bruce & Co. to unite in the effort to make their debts out of the mortgaged property indicates a lingering doubt as to the liability of Stafford, as otherwise his zeal was without motive, and was in fact against his interest. If the purpose was to protect himself to whatever extent liable by the suit to foreclose the mortgage, then of course the invitation to unite in that mortgage suit was in effect a request not to institute any other suit.

But in view of the finding of the jury it was not true in point of fact that Stafford was on the 19th of March released from liability as to all the notes, nor was he in any event then released as to No. 5 because it had not matured. It was not, therefore, a retraction of anything said or done before the letter which fixed liability or waived diligence, but a denial of liability absolute or contingent, and an invitation to unite in another proceeding to collect whatever could be collected. Instead of inviting an act of diligence to fix liability, it was well calculated to withdraw the attention of Bruce & Co. from the necessity of any suit for that purpose, as the letter distinctly assures them that: "You can rest assured that Stafford had much rather see you paid than the outside creditors, and will make a big fight for you, and I [am] employed to make that fight. Keep this quiet, as the unsecured creditors may not get a hold of it, or at least may not insist on it. If your attorney will act and advise with me in the matter under your instructions and for you, I shall be glad to work with him, and have his assistance. It seems to me there will be policy in us joining hands to secure the indemnity, and thus save you."

It seems, therefore, that this letter, even as an original matter would, as to the notes upon which there was then an existing liability, bring this case clearly within the principles announced in Mardis v. Tyler, 10 Ben Mon., 376, and it, therefore, follows that as there was a liability on notes 3, 4 and 5, by reason of the agreement of January 9, 1885, as found by the jury, the

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letter was, as to all these notes, but the expression of a willingness to trust to the equity proceeding as the only means or suit which could be instituted, or was at all necessary to ascertain what sum could be coerced out of the makers of the note.

Many exceptions were taken by appellant to the evidence introduced by appellees, but as most of these exceptions, if not all of them, were in the nature of a demurrer to the sufficiency of the evidence to establish a waiver of diligence, we deem it unnecessary to notice them further, having already established the effect of the waiver, which the evidence conduced to and did prove to the satisfaction of the jury.

It is insisted for appellee that the actual insolvency of the maker of the notes before their maturity, and the fact that appellant took a mortgage upon all of the property of the maker to secure him against loss by reason of his contract of endorsement upon these and other notes, dispensed with the necessity of suits to fix the liability of the assignor. It would be a sufficient answer to this claim to say that there was no finding by the jury as to either of these facts, nor any request that they should be found, and, therefore, as to appellee his right to a judgment must rest upon the findings. But aside from this we know of no case where diligence is not waived by the assignor, which allows the assignee to recover, unless it be shown that a judgment could not have been rendered against the maker, because of his removal from the State after the assignment, and before suit could have been instituted, or his death, or that he had been adjudged a bankrupt, or was incapable of making the obligation by reason of coverture or some other legal disability. In such cases the evidence of insolvency furnished by a judgment and return of "no property" may be dispensed with, and total insolvency shown as in other cases.

The judgment is reversed and the cause remanded, with directions to enter a judgment upon the verdict in favor of appellee for the amount of notes 3, 4 and 5, with interest from the maturity of each to the date of the verdict, and interest thereon until paid.

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SUPERIOR COURT ABSTRACTS.

HENRY v. HITE.

Filed May 16, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Ward, affirming.

Partnership—D. instituted this action for the settlement of a partnership business, in which he and H. had been engaged. He alleged, among other causes for a dissolution of the partnership, that H. was seeking to divert the partnership effects to the payment of his individual debts; had pledged partnership assets for borrowed money, and refused an account. There has been no settlement of partnership accounts; there is nothing in the record to show what, if anything, would be due D. on a settlement, or that the assets on hand are not amply sufficient to protect his interest as partner. Held—That in the absence of such a showing the court can not reverse a judgment denying him, or his assignee, any relief as against a party who, it is claimed, has partnership assets taken in payment of the individual debt of H. But, in any event, the pleadings and evidence show that the debt for which the partnership assets were taken was for money advanced to H. with the knowledge of D., and used for the firm.

Helm & Bruce for appellant; John J. Jackman for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. COPPAGE.

Filed May 16, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Res judicata—On a former appeal in this case the court intimated, if it did not expressly decide, that the petition did not state a cause of action. It was also held that, assuming that the petition stated facts sufficient to constitute a cause of action, the facts proved were not sufficient to authorize the instruction given, or sustain the verdict, and the judgment was, for that reason, also reversed. On the return of the case no further objection was made to the pleadings further than was involved in a motion made by defendant for a peremptory instruction, which was denied. Held—That the former opinion does not prevent, but expressly allows, the sufficiency of the petition to be now considered and determined.

2. Actions under statute for negligence—The father of one whose life has been lost through the willful negligence of another can not maintain an action therefor under section 3 of chapter 57 of the General Statutes. The word "heir," as used in that section, means child.

3. Same—The personal representative of the person whose life is lost by the negligence of another is the only person who can maintain an action under section 1 of chapter 57 of the General Statutes.

W. J. Lisle and Wm. Lindsay for appellant; Samuel Avritt for appellee.

WATHEN v. BYRNE & CO.

Filed May 16, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Appeals—Practice—That "the verdict is contrary to law;" that there was "error in the amount of recovery;" and "error of law occurring at the trial, and excepted to by defendant," assigned as grounds for a new trial, are too general to be considered.

2. Same—Bill of exceptions—Depositions read upon the trial of an ordinary action, but not copied into the bill of exceptions, can not be considered.

3. Same—A judgment can not be reversed upon the ground that it is not sustained by the evidence unless the evidence is stated in full in the bill of exceptions.

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4. Same—The statement in the bill of exceptions that to the giving of an instruction the "defendant excepted, and now excepts," is not sufficient to authorize the court to review the alleged error. There must be an objection as well as exception.

5. Reversible errors—The maxim of the law, to the effect that the law does not concern itself about trifles, has no application to a case where the plaintiff has recovered more than he claimed, or an amount which he admitted by his pleadings was more than he was entitled to recover. In this case the judgment in favor of the appellee is reversed because it is for $49 more than he claimed, the court holding that appellant would be entitled to a reversal, even if the error was only $14, as claimed by appellee.

6. Prejudicial errors—Within the meaning of the Code which requires the court to disregard every error which does not affect the substantial rights of the adverse party, every error is deemed prejudicial to the substantial rights of a party which denies him relief to which he is clearly entitled.

Barnett. Noble & Barnett for appellant; C. H. Gibson and E. J. McDermott for appellees.

GREEN v. MAGOWAN.

Filed May 16, 1888. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Bankruptcy—New promise—The cause of action set up in the plaintiff's original petition was that the defendant had, after his discharge in bankruptcy, agreed and promised to pay the debt sued on. The defendant averred in his answer that he was not able. By an amended petition the plaintiff averred that since the institution of the suit the defendant had become solvent, and was able to pay the debt. Held—That this allegation of the amended petition was irrelevant and superfluous, as the plaintiff nowhere alleges a promise by the defendant to pay when able. But even if the plaintiff had set up such a cause of action it would not deprive him of the right to recover upon the allegation of an unconditional promise, as the defendant might have promised unconditionally at one time and conditionally at another, and there would be no inconsistency in plaintiff relying on both promises.

2. Same—The evidence supports the finding of the court that the defendant, after his discharge, did unconditionally promise the plaintiff to pay the debt.

Wood & Day for appellant; H. L. Stone for appelleee.

SHEWMAKER'S ADM'R v. MITCHELL.

Filed May 16, 1888. Appeal from Washington Circuit Court. Opinion of the court by Judge Bowden, reversing.

Sheriff and deputy—Sureties—Demand—S., a sheriff, took bond, with surety, from B., his deputy, for the faithful discharge of the deputy's duties. After all the taxes should have been collected, B.'s sureties becoming apprehensive, applied to the sheriff to remove B. and appoint M. in his place to collect taxes not collected, which was done with the understanding that the appointment was for the sole benefit of B.'s sureties, their liability being regarded as already fixed. The sureties delivered to M. the tax list, which was in their hands. Without having consulted the sheriff, the sureties made the contract with M., by which he was to be liable only for money collected, and they took from him bond, with surety, stipulating that he would pay the sheriff whatever he might get, less his commission the sureties had agreed he should have for his services. The sheriff treated M. as the agent of the sureties, appointed for their benefit, and as one in whose doings he had no interest. Subsequently the sheriff, in consideration of $300, released B.'s sureties from liability. In this action by the sheriff against M., Held—

1. M. owed the sheriff no duty except with regard to money actually collected; he was not liable for mere failure to use diligence.

2. B.'s sureties were liable only for what B. could, with reasonable diligence, have collected, and which was uncollectible when he went out of the

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office; and for all increased cost and expense incident to the collection of what B. should have collected. It was this liability from which the sheriff released the sureties of B., but he did not thereby transfer to them any right he had against M. for money collected, or against taxpayers who had not paid. Therefore, the price of the release is not a proper credit to M. against what he collected.

3. M. is to be charged with what he got and to be credited by what he paid, and the agreed compensation for his services. He owes what remains, and ought to pay interest on it from the day he reported to the sheriff he had collected all he could and had paid over all he had collected.

4. The fact alleged by M. that he did make such report and tendered the books is sufficient answer to the claim that a demand was necessary. Moreover, the answer did not complain that there had been no demand, but went directly to the merits. But even if a demand had been necessary, an absolute dismissal was not proper.

W. C. McChord for appellant; J. W. S. Clements and John W. Lewis for appellee.

KRIEL & CO. v. STOLL

Filed May 16, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Bowden, affirming.

Purchasers with notice—A distress warrant against H. and in favor of S. was levied on tobacco hanging in a barn, most of it unstripped. At the suggestion of H. that a sale of the tobacco in that condition would inflict a loss, it was agreed that as a bailee of the officer he should prepare it for market, and that when prepared he should notify the officer, who should send it to Louisville in his own name or that of S., and have it sold there. S. was notified of the arrangement and consented to it. H., having prized the tobacco, shipped it in his name to a warehouse in Louisville. On the day the last lot arrived appellants were notified by an attorney that H. wished to sell the tobacco, whereupon they bought it, subject to the claim of the warehouse. The sale was for less than lug prices. Appellants did not see the tobacco or any sample of it, and no inquiry was made at the warehouse. Manifestly H. was in a hurry to sell, but no inquiry was made by appellants as to the reason for his haste. Held—That in view of all the facts the court can not say that the lower court erred in sustaining the lien upon the levy as against the claim of appellants While they had no information of any claim except that of the warehouse, this court can not say that there was not enough to put them on inquiry, which is notice of all that lay in the direct path of investigation.

Kohn & Barker for appellants; Carey & Spindle for appellee.

REID v. INGALLS, &c.

Filed May 16, 1888. Appeal from Barren Circuit Court. Opinion of the court by Judge Bowden, affirming.

Continuance—The court did not err in refusing to set aside the order of submission and to continue the case upon motion of plaintiff, in order to enable him to prepare his case for trial, as the affidavit did not show diligence.

B. Lawless, Sr., for appellant; W. L. Porter for appellees.

PHILLIPS' ADM'R v. PHILLIPS, &c.

Filed May 16. 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Bowden, affirming.

Attorney's fee—In this action in which the nominated executor of a will afterwards set aside seeks to recover the amount for which he is liable to his attorneys for services rendered under his employment in his efforts to probate the will, etc., it is held that the fee reported by the commissioner and allowed by the court is reasonable.

W. B. Harrison for appellant; Samuel Avritt for appellees.

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CLARK v. SMITH'S EX'ORS.

Filed May 30, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Ward, affirming.

Sales of personal property—Rescission for fraud—To enable the purchaser of personal property to rescind the contract and receive back the price paid upon the ground that there was fraud practiced in the sale, he must offer to return the property within a reasonable time after the fraud is discovered, or by the exercise of ordinary and reasonable diligence could have been discovered. And whether the offer to return was or not within a reasonable time, the facts being admitted, is a question of law.

In this case, the offer to return a piano, made eighteen months after the purchase, was not within a reasonable time, no fact being alleged to excuse or account for the failure to sooner discover the defects. The fact that the piano was left with the vendor for several months and then removed to a room for storage does not excuse the delay.

O'Neal, Jackson & Phelps for appellant; C. B. Seymour for appellees.

RAMSEY v. HAYNES.

Filed May 30, 1888. Appeal from Grayson Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Attorney and client—Contract against public policy—A contract whereby appellee, a practicing attorney, agreed to procure appellant's release from liability on account of certain bail bonds upon which judgment had been rendered against appellant as surety, and to save him harmless from costs and expenses by reason of his suretyship, in consideration of a certain sum paid by appellant to appellee, which was to have been refunded in the event the release was not procured, was certainly against public policy and void, if not within the provisions of the act against champerty and maintenance, as the court is inclined to the opinion it was. If appellee had been employed as an attorney on a conditional fee, which was paid in advance, a different case would be presented.

D. R. Murray for appellant; John Barrett for appellee.

CLINKENBEARD'S ADM'R v. HENDRICKS.

Filed May 30, 1888. Appeal from Fleming Circuit Court. Opinion of the court by Judge Barbour, affirming.

Revivor—Section 509 of the Civil Code does not require that the revivor of an action shall be actually made within a year from the time it could first have been made, but that the order to revive shall be made in that time. The mere entry of this order within the twelve months, however, is not sufficient; a copy must, within that time, be issued and placed in the hands of some one authorized to serve it; otherwise the representative of the deceased plaintiff loses his right to have the action revived in the summary mode pointed out in the Code.

Cassidy & McCartney for appellant. W. J. Hendrick for appellee.

COMMONWEALTH v. BREWER.

Filed May 30, 1888. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, affirming.

Continuance—The Commonwealth's attorney moved for a continuance, the ground, as stated in his affidavit, being the absence of the only witness whose name was to the indictment, and for whom a subpœna had been issued about twenty days before the term and returned "not found." A continuance had been granted upon the Commonwealth's motion at the preceding term, presumably upon the same ground. It does not appear that any attempt had ever been made to obtain the attendance of the witnes prior to the issue of the subpœna referred to. It does not appear that the witness was within the jurisdiction of the court, or that his attendance could reasonably be expected. Held—That the court did not abuse its discretion in refusing a continuance.

Finley Shuck for appellant.

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AUSTIN v. COMMONWEALTH.

Filed May 30, 1888. Appeal from Casey Circuit Court. Opinion of the court by Judge Bowden, dismissing.

Appeals—Special terms—It is an indispensable prerequisite that the appeal shall be prayed in the lower court during the term at which the judgment was rendered in order to give this court jurisdiction; and a special term held a week before the regular term can not be regarded as a part of that term, so as to give this court jurisdiction of an appeal from a judgment rendered at the special term where the appeal was not prayed until the regular term.

Stone & Stone for appellant; Wm. Herndon, for appellee.

JETT, &c. v. SHEETS.

Filed May 30, 1888. Appeal from Franklin Circuit Court. Opinion of the court by Judge Bowden, reversing.

Unrecorded mortgage—Execution lien—Where an execution creditor has notice before the sale of an unrecorded mortgage on the property levied on under the execution, his equity, whether as creditor or purchaser, is inferior to that of the mortgagee.

Wm. Cromwell for appellants; O. D. McManama for appellee.

THOMPSON & CO. v. FIDELITY TRUST AND SAFETY VAULT CO.
SAME v. SAME.

Filed May 30, 1888. Appeals from Louisville Chancery Court. Opinion of the court by Judge Bowden, reversing.

Partnership—The respective interests of two or more partners may be fixed at the outset, or, if the business is such and the circumstances of the partners are such that the ratio of interests can not be determined, it may be left to be fixed by the figures as they may finally appear.

Appellants and C. formed a partnership for the raising of tobacco. Appellants furnished the land and money and C.'s skill and labor were put in as his share, entitling him to one-half of the proceeds if he should raise the crop; but apprehending that C. might not be able to raise the crop alone the parties agreed that whatever appellants should contribute to that which C. was to do should augment the share of appellants to that extent and correspondingly diminish the share of C. Held—That the agreement is valid for the purpose of determining the interests of the parties in the crop after it has been raised.

Helm & Bruce for appellants; Wm. Christy Churchill for appellee.

TALIAFERRO v. CITY OF DAYTON.

Filed May 30, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Pleading—The appellant, sued as surety on the bond of a defaulting city clerk, filed an answer, in which he stated that he had "no knowledge or information on which to found a belief" that the clerk received the amounts charged, or any part of them, and in which he said that "he is informed and charges" that the clerk had paid to the city a certain sum in excess of the amount which was claimed as the balance due. Held—That as there was no averment in the petition that any record showed what the clerk had received, and it can not be assumed that there was any, a statement that the defendant had neither knowledge nor information sufficient to form a belief is a sufficient denial. The payment was also well pleaded. The word "charges" means alleges, avers, states, and an allegation may be avowedly made on information, and would be good, even if accompanied by an admission of a lack of personal knowledge.

2. Same—The denial that the clerk had received the amounts charged and the plea of payment were not inconsistent pleas.

3. Same—Election—While the court may, upon or without motion, require

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a party to elect between inconsistent pleas, it can not elect for him in the first place, and certainly should not strike both pleas from the file.

4. Set-off—To an amended answer which sought to set-off a part of the clerk's salary for a part of his second term (the defendant having been his surety for the first term), the city replied that it had been applied to a settlement of his accounts for the second term. Held—That a demurrer to this reply was properly overruled.

5. Evidence—It is the opinion of the majority of the court that there was no error in admitting the "stubs" of the license books as evidence of what the clerk had received.

C. J. Helm for appellant; J. S. Ducker for appellee.

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KENTUCKY COURT OF APPEALS.

BANK OF LOUISVILLE V. ATWOOD'S ADM'R.

(*Filed Sept.* 13, 1876—*Not to be reported.*)

Application of payments—A creditor having a lien upon certain shares of stock, to secure the indebtedness of the owner of the stock, which consisted of separate bills of exchange, obtained a judgment enforcing its lien upon the stock, but no specific application of the proceeds of the sale of the stock was made in the judgment or otherwise. The creditor now claims the right, as against one who is sought to be made liable on one of the bills as drawer, to apply the proceeds of the sale of the stock to the payment of the other bills, the amount not being sufficient to satisfy all. *Held*—That there was but one lien for the security of the several debts, and as the creditor enforced his lien for the payment of all he must be held to have elected to apply the proceeds of the sale *pro rata* upon each one.

Hamilton Pope for appellant.

Barr, Goodloe & Humphrey for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Cofer.

Robert Atwood was the owner of seventy shares of the capital stock of the Bank of Louisville which he pledged to the Owensboro Savings Banks to secure a loan of $5,000. Atwood became a bankrupt and the savings bank commenced suit against Atwood and the Bank of Louisville to obtain a sale of the stock and to compel the transfer of the stock to the purchaser.

The Bank of Louisville answered, alleging that it held four bills of exchange, three of them for $5,000 each and the other for $7,500, on all of which Robert Atwood was bound, on the first three as acceptor and on the last as drawer, and that by the provisions of its charter it had a lien on the stock owned by said Atwood to secure his indebtedness to the bank, and concluding as follows: "Wherefore, these defendants (the president, directors and company of the Bank of Louisville) make this answer a cross petition against the plaintiff (the Owensboro Savings Bank), said Robert

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Atwood and Stephen E. Jones (his assignee in bankruptcy), and pray priority over the plaintiff, an enforcement of their lien against said shares or certificates of stock owned by said Atwood in their bank, * * * and a sale of said shares or certificates to raise or pay these defendants the amount due these defendants on said bills by said Robert, and they pray for general relief."

That cause proceeded to judgment on the cross petition, and it was adjudged that the lien of the Bank of Louisville was superior to that of the savings bank, and the stock was adjudged to be sold to pay the four bills which are described in the judgment with the same particularity with which they were set forth in the cross petition.

The stock was sold and realized the sum of $5,477.28, but no formal order seems to have been made crediting the sum realized on any one or more of the bills.

William Atwood, who was the drawer of two of the $5,000 bills, having died, and the name of the payee and endorser having been forged, the bank presented these bills as claims against the estate of the said William, but the administrator claimed and obtained credits thereon for a *pro rata* of the amount realized from the sale of Robert Atwood's stock, and from that judgment this appeal is prosecuted.

It is conceded that the parties bound on the bill for $7,500 are all insolvent, and that the name of the endorser on the remaining $5,000 bill was forged and that the endorser remains bound, but whether he is solvent or not does not appear.

Under these circumstances the bank claims that inasmuch as no specific application of the proceeds of the sale of the stock was made in the judgment or otherwise, it has a right to elect to which of the bills that sum shall be applied, and now claims to apply it to the $7,500 and $5,000 bills upon which William Atwood is not bound, and this presents the sole question in the case.

We do not deem it necessary to enter at large into the doctrine of the application of payments. The appellant set forth in its cross-petition all the bills, and claimed the benefit of its statutory lien for the security of each of them and took a judgment to sell for the satisfaction of all.

There was but one lien for the security of the several debts. The debts were of equal dignity, and, as matter of law, each bill was alike secured by the lien; and as the appellant asserted the lien as a security for the payment of all bills, the court properly treated the proceeds of the sale of the stock as a payment *pro rata* on all the bills.

It may be that the appellant might have elected to enforce its lien for the satisfaction of the bills upon which William Atwood was not bound, and that it might, in that case, have proved the whole of the bills upon which he was bound against his estate, but it did not elect to pursue that course but enforced its lien for the payment of all, and must be held to have thereby elected to apply the proceeds of the sale *pro rata* upon each one.

It seems to us that for these reasons the judgment must be affirmed.

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SAVINGS BANK OF LOUISVILLE'S ASS'EE V. CAPERTON.
MYER, &C. V. CAPERTON, &C.

(*Filed June* 2, 1888.)

1. *Parties to actions*—Where loss has resulted from the negligence of the directors of a bank, the bank or its assignee, and not the depositors, is the proper party plaintiff, unless it plainly appears that a cause of action exists, and that the bank refuses to bring the action.

2. *Duties and liabilities of bank directors*—The directors of a bank are not liable for loss resulting from the frauds of an officer of the bank unless they have been guilty of gross neglect, which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised.

3. *Same*—A bank director is not required to be either an expert or a competent book-keeper, or do more in the general management of the bank with reference to its cashier and book-keeper, whom they have used proper care in selecting, than to see that the daily or weekly statements made to the board, as the case may be, correspond with the general balances upon the books; and this, connected with the periodical count of the money, notes, bonds, etc., is all the supervision required unless there is some reason for suspecting that the cashier is neglecting his duties.

In this case it is held that the directors are not liable for their failure to detect fraudulent entries made by the cashier in the books extending through a period of nine years.

4. *Same*—It is the duty of the directors to use ordinary diligence in the selection of all the officers neccessary to carry on the business of the bank, which they seem to have done in this case.

5. *Same* -Where one bank was merged into another, the president of the new bank was properly selected by the directors to transfer the balances from the books of the old bank to the books of the new, and although the president was at the time a defaulter as an officer in the old bank, yet as there was nothing to excite any suspicion as to his honesty the directors were not guilty of negligence in permitting him to use the books of the old bank for the purposes of the new, instead of making a transfer to a new set of books.

6. *Same*—The directors were not guilty of negligence in allowing the same person to act as cashier, book-keeper and teller. Nor were they negligent in placing bonds in the custody of a New York bank for the purpose of enabling their bank to draw upon the New York bank; and although the bonds were afterwards hypothecated with that bank for money loaned the cashier of the former bank, the directors are not liable.

7. *Same*—As the bank was in the habit of investing in bonds, the directors were not negligent in failing to discover that bonds exhibited by the cashier as part of the assets of the bank were the property of one of their number, who was absent.

8. *Same*—In an action by depositors against a bank the fact that the misappropriation of funds by the cashier was unknown to the directors constitutes no defense to the bank, the presumption being that the directors knew every entry made by the subordinate officers in the bank ; but in an action against the directors to make them personally liable no such presumption exists, and the burden is on the creditor to show a want of diligence on the part of the directors in discovering or preventing the fraud.

Woolley & Buckner, A. P. Humphrey, R. Wessinger and Kohn & Barker for appellants.

James Speed, A. Barnett and Thos. and John Speed for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

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This action was instituted by Gustave Myer and others against the president and directors of the Louisville Savings Bank to recover various sums due to them as depositors in its savings department, the loss having been caused from the embezzlement of the funds of the bank by J. H. Rhorer, the cashier. The ground of recovery is the alleged negligence of the directors in the general conduct of the bank, and a want of diligence in supervising the acts of their subordinate, the cashier. The bank, by reason of the defalcation, was rendered insolvent and an assignment made in January, 1880, of all of its assets to the appellant, Jones. The creditors of the bank filed this petition in equity, alleging that Jones, the assignee, refused to sue the directors or to unite with them in the action. Jones was made a defendant to the action and by a cross petition sought to recover of the directors for the default of Rhorer on account of their negligence with reference to the affairs of the bank, alleging that he had delayed the litigation for the purpose of ascertaining the condition of the bank, and the facts, if any, upon which a recovery could be had against the directors.

A controversy originated in the court below as to the right of Jones to maintain this cross action, and on motion of the creditors they were alone allowed to prosecute the cause of action set up in the original petition, and the claim of the assignee, in so far as it affected the depositors, was dismissed.

It is not necessary, in the light of the facts presented, to discuss the right of either Jones or the creditors to maintain the action further than to say that the bank or its assignee is the proper party plaintiff in such cases unless it plainly appears that a cause of action exists and the bank refuses to bring the action. We will proceed, therefore, to consider this case on its merits.

The corporation, the Louisville Savings Bank, was organized in the year 1866, and was the successor of a bank called the Louisville Savings Institution, the former having been merged in the latter by taking all of its assets and assuming all of its liabilities. An election of directors was held in August, 1866, and James Guthrie, Joseph F. Speed, James W. Henning, Milton H. Rhorer and James H. Rhorer were selected. The directors then elected J. H. Rhorer, the subsequent defaulting cashier, president and Thomas Hanlay cashier, and when this was done directed the president and other officials to have the balances on the books of the old bank transferred to the books of the new bank. Guthrie died in April, 1869, and John Caperton was made director in his stead. In 1871 J. H. Rhorer resigned as president and was made cashier, Hanlay having ceased his connection with the bank. Caperton was then elected president. In 1874 M. H. Rhorer resigned as director and Andrew Sabine was placed in his stead.

From the first of January 1871, J. H. Rhorer filled the place of cashier, teller and book-keeper in the commercial or general department of the bank. The bank had two departments in the same building, one known as the savings department and the other as the general or commercial department, both regarded, however, as the one bank, and money often transferred from one department to the other. The directors sought to be made liable are Caperton, Henning, Speed and Sabine, the fifth director being J. H. Rhorer. The books of the general department were kept by Rhorer, and of the savings department by Joshua F. Speed, jr. In the year 1872, shortly after Rhorer was elected cashier, the bank built what is termed a safety vault at a cost of $55,000. The capital stock of the

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bank was only $100,000, one-fifth of which was owned by J. H. Rhorer, the cashier.

Rhorer was not only the cashier and the one-fifth owner of the stock, but as is manifest from the proof in this case was the leading spirit in directing and controlling the affairs of the bank during the series of years in which he was engaged in making fraudulent entries in the books of the bank to enable him to appropriate its funds to his own use. His entire administration of the affairs of the bank evidences a systematic purpose in embezzling the funds of the institution and betraying an almost unlimited confidence placed in him by the directors. It was not until the month of January, 1880, that the frauds were discovered, although practiced for the nine years he was cashier and long before, and then made known by the written acknowledgment of Rhorer, found with the papers by the bank to the effect that he had been robbing the bank and had surrendered himself into the custody of the law.

The investigations and settlements made since the assignment shows the defalcation to be $118,000.

The only question presented in this case is whether the directors acted in good faith and with ordinary care and diligence in conducting the affairs of the bank, or such diligence as ordinary prudent men would have exercised with reference to the conduct of such a moneyed institution. It is not a question as to how the frauds of the cashier might have been discovered, but were these directors guilty of gross neglect, which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised?

The directors received no compensation for their services, the benefits to be derived by them from the profits of the bank flowing solely from their interests as stockholders. If their liability is to be measured by that imposed upon the president or the director who receives as compensation a sum equivalent to an undertaking to supervise the entire affairs of the bank, by an actual inspection and examination of the accounts and books of the bank, as well as the other duties pertaining to such a position, then there would be no question as to the liability of the appellees in this case, but with services rendered that are merely gratuitous, or at least without reward, it can not be held that a liability is to be fixed upon them for no other reason than their failure to detect the fraudulent entries made by the cashier in the books of the bank, although extending through a period of nine years. The facts, however, presented by this record must determine the question of negligence or the result of diligence on the part of the appellees. It was incumbent on the directors to appoint all the officers necessary to carry on the business of the bank, and to use ordinary diligence in the selection of men qualified to fill such positions. In the year 1871 when, Rhorer was elected cashier of the bank and also made its book-keeper, his past life as a business man, so far as then known, was a sufficient guaranty to the directors of his honesty and capacity for the position. He had been made president of the bank at its organization in 1866, with, as the proof shows, some of the most successful business men in Louisville as the directors, Guthrie, Speed and Henning. His experience in banking, as well as his high character for integrity, both personal and financial, commended him to all business men as well qualified for such a position. There was no reason for suspecting his fidelity to his co-directors and to the interests of the bank, whose affairs he had been called on to manage, and yet he was, at the time he was elected president of the Savings Bank, a

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defaulter in the Savings Institution that had been merged into the former bank in the sum of $17,000.

It is insisted, as one of the grounds for imputing negligence to the directors, that Rhorer, who had been elected president of the Savings Bank, and was directed to transfer the balance from the books of the Savings Institution to the new bank, failed to open new books, but continued to use the old books, and especially the individual ledger containing the accounts of depositors in the Savings Bank until its suspension in the year 1880; that this aided Rhorer to cover up his defalcations in the old bank and to practice his frauds in the new bank, when, if the accounts on the old books had been balanced and the proper entries made in the new books, the fraud, already practiced, might have been detected; that a proper and thorough examination of the accounts of the Savings Institution would have been the safest method for these directors to have pursued, with new accounts opened for depositors, must be readily conceded, but Rhorer having been cashier of the old institution, and having, at the time of the merger of the two banks, been elected president of the Savings Bank, it was not unreasonable, but consistent with the duties these directors owed to all interested, that Rhorer should have been selected to make the transfer, and to pursue that course that, in his judgment, was proper in opening the books for the new bank. There was nothing to excite the least suspicion as to his honesty, and it can not be regarded as neglect on the part of the directors in permitting him to use the books of the old for the purposes of the new bank.

If balances had been struck and transferred from the old set of books to the new the fraud already practiced would necessarily have entered into the books of the new bank, as Rhorer, who was directed to make the transfer, would scarcely have made entries that would have resulted in an exposure of his fraudulent practices.

The frauds perpetrated by the cashier in abstracting the money of the bank were committed in various ways: First. When deposits in certain instances were made he would credit them on the individual ledger, but make no charge of them on the blotter. In one instance the Louisville Steel Works is credited on individual ledger with $5,000 and this sum not credited to the concern or charged to cash on the blotter; again, the same party is credited by several items amounting to $2,719 in the same way. Second. The blotter shows a deposit on January 25th of $3,898.50, and on that day Rhorer & Cotton are credited with that amount on the individual ledger. On the same day the Metropolitan National Bank of New York is credited on the blotter with $6,101.50, these two items amounting to $10,000, and the bank, on the general ledger, is credited by $10,000. It appears that the Metropolitan Bank was entitled to a credit of $10,000 when Rhorer only placed to its credit $6,101.50, and gave credit to Rhorer & Cotton for $3,898.50, when no such deposit had been made; but by crediting the bank's account in the ledger with the true amount, $10,000, the accounts appeared correct and enabled the cashier to appropriate $3,898.50 to his own use. Another instance is where Rhorer is credited on the blotter with $350, and this sum is posted to his account in the individual ledger as $2,350. Again he would charge a depositor on the blotter with a certain sum, as if paid on the depositor's check. This sum would be posted to his account on the individual ledger, and when balancing the account the item would be omitted from the addition. This character of fraudulent entries in the books of the bank was practiced from the year

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1871 until the close of the bank in January, 1880, the amount of the defalcation concealed by the fraudulent entries amounting in the aggregate to near, if not quite, $60,000, with the cash found short in the sum of $58,000. The entire defalcation was $118,228.57, as reported by the expert accountants in the examination made of the bank accounts.

The principal grounds relied on for a reversal in this case are: First. That the directors, in giving to Rhorer the sole control of the books of the bank, making him cashier, book-keeper and teller, placed it within his power to perpetrate the fraud, and for that reason they were guilty of such neglect as makes them responsible to the bank. Second. They failed to make proper examinations as to the condition of the bank, and allowed the books to be falsely kept.

We have said that it was their duty to exercise that reasonable and ordinary care with reference to the affairs of the bank that ordinarily prudent men would exercise in reference to such business affairs. If it was the duty of the directors to examine the books of the bank, in the absence of any reason for suspecting the honesty of the bank cashier, with a view of testing their correctness, with the weekly statements made them, or when making their periodical investigation of the money on hand, and the notes, bills and bonds belonging to the bank, it being manifest that the frauds could have been easily discovered, at least by a book-keeper of ordinary intelligence, their responsibility would necessarily follow.

It is difficult to define each and every duty pertaining to such a position, but we are satisfied that a bank director is neither required to be an expert or a competent book-keeper, or do more in the general management of the bank, with reference to its cashier and book-keeper, than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily or monthly statements made to the board correspond with the general balances upon the books. In this case the weekly statements as to the cash on hand, bills discounted, etc., corresponded with the cash account as it appeared each day, or, at the time the statement was made, with the cash account on the teller's blotter, where, as in this case, the cash account was kept. It is argued, however, and the expert so states, that these frauds could have been readily detected by comparing a balance on the individual ledger with the amount stated to be due depositors in Rhorer's weekly statements. It is plain that any director, if at all conversant with book-keeping, could have gone to the individual ledger, and running over the accounts of depositors, and then comparing that with the blotter evidencing each day's transactions, could have discovered the fraud, or it might have been discovered by ascertaining the amount due each depositor, as appeared from that book; but we know of no rule of law or reason that would require such an investigation by directors, and to hold them responsible for failing to discharge such a duty would be imposing a responsibility that no business man would assume without a compensation commensurate with the labor required.

If they have selected a cashier and book-keeper, regarded at the time as qualified for the position assigned, or used reasonable care and precaution in making the selection, and taken from him a bond in an adequate penalty for the faithful discharge of his duties, his weekly or daily statements, as the condition of bank may be, agreeing with the balance as found on his books, connected with the periodical count of the money, notes, bonds, etc., is all the supervision required, unless the directors have some cause for suspecting, or see that he is neglecting his duties.

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In the present case the cashier made weekly statements to the directors that were compared with the cash balances and found correct, or if not compared at the time, those statements agreed with the general balance found on the books that were, however, false and erroneous by reason of fraudulent entries and false balances. They examined the general condition of the bank once in every six months by making an actual count of the cash and ascertaining the amount of bills, notes, bonds and securities on hand, all of which agreed with the statements made by the cashier and verified by the general balance found in the books. It is argued, however, that, as one of the means of preventing such defalcations, it is prudent to have different employes in charge of the books as checks upon each other, and not entrust those duties to one man. This, no doubt, is the safest course to pursue so as to prevent fraud and have perfect accuracy in the accounts, but the fact that these directors saw proper to confide in Rhorer and permit him to discharge the double duty of book-keeper and cashier does not evidence a want of ordinary diligence on their part. If called on to adopt that mode which would approach nearer to absolute security against such thefts than any other the usual custom in the banks of a city would be adopted, but the question here presented is: Were the directors, in making such an employment, doing that which men of ordinary prudence in such business would have regarded as unsafe? We think, measuring the duty of a director by the character of the interest he is supervising, the entire testimony in this case gives a negative answer to the question. He had been trusted to an unlimited extent prior to this undertaking in the conduct of financial transactions, involving millions of dollars. He was regarded as a man of means and worthy of every man's confidence by reason of his supposed great moral worth, as well as his financial standing, and no reasonable man, unless exercising the highest degree of care under the circumstances, would have supposed that a check on his conduct in the bank was necessary, or that any inspection of the books by way of detecting errors was demanded. We, therefore, see no reason for holding these directors personally liable by reason of false entries, requiring the skill of expert accountants to ascertain, when no breach of duty on the part of the cashier had been brought home to the directors, and the defalcation resulting in no act of their own. J. F. Speed, jr., who had charge of the books in the savings department of this bank, was an inexperienced book-keeper at the time of his selection, yet his books were accurate and his fidelity to the bank and its patrons unquestioned. The evidence of honesty and the utmost good faith was found on the side of the youthful book-keeper, while a systematic concealment of fraud was being practiced by the shrewd and experienced financier. Henning and Speed, two of the directors, were in the bank daily aiding in its control and management. They were both business men, with their capital invested in the stock of the institution, and to adjudge that they were indifferent to their own interests or that of the bank would be a conclusion not sustained by the facts before us.

The case of Dunn's adm'r v. Kyle's ex'or, 14 Bush 134, is very similar in many of its features to the case before us, in which it was held that the directors were not liable to stockholders for the default of cashier, unless occasioned by their fraud or gross neglect. The absence of ordinary care was attempted to be shown in that case because of the failure of the directors to discover the fraudulent acts of the cashier, such as required the skill of an accountant to develop.

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Where directors by their own act cause the loss to the bank or the corporation they represent no doubt as to their liability can arise. Where they discount paper known to be worthless, or cause the cashier or other officer of the bank or corporation to do that which is forbidden by the charter, and loss arises they will be held responsible. (Spering's Appeal, 71 P. A. St., 11; United Society of Shakers v. Underwood, 9 Bush, 609; Bank v. Hill, 56 Me., 385.) Here the directors are charged not with any wrongful act of theirs by which loss has been sustained, but for neglect in failing to do that which they ought to have done. They were ignorant of the thefts being committed, but it is alleged they could have discovered the fraud by the exercise of ordinary diligence. If this action was against the bank it would not be allowed to say that its directors were ignorant of these frauds, for in such a case the law presumes that the directors knew every entry made by its subordinate officers on the bank books, and, therefore, the misappropriation of funds by a cashier unknown to the directors constitutes no defense to the bank, but in an action against the directors to make them personally liable no such presumption exists, and the burden is on the creditor of the bank to show a want of diligence on the part of the directors in discovering or preventing the fraud. The directors are under no personal liability to the creditors of a bank by reason of a neglect of duty. They are the agents of the corporation, and could only be sued in this case by the creditor, because of the refusal of the assignee to sue. They may be proceeded against personally for a conversion of special deposits by them, because guilty of a tort, as in the case of Shakers v. Underwood, 9 Bush, 609, or in a case where the president and directors are the parties to be charged, there is no reason why the creditors may not sue, making the bank and the directors defendant. So at last it is the bank suing the directors in this case for a neglect of duty, and if there were no depositors could the bank claim that the directors were guilty of neglect in permitting Rhorer to act as cashier and book-keeper, or in failing to detect the frauds so manifest after the discovery? We think not.

The appellants also say that the directors were guilty of neglect in placing certain United States bonds, amounting to $33,000, in the custody of the Metropolitan Bank in the city of New York that were afterwards hypothecated with that bank for money loaned to Rhorer without the knowledge of the directors. These bonds belonged to the savings side of the bank, the books of which were under the control of Joshua Speed, jr. This book-keeper reported in his statements these bonds as belonging to the savings side of the bank, and the directors, believing them perfectly secure and having placed them with that bank to enable the bank at Louisville, as Henning states, to draw upon the New York bank whenever it might need money, made no inquiry as to any use that might have been made of them by its bank officers. They had no reason to believe that Rhorer had pledged them as collateral to raise money that he might increase the fund in the home bank upon which to plunder, and we perceive no reason for holding them guilty of an imprudent act in depositing them with the New York bank for the purposes mentioned by Henning, one of the directors. They, it is true, might have suspected Speed of using them for his purposes if his honesty had ever been questioned or doubted by them, or they might have suspected Rhorer of stealing the bonds from Speed or the New York bank, but as no cause existed for suspecting either of the book-keepers the depositing of the bonds with the bank in New

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York did not constitute any character of neglect, as it was proper that they should do so under the circumstances. In regard to the Semple bonds belonging to Caperton, and that were used in his absence, in the statements as to the condition of the bank by Rhorer, as assets of the bank, it appears that the bank was in the habit of investing in bonds, and whether these bonds were all of the series of Semper bonds does not appear. Rhorer exhibited them to the other directors as belonging to the bank, and how they were to know they had been charged to the account of Caperton is difficult to perceive. They did not suspect Rhorer of deception. The bonds were in the vaults of the bank and exhibited as part of the assets. If it was their duty to examine Caperton's account in order to prevent fraud on the part of the cashier, their liability might be asserted, but even if Caperton had been present with a series of bonds of a like character he would doubtless have not suspected Rhorer of using his bonds as assets of the corporation. Nothing occurred during the interval between 1871 and 1880 that called the attention of the directors to the individual ledger or to a minute examination of any book connected with the corporation.

In the case of Scott v. Depeyster, 1 Edwards' Chancery Reports, 513, the cashier or treasurer of the corporation embezzled the funds by a series of frauds running through several years in a manner much like the cashier did in this case. The stockholders attempted to make the directors liable on the ground of neglect, etc. The court, in discussing the facts of that case, said that "such subordinates (alluding to the cashier) must be supposed to act honestly until the contrary appears, and the law does not require their employers to entertain jealousies and suspicions without some apparant reason." And further said the court: "I think the question in all such cases must necessarily be whether they (the directors) have omitted that care which men of common prudence take of their own concerns."

In the case of the Manhattan Co. v. Lydig, 4 Johnson's Rep., 397, it is said on this question of diligence: "The examinations of the bank by the committee of directors were in the usual way, and the fraud practiced eluded detection by means of a false balance sheet. It is not for the court to point out the mode banks are to pursue to detect frauds, but if they take the usual and uniform method adopted, not only by this, but by other banks, they can not be subject to the charge of negligence." And if the mode adopted by business men in such cases is to fix the measure of diligence or determine the question of neglect, as said by Lord Hatherly in Turquand v. Marshall, 4 Law Rep., Ch. App. Cases, 382, then directors are relieved from liability. Taking the entire testimony of bankers in this case, and these directors were as vigilant, or more so, than the directors of other larger moneyed institutions, and to hold them responsible under the facts presented would be to deter business men from accepting the position of a director, when, by doing so, they are required, in effect, to insure the honesty of bank subordinates by being made responsible for their fraudulent acts.

We have considered other questions of neglect made in this case involving fraudulent overdrafts, and the fact of notice given a man supposed to be perfectly honest of the day on which his money, as cashier was to be counted, in all of which we perceive no want of ordinary diligence. These directors were the principal stockholders. Their own interests were involved to a greater extent than that of the depositors. They were business men. Two of them were almost daily at the bank. The assets of the bank will pay eighty or ninety cents to the dollar, and if they paid less it could not affect the question here.

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They (the directors) have conceded their neglect in the particular of failing to have ample security to the bond of the cashier. They have made that neglect good by accounting to the bank for the penalty of the bond, which was $20,000. They have exercised ordinary diligence in the discharge of their official duties, and suffered loss, in common with the appellants, by the fraud of a cashier in whom they all had the right to confide.

The judgment below is affirmed.

McDowell v. C., O. & S. W. R. R. Co.

(*Filed June 7, 1888—Not to be reported.*)

Master and servant—Promise to repair—Where the master furnishes defective machinery or premises for the servant's use, the promise by the master to repair within a reasonable time after notice from the servant of the danger places the risk on the master, and as there is no pretense in this case that the servant used the defective machinery or premises (a platform) for such a length of time as would induce the belief that the master intended to or had violated his promise to repair, or any inference that the defect and danger were so imminent as that one of ordinary prudence would not have continued its use, a petition alleging the defect, the promise of the defendant to repair, its failure to do so and the resulting injury to plaintiff, stated a cause of action.

E. D. Walker, Matt O'Doherty and R. C. Davis for appellant.

P. H. Darby for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action having been instituted to recover for a personal injury sustained by the appellant while in the employ of the appellee, by reason of defective machinery belonging to and used by the latter, and a demurrer having been sustained to the petition by the court below, that judgment was affirmed. On a petition we are inclined to reconsider the opinion delivered, and to now hold that the petition contains a cause of action.

The promise by the employer to repair, within a reasonable time after notice by the servant of the danger, places the risk on the employer. There is no pretense that the appellant used the platform for such a length of time as would induce the belief that the employer intended to or had violated his promise to repair, or any inference that the defect and danger were so imminent as that one of ordinary prudence would not have continued its use.

The judgment below is reversed and cause remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

Robbins v. Robbins.

(*Filed June 7, 1888—Not to be reported.*)

Construction of devise—By our statute any estate created by deed or will is to be deemed a fee simple, although no words of inheritance are used, unless

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a different purpose appear by express words or necessary implication. But aside from the statute the court is of the opinion that the intention of the testator is manifest in this case to give to the devisee the absolute estate.

The testator directs his executor to sell his "Chicago property" as soon as "he may think best for the interest of my estate or the interest of my wife, or any part thereof, as in his judgment may seem best; but it is my direction that said sales be made as soon as he thinks advisable. When sold, I direct that he forthwith invest the proceeds of said sales in United States bonds, in the name of my said wife, and for her benefit. She will at no time loan any of the proceeds of said sales of said real estate to any person or persons whatever, but is to have the interest on said bonds to use as she may desire." By a subsequent clause of his will the testator provides that the rents of the property are to go to his wife, to use as she may desire until the property is sold.

Held—That the wife takes the fee, and not merely a life estate. It is manifest, from a reading of the entire will, that it was the testator's intention to dispose of the whole of his estate, and as there is no devise over of this property, and none can be inferred from any provision of the will, it must be held to be merely an effort to require the absolute owner to use only the income of the estate and not encroach on the principal.

C. H. Lee and J. H. Barker for appellant.

O'Hara & Bryan and L. T. Applegate for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Chief Justice Pryor.

There is only one question necessary to be considered in this case, and that arises on the construction given the will of H. L. Robbins by the court below. The devisor died without children, leaving his brothers and his wife surviving him.

By the second clause of his will he directs his executor to sell his Chicago property as soon as "he may think best for the interest of my estate or the interest of my wife, or any part thereof, as in his judgment may seem best, but it is my direction that said sales be made as soon as he thinks advisable. When sold I direct that he forthwith invest the proceeds of said sales in United States bonds in the name of my said wife, and for her benefit. She will at no time loan any of the proceeds of said sales of said real estate to any person or persons whatever, but is to have the interest on said bonds to use as she may desire." The last clause of the will provides that if the estate in Chicago is not sold, then these rents are to go to the testator's wife until sold, to use as she may desire. It is contended by the appellant that this devise only invested the wife with a life interest in the Chicago property, entitling her to the rents and profits, and nothing more.

In support of this construction of the testator's will other clauses of that instrument are referred to, by which he devises to his wife certain other real estate in Kentucky and certain cash notes, with the express power given her "*to do* with the same *as she may see fit*." It is, therefore, argued that as the testator used such language in regard to the other devises as not only invested the wife with the fee, but in express terms said that she could dispose of it as she pleased, that his intention with reference to the devise of the Chicago property was to limit the donation of the estate for the life of the wife, and restrict the use to the income or the rents and profits. If the devise to the wife of the Chicago property passes an estate for life only, then the remainder is undisposed of by the

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will, and passes to the testator's heirs at law. It is manifest that the intention of the testator was to dispose of his entire estate, and from a careful reading of the will in question it is evident that he has disposed of the absolute estate in the Chicago property. He made devises to his brothers as well as to his wife, and in each invests them with the power to dispose of the devise made to each as they might see proper. The will is intelligently written, with the details as to the property owned and devised specifically given, and if the testator intended to give to his wife only a life-estate in the property in question it is a little remarkable that he failed to make any disposition of the remainder. He makes no devise to any of his collateral kindred except certain specific property, in regard to which there is no ambiguity, and, if the construction given the clause of the will by appellant is the proper one, neglected to dispose of the most valuable part of his estate, or to designate anyone of his collateral kindred as entitled to the remainder interest. It seems to us, however, that to construe the estate as one for life in the wife is inconsistent with the language used, and contrary to the plain intent of the devisor. He left no children, and in the disposition directed to be made of this Chicago investment by his executor was desirous of providing a fund, the income of which would be sufficient to support the wife, and, therefore, restricted her power (or attempted to do so) to loan out the proceeds where they might likely be lost, and directed his executor to invest the proceeds in government bonds *in the name of my said wife and for her benefit*, and in the latter clause of the will provided that she should have the rents until the property was sold. The testator was evidently endeavoring to keep the fund arising from the sale secure for the benefit of the wife, with the power on her part to use the interest. He had already given the entire proceeds to her. The investment was to be made *in the name* of the wife and for *her benefit*, with no limitation or restriction except that "*you, my wife*, must not loan out the proceeds, but use for your support the interest alone." There was no devise over, and no such intention can be inferred from any language used or from any provision of the testator's will. It is simply an effort to require the absolute owner to use the income of the estate and not encroach on the principal. Besides, by our statute, every estate created by deed or will should be deemed a fee simple or pass all the title of the grantor, although no words of intendance are used, unless a different purpose appear by express words or necessary implication. We think, however, that the intention is manifest here to give to the wife the absolute estate. We perceive no objections to the ruling of the court on any branch of the case.

Judgment affirmed.

L. & N. R. R. Co. v. Mitchell.

(*Filed June* 7, 1888.)

1. *Negligence—Pleading*—In a common law action for negligence the degree of negligence, whether wilful, gross or ordinary, need not be stated. It is a matter of proof and not of averment. In this case, under a general averment of negligence, the question whether the injury was caused by *gross* negligence was properly submitted to the jury.

2. *The special findings of a jury*, like a general verdict, can not be disturbed upon the ground that they are against the weight of the evidence, unless they are flagrantly so.

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3. *Gross negligence*—The absence of slight care in the management of a railroad train is *gross* negligence. It is the duty of the conductor of a train to see that there was no new movement of the train while the brakeman was making a coupling under his direction, and he was guilty of gross negligence in failing to see that no such movement took place.

4. *Exemplary damages*—The finding of gross negligence authorized the finding of exemplary damages. The jury, however, were restricted to compensatory damages, of which the company of course can not complain.

5. *Excessive verdict*—It is only when the damages assessed by the jury are glaringly excessive, and appear at first blush to have resulted from passion or prejudice, that the court can set aside the verdict upon that ground. Every verdict should be regarded as *prima facie* as the result of the exercise of an honest judgment upon the part of the jury. As the evidence in this case shows that the plaintiff has suffered beyond estimate, his life for weeks hanging in the balance; that he is a cripple for life, disabled from earning a living, at least at his accustomed employment, if not altogether, and in large measure deprived of the enjoyment of life, a verdict awarding ($10,000) ten thousand dollars as compensatory damages will not be set aside upon the ground that it is excessive.

6. *Special interrogatories propounded to the jury* are not open to the objection that they are improperly leading and suggestive, merely because their form indicates to the jury how to find in order to authorize a judgment for the one party or the other.

7. *Same*—The court did not err in refusing to direct the jury to find whether the injury was the result of an accident. It was not a question of accident under the pleadings, but whether the defendant had been guilty of gross neglect, or the plaintiff of such negligence that but for it the injury would not have happened.

8. *Evidence—Prejudicial error*—Whether evidence that the plaintiff had a family was competent in this case is not necessary to determine, as such evidence, if incompetent, was not prejudicial, the jury being restricted in estimating the damages to such sum as would "reasonably compensate plaintiff for the injuries sustained by him because of such neglect—the bodily and mental suffering (if any) resulting directly from such injuries, and the impairment of capacity (if any) to labor and enjoy life resulting also from said injury."

Wm. Lindsay and Barnett, Noble & Barnett for appellant.

Brown, Humphrey & Davie for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Holt.

The appellee, Robert S. Mitchell, while in the employ of the appellant as a brakeman, and when engaged in the hazardous work of coupling some freight cars in the presence of and under the direction of the conductor, was caught by the wheel of one of them and his ankle and foot so crushed that it had to be amputated.

His theory as to the manner of the injury is that, after making the coupling and before he had time to get from between the cars, there was a new movement of the train under the direction of the conductor, by which he was knocked down and injured.

The company, upon the other hand, claim that there was no new movement of the train; that it backed slowly and properly to the car that was to be coupled to it; that the appellee went between them and made the coupling, and then, instead of coming out at once, walked between the two cars for three or four steps as they continued to go backward, some six or eight feet, from the force of the movement that was necessary to make the coupling, and in this way was caught and injured.

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The company now object to the judgment of $10,000, that was rendered upon the special verdict, upon several grounds. The petition, after setting forth the manner and extent of the injury, avers that "the said action of said defendant's conductor in charge of said train, and the action of defendant in regard to said operating of said train, was negligent and careless, and the defendant was guilty of negligence, and the said injury to the plaintiff occurred by reason of the negligence and want of reasonable care on the part of defendant, and without any fault of the plaintiff."

The degree of the imputed negligence is not stated, at least in express language.

Waiving the question whether this may not be done, and whether it is not done in this instance by the statement of the manner of the injury, we are of the opinion that the use of the generic word "negligence" in the pleading in an action of this character is sufficient without averring its degree.

This is not an action under the statute for a killing by "wilful" neglect. If it were it would have been necessary, inasmuch as the statute creates and defines the injury, to allege that the negligence was wilful; but it is one at common law for negligence. In such a case the decree, whether wilful, gross or ordinary, need not be stated. It is a matter of proof and not of averment.

It is said in Chitty that a general averment of negligence authorizes proof of gross negligence. (2 Chitty on Pleadings, * 358, note e.)

In Abbott's Trial Evidence, page 583, "gross negligence may be proven under a general averment of negligence."

Another writer uses this language: "The declaration must aver the negligence or default of the company; but it need not describe the kind of negligence or particular acts which constitute the default or the names or positions of the servants by whose fault the injury was inflicted." (Pierce on Railroads, page 393.)

Newman in his work on Pleading and Practice, page 415, says, in substance, that where a statute creates and defines an injury by neglect, its particular degree must be averred in the language of the statute, or in equivalent words; but that in other cases the general allegation of negligence will be sufficient, as it "in general includes gross as well as ordinary negligence."

Many cases might be cited in supprt of these text-writers. Among them are Nolton v. Western Railroad Corporation, 15 N. Y., 444, and Turnpike Company v. Maupin, 79 Ky., 101.

The last-named case was for an injury sustained by reason of a defect in a bridge of the company, and the court in its opinion says:

"The allegation of negligence is sufficient to entitle the plaintiff to recover in an action like this for any degree of culpable negligence that may be established by the evidence."

Why should not the general allegation of negligence authorize proof of gross negligence where its existence is necessary to a recovery equally with evidence of slight or ordinary neglect in a case where it is sufficient? Each are but subdivisions of it, and equally embraced by the term.

There is some evidence that the injury to the appellee resulted from gross neglect; the pleading authorized its admission, and as its existence was necessary to a recovery the question was properly submitted to the jury whether the injury was thus caused.

The company contends that the interrogatories submitted to the jury were suggestive and calculated to induce responses favorable to the appellee; that the court improperly refused to let them say whether the injury resulted from an accident which could not have

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been guarded against by the exercise of ordinary prudence upon the part of the train men; that it failed to inform them that the burden rested upon the appellee, not only to show the company's neglect but his own freedom from any negligence; that some of the material findings are unsupported by the evidence, and that the damages awarded are excessive, resulting, in part at least, from the improper admission of evidences that the appellee had a family.

The jury, in answer to the interrogatories, found that the appellee, when coupling the cars, was acting under the orders of the conductor; that when the coupling was made there was a momentary check of the train, but that it was in motion when the appellee was hurt, and that the conductor by signal caused the train to move on before the appellee had reasonable time to get from between the cars; that the gross negligence of the conductor in controlling the train caused the injury, and that he failed to use such caution as an ordinarily prudent person would have used under like circumstances; that the exercise of ordinary care by the appellee would not have avoided the injury, and that $10,000 in damages would reasonably compensate him for the mental and bodily suffering and the impairment of his capacity to labor and enjoy life, arising from it.

It is insisted for the company that the findings, that there was a new movement of the train; that the injury resulted from gross negligence upon the part of the conductor, and that the exercise of ordinary care by the appellee would not have averted it, are altogether unsustained by the evidence.

Whether this is so, and whether the verdict is so excessive as to warrant the intervention of an appellate tribunal, are the main questions to be considered.

The special findings of a jury, like a general verdict, can not be disturbed upon the ground that they are against the weight of the evidence unless they are flagrantly so.

The appellee testified in substance that by the direction of the conductor, and in his presence, he went between the cars to make the coupling; that after doing so, and before he had time to get out, he was injured by a new movement of the train. If this be true the conductor was certainly chargeable with gross negligence. He was immediately present; he was controlling the train; he knew the appellee had gone between the cars by his orders to make the coupling, and that a new movement of the train would imperil his life.

Under such circumstances it was his duty to see that it did not take place. Certainly the absence of slight care in the management of so dangerous an agency as a railroad train is gross negligence. The conductor would not, for fear of injury to his own person, have permitted a new movement of the train, if he had occupied the appellee's position. To permit it under the circumstances was an absence of all care.

It is true that several other witnesses testify that there was no new movement of the train, but that merely the motion of the train necessary to make the coupling carried it backward a few feet. In fact we are inclined to think that some of the findings are against the weight of the evidence, as it appears to us in the record; but they are the conclusions of twelve men who heard and saw the witnesses, and we can not say that they are flagrantly so, especially in view of the fact that they have been approved by the trial judge, before whom the witnesses also testified.

The evidence fails to show that the negligence, which must be imputed to the company, was accompanied by any act of willfulness.

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The jury, however, found it to be gross, and this authorizes the finding of exemplary damages. Railroad Company v. McCoy, 81 Ky., 403.

The jury were, however, restricted by the court to those which are compensatory only; and of this the company can not of course complain. The amount allowed seems large. It is so. The fact, however, that it appears high to us does not authorize a reversal.

We are not acting as a jury, and it is only when it is glaringly excessive, and appears at first blush to have resulted from passion or prejudice, that we can interfere.

The power should be sparingly exercised, and only in extreme cases. This is the policy of the law, and reasonably and necessarily so. It is difficult, indeed impossible, to measure with mathematical certainty the extent of some of the elements of compensatory damages. The law has confided the duty to the opinion of the jury as the best means of arriving at their extent, even approximately, and every verdict should be regarded, *prima facie*, as the result of the exercise of an honest judgment upon their part.

Any other rule would soon burden this court with numberless appeals upon this ground. The evidence shows that the appellee has suffered beyond estimate. For weeks his life hung in the balance. He is a cripple for life; doomed to hobble about the balance of his days, disabled from earning a living, at least at his accustomed employment, if not altogether, and in large measure deprived of the enjoyment of life.

In estimating the damages for all this different minds may well arrive at different results; and in view of the well established rule upon this subject the verdict of the jury can not be disturbed upon the ground that it is excessive.

The interrogatories objected to are, in form, as follows:

"4. Did or not the conductor (Sterling), whilst the plaintiff was coupling the cars, and before he had reasonable time to complete the same and come from between the cars, cause, by order or signal, the train to start in motion, and thereby catch the plaintiff between the cars, and cause the injury to the latter?"

"Answer. We, of the jury, say that the conductor did, by signal, cause the train to move on before the plaintiff had reasonable time to come from between the cars."

"5. Was or not the injury to the plaintiff caused by the negligence or want of care on the part of the conductor (Sterling) in controlling or directing the movements of the train at the time?"

"Answer. We, of the jury, say yes, it was."

"5½. If they answer question 5 in the affirmative, then they will say whether such neglect on the part of the conductor was gross neglect or ordinary negligence?"

"Answer. We, of the jury, say it was gross negligence."

"5¾. Did or not the conductor (Sterling), at the time of plaintiff's injury, fail to use that kind of care and caution which an ordinary prudent and skillful person engaged in like business would have observed under similar circumstances?"

"Answer. We, of the jury, say he did fail."

"6. Could or not the plaintiff, by the use of ordinary care and prudence on his part at the time, have avoided said injury?"

"Answer. We, of the jury, say he could not."

"7. If the jury answer question No. 4 in the negative, question No. 5 in the affirmative, and question No. 6 in the negative, and say, in answer to question No. 5½, that said conductor was guilty of

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gross negligence, then they will consider, and say, in answer to this question, what sum in damages, within that claimed, will reasonably compensate plaintiff for the injuries sustained by him, because of said negligence—the bodily and mental suffering, if any, resulting from said injuries, and the impairment of capacity, if any, to labor and enjoy life resulting also from said injury. If, however, said questions 4, 5 and 6 are not answered, as herein set forth, then this, the 7th question, need not be answered."

"Answer. We, the jury, find for the plaintiff in the sum of ten thousand dollars."

It is urged that they pointed out to the jury how to find a verdict that would sustain a judgment for the appellee. It may be equally said that they informed the jury how to find so as to authorize one for the company. As to the last interrogatory it may be said that it would be difficult, if not impossible, to frame a hypothetical question so that a jury of ordinary intelligence would not know how to find to authorize a judgment for the one party on the other. Certainly it would be impossible to submit interrogatories of such a form that the attorneys could not point out to the jury how they desired them to answer them to authorize a judgment for their client. If such a thing were possible the jury would be unable to act intelligently. We must presume that they hunt for the right and not wrong, and, in our opinion, the interrogatories are not open to the objection that they are improperly leading and suggestive.

The court, by its instructions, properly defined what would constitute gross and ordinary negligence upon the part of the conductor, and what would be ordinary care upon the part of the appellee, and the interrogatories must be read in the light of these instructions. The jury were not only required to find specially whether the appellee had been guilty of any negligence, but were informed that the burden of proof rested upon him, and he must make out his case by the weight of the testimony. It was not a question of accident under the pleadings, but whether the company had been guilty of gross neglect or the appellee of such negligence that but for it the injury would not have happened. This was the issue, and it was proper to shape the interrogatories with a view to its determination and not of some question not presented.

In the case of L., C. & L. Railroad v. Mahoney, 7 Bush, 238, evidence that the injured party had a family was held to be competent. That was an action, however, under the statute for a killing by wilful neglect.

In actions for injuries for neglect not based upon such a statute, and where compensatory damages only are allowable, the authorities are, to some extent, conflicting as to the competency of such evidence.

In the case of Winters v. Railroad Company, 39 Mo., 468, it was decided that it was competent to prove that the injured party had a family, not as a fact in itself authorizing damages, but as showing his condition and situation in life by way of estimating the damages done him. Upon the other hand this was denied in the case of the Railroad Company v. Powers, 74 Ill., 341, upon the ground that it would tend to unduly enhance the damages and beyond compensation; that the only question is, how much has the plaintiff been damaged, and if such evidence be admissible, then it would be equally proper to show that the wife was blind, or the daughter an invalid.

It was held by the Supreme Court of the United States, in the case of Pennsylvania Company v. Ray, 102 U. S., 451, that evidence

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as to the poverty of the injured party, or whether he had a family was admissible where he was entitled to compensatory damages only. This left the question open, so far as that court is concerned, in a case where an injury results from gross neglect, unaccompanied by wilfulness or acts of aggravation.

In the case now in hand the petition avers that the appellee has a family. It is specifically pleaded.

It is held in some cases, as in Laing v. Colder, 8 Penn. St., 479, that matters not naturally attendant upon the act but proper by way of special damage, as that the injured party is the head of a family, may be proven if specially pleaded.

Mr. Rhorer, in his work on Railroads, vol. 2, p. 1099, appears by the citation of authority to support this view.

It is not, however, necessary in this case to decide whether such evidence is competent in a case where an injury results from gross neglect, which authorizes exemplary damages, but which is unaccompanied by any act of wilfulness or oppression, or whether it is admissible in support of such matter when specially pleaded, because in this case the jury were, by the seventh interrogatory, expressly restricted to estimating the damages to such sum as would "reasonably compensate plaintiff for the injuries sustained by him because of such negligence, *the bodily and mental suffering* (if any) *resulting directly from such injuries, and the impairment of capacity* (if any) *to labor and enjoy life resulting also from said injury.*"

This question enumerated the elements for the calculation of the damages, thereby withdrawing from the consideration of the jury the evidence as to the family as effectually as if it had been done by express instruction. Railroad Company v. Shipley, 31 Md., 368.

It was not a general verdict, but the finding as to damage was upon a special question that pointed out to the jury what they should consider in fixing it.

We can not presume that they did not follow it; and if an erroneous step or instruction in a case be corrected by a subsequent instruction or otherwise, no ground for reversal exists.

Judgment affirmed.

FELAND V. MORTON, COUNTY JUDGE OF MUHLENBERG.

(*Filed June* 9, 1888—*Not to be reported.*)

County court—Subscription—Mandamus—While the justices of the peace must act in conjunction with the county judge in order to make an appropriation of money and the levy for its payment valid, yet where a county makes an unconditional subscription to the capital stock of a corporation, and issues bonds for its payment, and thus becomes a stockholder in the corporation, it will be treated as all other stockholders, and if the county court is imperatively required to cause to be levied and collected a tax for the payment of the subscription for the interest on the bonds, the county judge *alone* may be compelled by mandamus to cause the tax to be levied and collected. No appropriation has to be made in such a case, either by the county judge or the justices associated with him, the appropriation having already been made. The act of the Legislature is mandatory, requiring the county court to discharge a plain ministerial duty, in regard to which it has no discretion.

John Feland for appellant.

Thos. W. Brown for appellee.

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Appeal from Muhlenberg Circuit Court.

Opinion of the court by Chief Justice Pryor.

The bonds of Muhlenberg county were issued in payment of its subscription of $400,000 to the capital stock of the Paducah & Elizabethtown Railroad Company.

The appellant, John Feland, being the owner of certain coupons attached to those bonds, which evidence the semi-annual interest that had accrued on them, filed his petition in the Muhlenberg Circuit Court against the appellee, John H. Morton, the county judge of that county, for the purpose of compelling him to cause to be levied and collected from the property of the county a sum sufficient to satisfy the amount of the coupons, with the interest.

The act under which the subscription to the stock of the corporation was made was approved on the 24th of February, in the year 1868, and that section of the charter under which the appellant's right to the mandamus is asserted reads as follows: "That in case any county, city, town or election district shall subscribe to the capital stock of the said Elizabethtown & Paducah Railroad Company under the provisions of this act, and issue bonds for the payment of such subscription, it shall be the duty of the county court of such county, the city council of such city, and the trustees of such town, to *cause* to be levied and collected a tax sufficient to pay the semi-annual interest on the bonds issued, and the cost of collecting such tax and paying the interest on all the real estate and personal property in said county, city or town, subject to taxation under the revenue laws of the State, including the amounts owned by residents of such county, city or town, or election districts, which ought to be given in under the equalization laws."

A demurrer was filed to this petition of the plaintiff, and sustained by the court below, the principal ground being that the county judge had no authority to impose the levy or have the collection made.

All the facts necessary to the relief sought have been alleged, and if the county judge has the power to enforce the collection the demurrer should have been overruled.

It is insisted by learned counsel for the appellee that the justices of the peace of the county must be associated with the county judge when levying this tax, as provided by art. 17, sec. 1 of the General Statutes, that provides: "The county judge of each county shall hold the county court on the days prescribed by law, but at the court of claims, which shall be held once in each year, the justices of the peace of the county shall be associated with him and constitute the court, a majority of whom shall constitute a quorum for the transaction of business, which shall be confined to laying the county levy, appropriating money, and transacting other financial business of the county." The power to thus legislate with reference to the county court is derived from sec. 29 of art. 4 of the Constitution, that provides: "The General Assembly may at any time abolish the office of the associate judges whenever it shall be deemed expedient, in which event they may associate with said court any or all of the justices of the peace for the transaction of business." Section 37 of the same article also provides: "The General Assembly may provide by law that the justices of the peace in each county shall sit as the court of claims, and assist in laying the county levy and making appropriations only."

The office of associate judge has long since been abolished, and the justices under proper legislation have been associated with the

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county judge when laying the county levy and making appropriations by the county, and in all matters affecting the financial interests of the county, such as making appropriations and laying the county levy for the payment of such allowance or indebtedness as the county court, by virtue of the general powers conferred upon it, has the authority to make or create. It has been universally held by this court that the justices of the peace must act in conjunction with the county judge in order to make the appropriation or levy valid; but, on the other hand, where the county becomes a stockholder in a corporation, and makes an unconditional subscription under legislative authority, it will be treated as all other stockholders, and if the collection and levy for the payment of the stock is imperative, this court will not stop to inquire whether the levy has been made by the county court, composed only of the presiding judge, or the justices associated with him. No discretion as to the appropriation of the money or the creation of the debt is with the county judge, or to the justices in this case, and whatever may be the financial condition of the county it is no response to the creditor, after the debt has been incurred, to say that it is now inconvenient to meet the obligation, by reason of an empty treasury, or the inability of the county to pay the indebtedness. The ordinary test must be applied; that is, a sale of the property of the taxpayer to discharge the liability. The act here is mandatory, requiring the county court to discharge a plain ministerial duty, in regard to which it has no discretion. No appropriation has to be made by the county judge or the justices associated with him. The appropriation has already been made, and forms no part of that indebtedness that ordinarily pertained to the court of claims, and if every justice of the peace within the county had been seated with the county judge when this appropriation was made, they had no power to refuse to make the levy. It is said, however, that the coupons might be forgeries, and, therefore, a discretion would exist with the justices for that reason. This argument would apply to the exercise of every ministerial act, however imperative the command to do the act might be, and is no answer to the claim for relief in this case. There is no such defense made, or any denial as to the validity of the claim, other than the power of the county judge when sitting as a court to enforce the collection of the subscription made. These questions have been, in effect, decided in the cases of Bowling Green & Madisonville Railroad Co. v. Warran County, 10 Bush, 711; Logan County v. Caldwell, 1 KY. LAW REP., 376, and Cook v. Lyon County, 6 KY. LAW REP., 360. See also case of Meriwether v. Muhlenberg County Court, 120 U. S. 354, opinion by Mr. Justice Harlan.

The judgment sustaining the demurrer is reversed and cause remanded for proceedings consistent with this opinion.

HUNTER, &c. v. RYAN.

(*Filed June* 9, 1888—*Not to be reported.*)

Purchase at tax and execution sale—Transfer of bid—R. purchased B.'s land at a sale made both for taxes and for an execution debt for about one-eighth of its value. F., after R.'s purchase, bought the land from B., and for the purpose of perfecting his title paid to R. an amount which was $25 in excess of R.'s bid. R. executing to F. a receipt, reciting that the amount paid was in full of the execution, describing it, under which R. purchased, and further recit-

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ing that "this payment is made in lieu of said purchase under said execution." R. afterwards obtained from the sheriff a deed called a tax deed, and by this action seeks to recover the land from one to whom F. has sold. R. claims that he assigned only his interest in the execution bid and not in his bid at the tax sale. *Held*—That the claim of R. can not be sustained upon the mere verbiage of a receipt that the entire transaction fully explains, and, therefore, he can not recover.

Jas. A. Mitchell for appellants.

Thos. H. Hines for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Pryor.

A careful examination of this record results in the conclusion that the chancellor below must have overlooked the fact that the appellee had been paid all and more than the amount bid by him for the land in controversy at the execution and tax sale.

The facts, as presented by this record, show that one Brown owned the land in controversy, of the value of twenty-five hundred dollars; that he was involved in debt, and his land sold under an execution and for the payment of certain taxes due the State and county. The land was sold in February, 1877, and purchased by the appellee, Ryan, the entire amount of his bid being $305. The land was sold on the same day to satisfy all three of the claims and the money paid by Ryan to the sheriff, who applied it, first, to the payment of taxes, $14.20; second, to the payment of a capias, $4.52, leaving a balance of $286.28 that was credited on the execution, making in all $305. After this sale a man by the name of Ferguson purchased the equity of redemption under an execution sale, the court having sold for less than two-thirds of its value to Ryan. This purchase was for the owner, Brown, and Brown failing to pay, Ferguson gave to him $1,000 and took the land. The transactions with Ferguson were all subsequent to Ryan's purchase.

Ferguson having purchased from Brown, says that Ryan offered to sell him his interest in the land at the price he, Ryan, paid for it; that he gave Ryan his note for $330, which was $25 in excess of Ryans' bid and the amount he had paid, and subsequently paid the note off. The payment Ryan admits, but says that he intended to assign him his interest only in the execution bid, meaning, to use Ryan's language, to *convey* that. The receipt executed to Ferguson reads: "Received of John J. Ferguson the sum of three hundred and thirty dollars, in full of an execution of Reinhart, Ballard & Co. v. D. Brown. The said Ryan having bought the property of the said D. Brown, sold under this execution, No. 437, this payment is made in lieu of said purchase under said execution." Dated June 13, 1877. Signed C. H. Ryan.

In three or four months after Ryan had bid the $305 for the land he receives from Ferguson $330, who had paid Brown, the original owner, $1,000, and was trying to perfect his title. Ryan now says that nothing was said about the tax sale made on the same day, and that Ferguson knew the taxes were unpaid, and acting on this most singular version of the transaction, obtained from the sheriff a deed called a tax deed and brought this action against the children of Mrs. Hunter, to whom Ferguson had sold, to recover the land on this tax title. This unconscionable transaction has been approved by the judgment below, and Ryan, for the failure of Ferguson or Brown to pay $14.25, has recovered of the children of Mrs. Hunter this land.

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The sale of the land and the title is all regular, but the transaction with Ferguson is conclusive as to the rights of these parties, and leaves the claim of the appellee unsupported by any rule of law, equity or justice.

Here the purchaser at the tax sale had received more than he bid for the land, and if nothing had been said at the time, but the act of payment by Ferguson admitted, it would have entitled the appellants to demand the right to redeem. With Ferguson's statements in the record, that are rational and consistent with every fact connected with this ordinary business transaction, this claim of Ryan's can not be sustained upon the mere verbiage of a receipt that the entire transaction fully explains.

The judgment is reversed with directions to dismiss the petition.

CITY NATIONAL BANK OF PADUCAH V. CITY OF PADUCAH, &c.

(*Filed June 9, 1888—Not to be reported.*)

Taxation of National banks—The National banks located in this State stand, with reference to taxation, upon precisely the same footing with the State banks, and can not, therefore, be taxed to a greater extent than the State banks. Therefore, as the State banks are not liable to county or city taxation, the state tax upon each one hundred dollars of their capital stock being in lieu of all other taxation, the National banks are also exempt from county or city taxation.

J. M. Bigger for appellant.

E. W. Bagby and C. S. Marshall for appellees.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellant, by this action, enjoined the appellee from collecting taxes which the appellee had assessed for city purposes on its banking-house in the city of Paducah, also the sum of two hundred dollars assessed against the appellant as a specific tax for the privilege of doing a banking business in said city. Also to recover from the appellee the sum of two hundred dollars, a specific tax that the appellee had paid under protest for the privilege of carrying on the banking business in said city, upon the ground that the appellee had no right to collect said tax, and that the demand was illegally coerced from it. Upon the motion of the appellee the appellant elected to abandon its claim for the recovery of said two hundred dollars and to proceed on the action of injunction. Upon the hearing of the cause in the lower court the court sustained the appellant's action in so far as it sought to enjoin the collection of the specific tax, and perpetuated the injunction. But the court, as to the ad valorem taxes, dissolved the injunction and dismissed the action as to the ad valorem taxes; from this judgment the appellant has appealed to this court.

It was decided by this court a few days ago, in the cases of the Franklin County Court against the Bank of Kentucky, the Farmers Bank of Kentucky and the Deposit Bank of Frankfort, *that said

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*These cases are pending upon petition for rehearing, and for that reason the opinion has not been published.

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banks, under the provisions of their charters which imposed a tax of fifty cents on each one hundred dollars of their capital stock "in full of all tax or bonus," were not liable to county or city ad valorem taxation. According to the opinion rendered by Justice Matthews, in the cases of the Covington City National Bank v. City of Covington, 21 Fed. Rep., 484, and the authorities cited in those cases, the National banks, located in this state, stand, in reference to taxation, upon precisely the same footing with the State banks.

The judgment of the lower court, dissolving the appellant's injunction in reference to the ad valorem taxes levied on its banking-house and lot by the appellee, must be reversed, with directions to sustain the same.

COOK v. COMMONWEALTH.

(*Filed June* 12, 1888—*Not to be reported.*)

1. *Instructions*—While it is the duty of the trial court in criminal cases to give the whole law of the case, even in the absence of a request to do so, no instruction should ever be given unless based upon an hypothesis supported by some evidence.

2. *Murder*—Words of reproach, however grievous, are not provocation sufficient to free a party killing another from the guilt of murder.

Upon the trial of appellant for murder he was not entitled to an instruction as to manslaughter, as it does not appear that there was any demonstration or offensive movement upon the part of the deceased.

Z. W. Bugg for appellant.

S. H. Crossland for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Holt.

This conviction is for murder. The punishment awarded is confinement for life in the penitentiary. A proper instruction as to murder, but none as to manslaughter, was given to the jury.

The appellant asked the trial court to give the whole law of the case. It was its duty to do so in the absence even of such a request. No instruction should ever be given, however, unless based upon an hypothesis supported by some evidence. If the court passes this line it is no longer the law of *the case*.

In this instance there was no combat between the deceased and the appellant. There was, so far as the evidence discloses, no demonstration or offensive movement whatever upon the part of the deceased. Because of offensive words spoken by him the appellant crushed his skull with an axe, resulting in death. The person of the appellant was at the time in no danger. There was no legal provocation to reduce the offense from murder to manslaughter.

Says Wharton: "Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are indecent, provoking actions or gestures expressive of contempt or reproach without an assault upon the person." Wharton's Crim. Law, sec. 970.

This rule is well settled. The peace of society and the safety and value of human life will not admit of a different one.

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The facts of this case did not authorize an instruction as to manslaughter.

Judgment affirmed.

THOMAS' ADM'R, &C. V. THOMAS' ADM'X, &C.

FLUTY, &C. V. BUTLER, &C.

THOMAS' ADM'R V. THOMAS' HEIRS, &C.

(*Filed June* 14, 1888—*Not to be reported.*)

1. *Execution sales—Waiver of error* -Even if the fact that the sheriff sold land under execution for $23 more than the execution debt would ordinarily render the sale void, the execution defendant in this case waived the error by refusing to receive the $23 when tendered to him by the sheriff soon after the sale, and directing the sheriff to return the amount to the purchaser and let the sale stand.

2. *Sheriff's deed*—It is not necessary in order to enable the successor of a sheriff who has sold land under execution to execute a conveyance to the purchaser, that the purchaser should produce the certificate of the sheriff making the sale, showing that the purchase money had been paid. Such was the requirement under the statute of February 11, 1809, but the law has been changed.

3. *Same*--After the expiration of the time provided for the redemption of land sold under execution the sheriff may convey to the purchaser, although the execution defendant has died.

Robert Riddell and H. C. Lilly & Son for appellants.

Thos. Turner for Fluty.

I. N. Cardwell for Butler.

B. J. Peters for Hall and wife.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Bennett.

The controlling question to be determined in these cases is whether the land in controversy belongs to the appellee, Mrs. Butler.

The sheriff of Estill county having an execution in his hands in favor of T. M. Barnes against H. C. Thomas, he sold the land in controversy to satisfy said execution on the 3d Monday in February, 1867. The sale was made at the courthouse door on a county court day. H. C. Thomas surrendered said land in writing to the sheriff for the purpose of levy and sale. At the sale Harrison Cockrill purchased the land at the price of two hundred and eighty dollars, which was less than two-thirds of its appraised value. H. C. Thomas died in the fall of 1867, without having redeemed said land. In 1873, no person having redeemed said land, Mrs. Butler, who was the wife of H. C. Thomas at the time of his death, and subsequently married Butler, purchased said land from Harrison Cockrill at the price that he had paid for it and interest thereon. The sheriff that sold said land never conveyed the same to Cockrill. Said sheriff's successor in office, by the written directions of Cockrill, made Mrs. Butler a deed to the land on the 14th day of October, 1873.

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The fact that the sale was regular is not denied.

It is contended here that Cockrill purchased the land for the benefit of H. C. Thomas, and that the latter furnished the money with which to pay off the purchase price of the land. The record discloses no fact or circumstance of the kind. On the contrary, it is alleged, in the appellee's answer and cross-petition, that Cockrill purchased the land for himself and paid the purchase price; and that she purchased the same from him at the price that he paid for it, and the interest thereon. These allegations are not denied. Besides, Cockrill, whose deposition was taken by the appellants, swears substantially to the same facts, and there is no evidence in the record tending to show a different state of case.

It is also contended that, inasmuch as the sheriff sold said land for $23 more than the execution debt, interests and costs amounted to, the sale was void. Conceding that this excess would ordinarily render the sale void, yet it will not be controverted that the execution defendant could waive the error. The record shows that the sheriff informed H. C. Thomas shortly after the sale of the mistake, and tendered him the $23, but he directed the sheriff to return the $23 to Cockrill, and to let the sale stand. By this act H. C. Thomas waived the right to take advantage of the error. And as he elected to waive the error the appellants have shown no right to take advantage of it.

It is contended by the appellants that the successor of the sheriff making the sale had no right to convey the land unless a certificate of said sheriff was produced, showing that the purchase money had been paid. There are old decisions of this court holding that the production of such certificate was prerequisite to the successor's right to make a conveyance. But these decisions were based upon the statute of this State approved February 11, 1809, which authorized the sheriff in office to convey land that had been sold under execution by his predecessor in office, upon the production by the purchaser of the certificate or receipt of his predecessor, showing "the actual purchase" and the payment of the purchase money. There was no such requirement in the law under which the sale in this case was made. At the time the sale, transfer and conveyance were made, the Revised Statutes were in force, and sec. 10 of chap. 36 provided: "The sheriff who sells land under execution, or his deputy, or the successor of the former, must convey the title sold to the purchaser, or his assignee, or his heirs or devisees, if the same is not redeemed. Under this section the prerequisite of producing a certificate or receipt of the former sheriff, showing the purchase and the payment of the purchase money, was dispensed with, which section makes it the duty of the successor in office to make the conveyance to the purchaser or his assignee, &c., if the land has not been redeemed." A similar provision is contained in the General Statutes.

It is contended that the sheriff had no right to make the conveyance after the death of H. C. Thomas. It has been held, time and again, that in a chancery proceeding for the purpose of conveying the title to land, if the owner dies between the time of the decree for the sale and the sale, or between the time of the sale and confirmation, or between the time of confirmation and the making of the deed (the latter is changed by the Civil Code of Practice), it is the duty of the court to have his heirs brought before it before proceeding to make the conveyance. The bringing of the heirs before the court is a jurisdictional necessity, for the reason that the conveyance must be made in their names. But as the sheriff seizes

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and sells the title of the execution defendant, by virtue of his authority as a ministerial officer, and as he conveys the title in his own name, and not in the name of the execution defendant, the reason of chancery rule does not apply to him, therefore, after the time allowed the defendant or his heirs, in case of his death, to redeem the land has expired the sheriff may make the conveyance to the purchaser or his assignee.

The record fails to disclose that the appellee, as the administrator of H. C. Thomas, had any means belonging to his estate with which to redeem said land. After the time of the right of redemption had expired the land belonged absolutely to Cockrill, and he sold it to the appellee, and she bought it for herself and paid for it, as the record shows, with her own means. We, therefore, can not decide, in view of the further fact that there was no fraud or collusion in the transaction, that her purchase redounded to the benefit of H. C. Thomas' heirs and creditors.

Mrs. Fluty claims the land by virtue of an execution sale in favor of Major Turner against H. C. Thomas' administrator and heirs. Said execution was issued, and the land sold under it long after Cockrill's purchase, therefore, Mrs. Fluty acquired no title to the land as against said purchase.

After a careful review of the entire record we find no reversible error.

The judgment is affirmed.

KENTUCKY SUPERIOR COURT.

RICHARDSON V. LEWIS.

(*Filed Feb.* 29, 1888.)

Want of jurisdiction waived—When the court has jurisdiction of the subject-matter of an action the right to object to the jurisdiction upon other grounds may be waived.

The appellant having instituted an action in a police court, which had no jurisdiction of the amount in controversy, the police judge transferred the case to the court of a justice of the peace, who had jurisdiction of the subject-matter of the action. The parties appeared before the justice, and the defendant, now the appellant, without objecting to the jurisdiction, "*asked* a change of venue to some other justice's court for trial and judgment." The venue was changed to another justice, and, without any objection being made to his jurisdiction, a trial was had upon the merits, which resulted in a judgment for the plaintiff (appellant). The defendant (appellee) appealed upon the ground that the police court in which the action was begun, did not have jurisdiction on the subject-matter. *Held*—That as the justice's court had jurisdiction of the subject-matter, the appellee waived his right to object to its jurisdiction upon the ground that the police court, in which the action was begun, had no jurisdiction.

H. C. Martin for appellant.

Lewis McQuown for appellee.

Appeal from Hart Circuit Court.

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Opinion of the court by Judge Barbour.

The police court of the town of Horse Cave, in Hart county, has no jurisdiction of an action for the recovery of money or personal property where the amount involved exceeds $100. In this action, which was begun in that court, the appellant sued to recover the possession of a horse, valued at $150, and $45 damages for its detention. The court had no jurisdiction of the action. However, the day the case was set for trial the police judge, being sick as his order recites, transferred the cause to the court of a justice of the peace.

By the act of March 6, 1882, justices of the peace in Hart county had jurisdiction in actions for the recovery of money or personal property where the amount involved did not exceed $200. The justice, therefore, had jurisdiction of the subject-matter of this action. Where the court has jurisdiction of the subject-matter the right to object to the jurisdiction upon other grounds may be waived. Hughes v. Hardesty, 13 Bush, 364. In this case the parties appeared before the justice to whom the police judge had transferred the case, and the defendant, who is now the appellee, without objecting to the jurisdiction of the justice, made oath that he could not have a fair trial in his court, and "*asked* a change of venue to some other justice's court for trial and judgment." The venue was changed to another justice, and both parties appeared before him, and without any objection being made to his jurisdiction the parties went to a trial upon the merits, which resulted in a judgment for plaintiff; and from that judgment the defendant appealed to the circuit court, which court, upon his motion, dismissed the action upon the ground that the police court in which the action was begun did not have jurisdiction of the subject-matter. This judgment was erroneous, for though the police court did not, the justice's court in which the action was tried did have jurisdiction of the subject-matter of the action, and the latter court being the court to which the defendant asked that the case should be sent for trial, and he having appeared in that court, and having gone into a trial of the case upon its merits, waived his right after a judgment had been rendered to object to the jurisdiction, on the ground that the police court in which the action was begun had no jurisdiction. Any irregularity as to the manner in which the action was begun or brought into the justice's court was waived by submitting to a trial in that court without objection. Hughes v. Hardesty, *supra*.

In Fidler v. Hall, 2 Met., 461, an action was begun in a magistrate's court for an amount exceeding its jurisdiction. The magistrate dismissed the action upon that ground. The plaintiff appealed to the quarterly court, which also dismissed the action. He then appealed to the circuit court, and obtained a judgment, notwithstanding the defendant's objection to the jurisdiction. Upon the defendant's appeal the Court of Appeals reversed the judgment of the circuit court.

The court, in its opinion, intimate that if the defendant had submitted to a judgment, without objecting to the jurisdiction, it would have been otherwise. It will not be controverted that if the judgment of the justice in this case had been for the defendant it would be conclusive of the plaintiff's right until reversed or set aside. Then shall the defendant be allowed to say that the judgment, which is the result of the trial he submitted to without objection, is not binding on him?

The judgment is reversed and cause remanded, with directions to set aside the judgment dismissing the plaintiff's action, and for further proceedings.

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LOUISVILLE & NASHVILLE RAILROAD CO. V. BORING, &c.

SAME V. JOHNSON, &c.

(*Filed April* 18, 1888.)

1. *Taxation of railroads*—While the "fragmentary taxation" of the property of railroad corporations is within legislative discretion and control, yet the power to tax can not be extended beyond the language of the act granting the authority.

As a common school district is a territorial or political division not named in the statute providing for the valuation and taxation of railroads, a railroad is not liable, to the extent of the value of the road within a common school district, to a tax to aid in building a schoolhouse.

2. *Same*—As the statute provides that no tax shall be levied upon the property of white persons for the benefit of a school for colored children, and that no tax shall be levied upon the property of colored persons for the benefit of a school for colored children, it must be inferred that the Legislature did not intend to tax *corporations* for the purpose of building schoolhouses for either, there being no *common* fund for that purpose as there is for the employment of teachers.

Alcorn & Craft for appellant.

R. L. Ewell for appellees.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Ward.

The primary question presented by the appeal in each of the *above* cases is: Are railroads liable to a district school tax to aid in building a schoolhouse, to the extent of the value of the road located within the district?

At the time of the attempted levy of the taxes in question the act, approved April 3, 1878, authorizing the taxation of railroads for local purposes was in force, and if the right, for the purpose named, exists it is conferred by that act. After providing for the assessment of railroads said act, in the 4th section, provides:

"The same rate of taxation for State purposes, which is or may be in any year levied on other real estate in this Commonwealth, shall be, and is hereby, levied upon the value so found by the said board, of the railroads, rolling stock and real estate of each company, and the same rate of taxation for the purpose of each county, city, town or precinct in which any portion of any railroad is located, which is or may be in any year levied on other real estate therein, shall be, and is hereby, levied on the value of the real estate of said company therein and of the number of miles of such road therein, *reckoned* as of the value of the average value of each mile of such railroad, with its rolling stock, as ascertained as aforesaid." In the first section of said act it is provided that the officers of the road, in making return to the auditor for taxation, shall report the length of the road within "the State, and in each county, city and incorporate town."

A common school district is a territorial or political division not named in the act, neither in that part of it requiring the length of the road within designated divisions to be reported, and in that way ascertained for assessment nor in that part subjecting the road to taxation for local purposes.

Without some mode being provided by which the length of the road within a political division can be ascertained we are unable to

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see how there could be a valid assessment under the act in question, and without some authority to levy a tax for a local purpose or object being conferred by the Legislature none such exists. Neither can be supplied by construction.

The courts have uniformly held that the "fragmentary taxation" of the property of a railroad corporation was one within legislative discretion and control, but in this matter of taxation, as in others, have declined to extend the power to tax beyond the language of the act granting the authority. Hence in case of L. & N. R. R. Co. v. Warren County Court, 5 Bush, 243, it was held that the act of February 20, 1884 (Myer's Supplement, 480), providing for the taxation of railroads at a given rate per mile, did not authorize the counties in which a part of the road was located to impose a tax on the railroad under an act which authorized county courts "to levy on the property of said counties listed for taxation for revenue purposes an *ad valorem* tax of not exceeding fifteen cents to each one hundred dollars of property so listed."

In Hewitt, Auditor v. Trustees Frankfort Common Schools, 81 Ky., 680, it was held that the common school fund of the State was not entitled to any part of the tax collected from railroads under the provisions of article 12 of chapter 92 of the General Statutes. These matters have been changed by subsequent legislation. So that power has been conferred upon counties, incorporate towns and cities and precincts to impose a tax on railroads (Acts 1876 and 1878), and later, by Act of 1886, to "part of a county or tax district of any kind, in which any portion of any railroad is located. And by act of May 12, 1884, the same rate of tax collected on other property for the general school fund was to be set apart to that fund from the taxes paid by railroads.

These decisions and acts illustrate and recognize the principle that the courts have no power, as to the subject-matter of or the imposition of taxes, and can do nothing except to restrain within constitutional bounds and enforce the laws so made.

There is another difficulty. By section 4 of article 11, chapter 96, General Statutes (edition of 1887), it is provided:

"That no tax shall be levied upon the property or poll, or any services required of any white person for the benefit of a school for colored children, and no tax shall be levied upon the property or poll, or any services required of any colored person for the benefit of a school for white children." As color can not be affirmed of an artificial person, a corporation, no argument can be made in favor of the right to impose a tax on the corporation for the benefit of a school for white children that would not apply with equal force to a school for colored children, and as an argument which would assume that the right to tax a corporation for the benefit of both, when the property of other persons can only be taxed for one, would prove too much, we must infer that the Legislature did not intend to tax for either, and probably will not, and can not, until it raises a common fund for all, for the purpose of erecting school-houses, as it has now a common fund for all for the employment of teachers.

The judgment in each case is reversed, with directions to dismiss the petition in each case.

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CONNER V. ELLIOTT & RICHARDS.

(*Filed April* 25, 1888.)

1. *Landlord's lien*—A landlord, having failed to sue out either a distress warrant or attachment for rent for more than ninety days after the obligation therefor matured, lost his *statutory* lien, and, therefore, had no lien *as landlord*, except such as he acquired under a distress warrant subsequently issued, which was inferior to the lien of a mortgagee acquired prior to the issual of the distress warrant.

2. *Contract for lien on crop not planted*--A sale or mortgage of property not in being is void *at law*, yet as between the parties it may be sustained *in equity* and confer rights against third parties who acquire an interest in the property with *actual* notice of the equity.

In this case a lien retained by the landlord in the lease and note, upon a crop of tobacco *to be* planted by the tenant, is sustained in equity as against a lien acquired by mortgage executed after the tobacco was planted, the mortgagee having *actual* notice of the lien retained in the lease and note.

B. D. Lacey for appellant.

J. J. Nesbitt for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Presiding Judge Ward.

The appellant, having failed to sue out a distress warrant or attachment for the rent due her for more than ninety days after the obligation therefor matured, lost her statutory lien, and could have no lien as landlord, except such as might be acquired under the distress warrant. The distress warrant was issued long subsequent to the execution of the mortgage upon which the appellees relied, so it follows that appellant's lien as landlord is inferior to that of appellees.

But appellant claims that in the contract of lease, and in the note executed for the rent, it was provided that she should have a lien on the crops until the rent was paid, and that appellees, at the time the mortgage was executed to them, had notice of the lien retained in the lease and note, and, therefore, appellant relies upon a contract lien, with notice, prior in point of time to the lien asserted by appellees. This lien can only apply, if at all, to the tobacco which was raised on appellant's land.

The lease and note was executed on the 1st of February, 1885. It is not averred that the tobacco had been planted at that time, and appellee's counsel insists that a lien can not be acquired upon property not in being at the time of the contract, and relies, we suppose, upon Ross, &c. v. Wilson, Peter & Co., 7 Bush, 29, and Hutchinson, McChesney & Co. v. Ford, 9 Bush, 318, as conclusive of this question.

The principle is thus stated in the former of these cases: "The general rule is that at law a grant or mortgage of property to be acquired *in futuro* is void; and if it can be upheld in equity, we apprehend it is only valid as a contract to assign when the property shall be acquired, and not as an assignment of a present interest, and if enforceable in equity at all it can only be enforced as a right under the contract, and not as a trust attached to the property."

From these cases it seems to be stating the rule too broadly to say that a contract for the sale of property not in being at the time is *void*. It may be effectual for many purposes, such as a contract to sell and deliver, which, if not performed, may entitle the party not

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in default to damages, or it may be upheld in equity as a contract to assign when the property shall be acquired.

In Zaring, &c. v. Cox's assignee, 78 Ky., 527, the facts were: That Goar sold and conveyed to Cox certain property, reserving a lien not only on the property conveyed, but upon "all property that may be added thereto to secure the lien for purchase money." The deed was not recorded. More than a year after the conveyance Cox assigned for the benefit of his creditors. The contest was as to the lien of Goar on the replenished stock. The court said: "Such a conveyance is evidently good between the parties, and the lien attaches so soon as the stock is added, and, being good between the parties, it is good as to antecedent creditors, at least until attacked for fraud."

Reconciling the causes the rule would seem to be this: That a sale or mortgage of property not in being is void at law, yet, as between the parties, it may be sustained in equity and confer rights against third parties who acquire an interest in the property with *actual* notice of this equity.

The mortgage upon which appellees rely was executed on the 27th of June, 1885, after the tobacco, which is the subject of controversy, was planted; and it is averred in the pleading of appellant, to which a demurrer was sustained, that appellees, at and before they took the mortgage on the tobacco, had notice of appellant's lien secured by the lease and note. These facts being so, they were not innocent purchasers, but the equity which they acquired must yield to the superior and older equity of appellant.

There was an attempt upon the part of appellant to allege that there was an agreement to the effect that the tobacco should be kept until the price improved, so that it would sell for enough to pay both parties. But it is not alleged that this agreement was made before the expiration of the time within which the appellant had a landlord's lien, and that the distress warrant was not sued out in consequence of this agreement.

But for the error in sustaining the demurrer to the second and third paragraphs of the reply the judgment is reversed, with directions to overrule the demurrer and for further proceedings.

KY. CENTRAL R. R. CO. v. PETERS, &c.

(*Filed May* 2, 1890.)

1. *Guardian and ward—Right of guardian to fell trees*—A guardian is entitled to the possession, care and management of the ward's estate, real and personal, and may lease the real estate and sell the personalty. And as a mode of managing he may, for the ward's benefit, and under particular circumstances, clear the land of all trees, or cut and sell some of them.

2. *Same*—As the right to fell trees exists when in the correct judgment of the guardian the ward's interest requires it, and as he has the right to sell the timber after it is felled and becomes personalty, the ward can not recover from one who has purchased it in good faith from the guardian, although the case may not have been one which justified the guardian in felling the trees. The remedy of the ward in such a case is against the guardian for waste.

3. *Same*—Even if the guardian had no right under any circumstances to fell trees the wards could not recover from a purchaser from the guardian in good faith, it being the right and duty of the guardian to sell the trees where they have been blown down or felled by a stranger. While equity courts

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often treat a fund as realty, refusing to recognize the fact of conversion, the law courts treat things as they are.

Jno. W. Brown and Hill & Alcorn for appellant.

W. O. Bradley for appellees.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Bowden.

In this action infant children, by their next friend, sued the appellant to recover some cross-ties made of timber alleged to have been wrongfully cut on land descended to them from their father, or the value of the ties, if they could not be had. They made their mother and their guardian defendants, because they refused to sue.

Our statute declares that a guardian shall have the possession, care and management of the ward's estate, real and personal, and that he may lease the former and sell the latter. As a mode of managing he may, for the ward's benefit, and under particular circumstances, clear the land of all trees or cut and sell some of them. McCracken v. McCracken, 6 Mon., 344; Thompson v. Boardman, 1 Vt., 376; Truss v. Old., 6 Rand, 556; 3 Wait's Ac. and Def., 553. He must act honestly and with reasonable prudence; if he does not he is liable for any waste he may commit. But as the right to fell the trees exist when, in the correct judgment of the guardian, the ward's interest requires it; and as he has the right to sell the timber after it is felled and becomes personalty, the wards can not recover from one who has purchased it in good faith from the guardian. It would be too hard to require every purchaser of a load of wood offered by a guardian to see to it that the case is such as justified the guardian—whether it was timber thrown down by wind or other natural cause, or felled by a trespasser or by the guardian himself, and if by the latter, whether the existing circumstances rendered it an act of prudence. Nor do we see how the wards can recover from such a purchaser, even if the guardian has no right under any circumstances to fell trees. Equity courts often treat a fund as realty, refusing to recognize the fact of conversion; but law courts treat things as they are. We have reported cases between the heirs at law and the next of kin, in the English Chancery Court, over proceeds of timber cut or some like conversion of realty into personalty, as in 1 Vesey, jr., 453, Ambler, 419, whether the money should go to the one as realty or to the other as personalty; but a court of law would not sustain an action of ejectment to recover these cross-ties. The rule of law, when title is not secured by accession, is not that several trees can be regarded as realty for any purpose, whatever caused the severance, but that if it was wrongful the property remains unchanged; that he who owns them as part of the realty continued to be owner of them as personalty, and may, therefore, maintain *detinue* to recover them or their value. It was so held in Strubbee v. Trustee Cin. Ry., 78 Ky., 482. But if he comes into court to assert a legal title he necessarily fails if the defendant proves that he purchased and got possession from one authorized to sell. If the trees had been blown down or had been felled by a stranger it would have been not only the right but the duty of the guardian to sell if he could. Even if he acts wrongfully in cutting down the trees, we do not see on what principle or rule of policy he should be deprived of the power to sell so as to affect the title in the hands of a bona fide purchaser. The ward may refuse to ratify the act by tak-

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ing the proceeds and may hold the guardian for mismanagement and waste; but it is difficult to see how a court of law can, out of the general statutory power to sell all personalty, except timber improperly cut by the guardian himself. Unless he can sell no one can. Why should it lie there and decay? He may honestly, but foolishly, cut trees and become liable for all injury done, but why incapacitate him from saving at least what he can get for the timber?

In Truss v. Old, cited above, the trees were cut and the timber was removed on a contract of sale made by the guardian, and it was held that the moment the trees became personalty by being severed the guardian had the right to sell, and that the remedy of the ward was against the guardian, either to make him properly account for the proceeds or for waste.

The evidence in this case was to the effect that the guardian cut the timber, made the cross-ties and sold them to the company, receiving full pay for them. An instruction based on the rule we have recognized was refused. The company offered to prove that the land was the only property owned by the widow or children; that $150 of the purchase money remained unpaid, and that the timber was cut with the consent of the widow and on an agreement with her to apply to the payment of the land debt the price of the ties, fixed at five cents each. The existence of that debt, and the fact that the only means by which it could be paid was to sell timber or incur the costs of a decretal sale and the loss of some or all of the land, will probably be important if the guardian is charged with waste when he comes to a settlement; but for the reasons given these matters seem irrelevant in this case. Even if the pleadings can be regarded as showing that the entire tract was occupied as a homestead, the consent and concurrence of the widow would put the guardian in a position to determine the question whether, for the ward's interest, the timber should or not be felled.

The judgment is reversed, with directions to grant the appellant a new trial.

BURKS v. RITTER.

(*Filed May* 2, 1888.)

Assignment "without recourse"—Warranty—Appellee assigned to appellant a promissory note which purported to be secured by a mortgage on land. The assignment, which was in writing, was "without recourse." It turned out that the mortgaged land was covered by a prior mortgage which consumed it, leaving nothing for appellant. In this action by appellant against appellee, the assignor, he alleges that the makers of the note were insolvent, and that the note possessed no value independent of the mortgage—a fact known to both plaintiff and defendant. He alleges that he purchased the note, paying the full amount of principal and interest, solely upon the faith of defendant's representations that "the mortgage was good, and a valid security for the payment of the note." He avers that these representations were untrue, in that the mortgage was not good, but was then, and is now, utterly worthless, and that the title of the mortgagors to the land mortgaged was not good. That at the time the mortgage was executed and when the note was assigned, the land was encumbered by a prior mortgage, which was a superior lien; that under a judgment of the court the land was sold, but did not produce more than enough to satisfy the prior mortgage. To this petition a demurrer was sustained. *Held*—

1. The facts alleged do not import a warranty that the mortgaged property was unincumbered and of a sufficient value to secure the payment

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of the debt—the character of warranty necessary to enable the plaintiff to recover. Construing the pleading most strongly against the pleader, the words used rather imply that the mortgage was properly executed and placed the property in pledge for the payment of the debt.

2. The averment as to the breach of the alleged warranty is not well made. It is not alleged when the property was sold, nor that when it was sold it brought its value, nor that if it had been sold when the assignment was made, or within a reasonable time thereafter, it would have brought no more, or was then worth no more, than when it was sold. The statement that the mortgage was, at the time of the assignment, worthless, taken in connection with the other averments, is but the conclusion of the pleader.

3. But, in any event, the written assignment, which was "without recourse," by its terms precludes the idea that there was any warranty, or rather is, in effect, an express refusal to give a warranty. And a written contract can not, in the absence of fraud or mistake, be changed or altered by parol evidence.

By an assignment without recourse the assignor simply transfers the title to, and property in, the note, and relieves himself from all liability to the assignee, unless he had no title, or right to transfer the note, or unless it should turn out that the note is not the obligation of the ostensible makers, or is invalid for the want of or by reason of the illegality of the consideration.

James A. Mitchell for appellant.

Walter Evans for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Barbour.

The appellee, Ritter, being the payee and owner of a note on S. A. Edwards and W. H. Edwards for $433.33, dated December 4, 1882, and due one day after date, which note recites on its face that "the same is secured by mortgage of this date," in consideration of $449.23, the amount of the principal and interest at the time of the transfer, sold, and by writing assigned, it to the appellant, Burks. The assignment is as follows: "For value received, I hereby assign and transfer the within note to H. H. Burks without recourse upon me. July 16, 1883. JOHN RITTER."

In 1887, four years after the assignment, the appellant instituted this action against the appellee to recover the consideration paid by him for the note. The averments of the petition which are necessary for our consideration are, in substance, that at the time of the assignment the makers of the note were insolvent, and, independent of the mortgage, the note possessed no value, all of which was known by plaintiff and defendant, and at the time of the transfer the defendant represented to the plaintiff that the mortgage was good and a valid security for the payment of the note; that the plaintiff believed the mortgage to be good, and that it was a valid and sufficient security for the payment of the note, and he purchased it solely on the faith of the defendant's representation, and paid him the full amount of the note and interest to the date of the purchase; that plaintiff has since learned and avers that the representations of the defendant, on the faith of which he was induced to buy the note, were untrue in that the mortgage was not good, but was then and is now entirely worthless, and that the title of W. H. and S. A. Edwards to the land mortgaged was not good; that at the time the mortgage was executed, and when the note was assigned, the land was encumbered by a prior mortgage, which was a superior lien; that under a judgment of the court the land was sold, but did not

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produce more than enough to satisfy the prior mortgage. To this petition the court sustained a demurrer, and the plaintiff, refusing to amend, dismissed the petition, and from that judgment this appeal is prosecuted. Independent of the written contract of assignment, which negatives the idea of any warranty and which is not attacked either for fraud or mistake, we are of opinion that the petition does not allege facts importing a warranty that the mortgaged property was unincumbered and of sufficient value to secure the payment of the debt—the character of warranty which counsel insists was made, and which would be necessary to enable the plaintiff to recover. The representations of the defendant, upon which plaintiff relied, were that the mortgage was good and a valid security for the payment of the note.

Construing the pleading most strongly against the pleader, these words do not necessarily imply that the property would, when sold, bring enough to pay the debt; they rather imply that the mortgage was good and valid security in law; that is, that it was properly executed and placed the property in pledge for the payment of the debt, and this implication is strengthened by the averment immediately following that the plaintiff supposed and believed the mortgage to be good, and that it was a valid and *sufficient* security for the payment of the debt. The averment that the mortgage was not good, and that the title of the Edwards' was not good, is qualified by the pleader, and the insufficiency of the mortgage and the title is shown to consist alone in the fact that the property, when sold, did not bring more than enough to pay the prior mortgage. There is no averment that the defendant concealed or that the plaintiff was ignorant of the existence of the prior mortgage. Without such averments the statements of the defendant, that the mortgage was good and a valid security, even if it could be understood as referring to the sufficiency of the mortgaged property to pay the debt, could only be taken as the expression of an opinion. Nor is the averment, as to the breach of the alleged warranty, well made. True, it is averred that the mortgage was, at the time of the assignment, worthless, but this, taken in connection with the averment that the land, when sold, brought no more than enough to pay the prior mortgage, is but the conclusion of the pleader. It is not alleged when the property was sold, nor that when it was sold it brought its value, nor that, if it had been sold when the assignment was made or within a reasonable time thereafter, it would have brought no more, or was then worth no more, than it was when it was sold.

But it seems to us that the written assignment is conclusive of this case. It is not assailed for fraud or mistake, and it, by its terms, precludes the idea that there was any warranty, or rather it is, in effect, an express refusal to give warranty. A written contract, in the absence of fraud or mistake, can not be changed or altered by parol evidence. By an assignment without recourse the assignor simply transfers the title to, and property in, the note. By his contract he relieves himself from all liability to the assignee unless he had no title or right to transfer the note, or unless it should turn out that the note is not the obligation of the ostensible makers, or is invalid for the want of or by reason of the illegality of the consideration. It is not pretended that the defendant was not the owner of the note, or did not have the right to transfer it. It is not alleged that the note was not the undertaking of those whose names appear to it.

True, one of the obligors was a *feme covert*, but it is admitted that the note was bought with a knowledge and understanding of that

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fact. Nor is it alleged that the note was executed without or for an illegal consideration. The sole ground of the appellant's complaint, giving to the averments of his petition all that is claimed for it, is that he relied upon the defendant's representation that the property which was mortgaged to secure the payment of the note was sufficient to pay it, and that it was not sufficient to pay it, nor could any part of the debt be made out of the mortgaged property because of the existence of a prior mortgage which consumed it all.

Admitting, as must be done upon demurrer, that the representations were made, they can not change, alter or affect the written contract to the contrary. We understand that the action is not upon the contract of assignment—no action could be brought upon it. Nor can any action be brought upon any implied or express oral contract of warranty for the reason that the written contract of assignment in effect precludes it.

The judgment is affirmed.

THE OLDS WAGON WORKS V. THE BANK OF LOUISVILLE.

(*Filed May* 16, 1888.)

1. *Negotiable instruments—Accommodation paper*—If accommodation paper is given for a particular purpose, and that purpose is known to the holder at the time it is taken, a diversion of the paper from that purpose, or misappropriation of it, will release the party giving the accommodation from all responsibility. But it can not be said that there is a diversion or misappropriation of the paper when it is pledged as it was intended to be, although the proceeds received by the accommodated party are by him applied to some other purpose.

In this case, however, the court is of the opinion that there was no misapplication of the proceeds.

2. *Application of payments*—Where a creditor holds several debts, some of which are secured and some not secured, and the debtor makes a payment without directing its application, the creditor, or the court for him, has the right to apply the payment to the unsecured debts, but this rule does not apply where there is a lien upon the fund which is paid for the benefit of all the debts. In such a case a surety in one of the debts has the right to demand that the debts for which he is bound shall receive a credit for its pro rata part of the amount paid.

A mortgage was executed by a debtor to secure all of his indebtedness to the mortgagee, that upon which there was personal security as well as that which was unsecured. The appellant's note was held by the creditor as collateral for one of the debts. The creditor, having applied the proceeds of the mortgaged property to the other debts, seeks to make appellant liable for the full amount of the debt for which he was bound. *Held*—That the appellant is entitled to a credit for its pro rata part of the proceeds of the mortgaged property. The mortgage in effect made the application upon all the debts *pari passu*. Moreover, the creditor having obtained a judgment in accordance with the prayer of his petition, for the sale of the mortgaged property to satisfy his debts against the mortgagor, in which was included the debt for which appellant was bound, can not make a re-application of the proceeds so as to exclude appellant from its benefits.

Dodd & Grubbs for appellant.

H. R. Phillips and Helm & Bruce for appellee.

Appeal from Louisville Chancery Court.

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Opinion of the court by Judge Barbour.

If accommodation paper is given for a particular purpose, and that purpose is known to the holder at the time it is taken, a diversion of the paper from that purpose or misappropriation of it will release the party giving the accommodation from all responsibility. But it can not be said that there is a diversion or misappropriation of the paper when it is pledged as it was intended to be, though the proceeds received by the accommodated party are by him applied to some other purpose. The party who makes the loan upon the faith of the accommodation paper can not be expected to see that the money is applied by the borrower to the purposes for which he borrowed it. To so hold would, in effect, constitute the loaner a trustee to see to the appropriation of the money. But in this case we are satisfied, from the evidence, that the note was given by the appellant to George Spalding to enable him to raise money for the purposes of his business, and was not, as is contended by the appellant, given to raise money to be used exclusively in the building of a warehouse.

For some time prior to the 8th of April, 1884, Spalding had been in the commission business in Louisville, handling and selling wagons, plows and other agricultural implements. The parties for whom he chiefly did business were the Olds Wagon Works, the J. I. Case Plow Co., and Hart, Hitchcock & Co. For the purpose of carrying on his business he had erected a large warehouse. This house was completed, and he was doing business in it as early as the latter part of November, 1883. Spalding desiring to establish a credit at the bank of Louisville, and having had several interviews with the president of the bank, the latter, on the 8th of April, 1884, addressed to him this letter: "Acting on your proposition to do all your banking business with us, we propose the following: That we will take your account and afford you facilities in the conducting of your business as you may require them, and for the loan of $7,500 you desire to use in the building of your warehouse, we propose that as security for that loan, and renewals of the same from time to time, that you place in our hands the notes of the three firms you have named for $2,500, payable to your order, and indorsed by you, to be held as collateral for your individual notes to this bank, the notes to be dated at the time you make your note or notes to this bank for this loan. The three notes for $2,500 each not to be used or discounted, but held as collateral for your faithful performance in the notes you give us for loans to that extent."

Taking this letter Spalding went to his three principal patrons, and obtained from the Olds Wagon Works and Hart, Hitchcock & Co. their separate notes, each for $2,500, dated April 12, 1884, and due in twelve months, and from the J. I. Case Plow Co. its note for a like amount, dated May 26, 1884, and due in twelve months. Upon the faith of these notes, which he pledged as collateral, Spalding borrowed from the bank, at different times, $6,500, pledging the Olds Wagon Works and Hart, Hitchcock & Co.'s notes each for $2,500, and the J. I. Case Plow Co.'s note for $1,500. When the Olds Wagon Works note became due it was renewed, and the renewed note pledged by Spalding as collateral for the notes which he had executed as renewals of the original notes executed by him when he borrowed the money. In 1885 the J. I. Case Plow Co. and Hart, Hitchcock & Co. failed, and their failure was followed by that of Spalding in 1886. This action was instituted by the appellee, the bank, against the appellant, the Olds Wagon Works. The principal defense relied upon is that the note was executed as accommodation

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paper to enable Spalding to borrow money, to be used in the building of his warehouse; that the bank knew this fact, and that the money was not advanced for the construction of the warehouse. The weight of the evidence shows that Mr. Olds, who was the appellant's president and chief manager, and who was familiar with Spalding's business, knew that the warehouse had been completed long before April 8, 1884, and, therefore, the letter of the president of the bank of that date could not possibly have misled the appellant. Besides, Spalding testifies that there was no understanding that the note was to be used exclusively to raise money to pay for the warehouse. On the other hand, he swears that the note was given to assist him in establishing a general credit, and this statement is strongly fortified by the letter of the appellant of July 23, 1885, in which it says that "the note was given to George Spalding merely as an accommodation and to enable him to borrow money upon;" and further, the appellant's conduct is inconsistent with its contention in this action, as Spalding says Mr. Olds was perfectly familiar with his business. Spalding was known as the appellant's manager, and his office as the appellant's southern office. In April, 1885, appellant renewed its note, and when it became due in April, 1886, desired to renew it again, and during all this time it never sought to be advised as to how the money Spalding had borrowed had been used. These circumstances are inconsistent with its contention that the money was to be used in building or paying for the warehouse, or that the appellant had any interest in its being so used. Counsel insists that the letter of April 8, 1884, and the appellant's notes must be considered as one contract. We can not think so. To make the letter a part of the contract it must have been so understood and so intended by the parties. That this was not the case is, we think, satisfactorily shown by Spalding's testimony, the appellant's conduct, and its letter of July 23, 1885. Whether, under the circumstances of this case, this letter of July 23 should operate as an estoppel against the appellant it is unnecessary for us to decide, for it is certainly evidence, and in connection with the other facts proven in the case is, in our opinion, quite conclusive. Upon the issue as to the misapplication of the paper the judgment is clearly sustained by the facts of the case. But we are of opinion that the judgment must be reversed for another reason.

It is conceded that Spalding, in January, 1885, executed to the appellee a deed of mortgage, conveying to it certain real estate and personal property to secure it on account of his indebtedness to it, and that in this indebtedness was included the amount secured by the collateral note sued upon in this action. It appears, from the record in the case of the Bank of Louisville v. Baumeister in the Court of Appeals, which is, by agreement, made a part of the record in this case, that the appellee had realized, by the enforcement of its mortgage lien, a considerable part of its entire demands against Spalding. The appellant is clearly entitled to a credit for its pro rata part of that amount. It is true that where a creditor holds several debts, some of which are secured and some not secured, and the debtor makes a payment without directing its application, the creditor, or the court for him, has the right to apply the payment to the unsecured debts. In such a case there is no lien upon the fund which is paid for the benefit of either of the debts. But that is not this case. Here a mortgage is made to secure all of Spalding's indebtedness to the bank, that upon which there is personal security as well as that which is unsecured. The mortgage itself, in effect, makes the application upon all the debts *pari passu*, and in

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addition the appellee, in the action to foreclose this mortgage in accordance with the prayer of its petition, obtained a judgment for the sale of the mortgaged property to satisfy its debts against Spalding, in which was included the debt for which the appellant's note was held as collateral. After thus applying the security, it would be inequitable to allow the appellee in this action to recede from its status in relation to its debts, as fixed by the judgment, and make a reapplication of the proceeds of the mortgaged property so as to exclude the appellant from its benefits. The case of The Blackstone Bank v. Hill, 10 Pickering, 129, is in point. In that case the bank sued Wall as principal and Hill as surety on two notes for $300 and $600 respectively. The bank had other notes on Wall, and in a suit upon those other notes and also the notes upon which Hill was surety, attached real estate, the property of Wall. All of these notes were also secured by pledge of $1,267 worth of bank stock. The bank obtained judgment for $8,359. *Fi. fa.* was levied on the attached property, and $6,294 realized therefrom. Hill claimed that this sum should be apportioned on all notes sued upon, and the bank that it could apply it all to satisfy the unsecured notes. The court held that the principal of law enabling a creditor, having several demands against a debtor, to appropriate a payment to the demand which is least secure, unless the debtor, at the time of the payment, elects to have it appropriated to a different demand, is clear, where it can be applied; but it has place only in cases of voluntary payment. It can not be applied to a payment by process of law or *in invitum*. It was not in the power of Wall to make his election, and say the property levied on should be appropriated in satisfaction of a particular note, out of several embraced in the judgment.

We think this rule applies to the facts of this case. All the debts sued upon by the appellee having been consolidated into one judgment, and that judgment having been fully satisfied by a sale of the property ordered to be sold, all the debts embraced in the judgment must be taken to be satisfied proportionately, and that the note of the appellant is, therefore, paid *pro tanto*.

We are aware that there is other very respectable authority seemingly in conflict with the views we have expressed, but it seems to us that the case of The Blackstone Bank v. Hill, *supra*, is sustained upon *principle*, and should be followed.

For the reasons indicated the judgment is reversed and the cause remanded, with directions to enter a judgment against the appellant, allowing it credit for the *pro rata* part of the amount realized by the appellee from the sale of the mortgaged property.

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SUPERIOR COURT ABSTRACTS.

BAILEY, &c. v. PENICK, &c.

Filed May 23, 1888. Appeal from Todd Circuit Court. Opinion of the court by Presiding Judge Ward, affirming on original and cross appeal.

1. *The commission to be allowed executors* is to some extent within the sound discretion of the court, and its allowance should be made in view of the manner in which the estate is managed and the faithfulness of the executors.

In view of the fact that the executors in this case have been charged with interest on all the funds in their hands from the time they received them, the court is not prepared to say that their failure to return a sale bill of property, the aggregate appraised value of which was only $445, and their failure to make a settlement when they ought to have made it, would have warranted the court in refusing them any commission at all, nor can the court say that a sound discretion was abused in allowing them as much as was allowed, which is about equal to five per cent. on the sum in their hands at the time settlement should have been made, paid as of that date, interest being allowed thereon from that time. But the amount allowed was quite as much as the executors were entitled to, although not three per cent. on what they were charged with, about half of what they were charged with being interest after the time they should have settled.

2. *Liability of executors*—As there were but six articles of property to be sold, and they were taken to the county town and sold on a public day, this, in the absence of other evidence, is sufficient to relieve the executors of responsibility for any sum in excess of that for which the property was sold.

3. *The executors were competent witnesses* as to whether certain notes which came to their hands could have been collected, and as they say the notes were not collectible, that the makers were insolvent when the notes were received and so remained, this made a *prima facie* case for them.

4. *Parent and child*—The general principle is that the father is legally bound to provide for and support his children during infancy. This liability continues, even though the children may have estate of their own, and even though the father is not a proper person to have the care of his children. If a stranger furnishes necessaries to an infant under such circumstances as will authorize him to do so, still he must generally look to the father for compensation. There may be exceptions to this rule where the father has no means or his estate is limited, and where the children have an estate, the income of which is ample for their support.

The facts of this case show that the claim against the estate of the infants for necessaries (board) falls within the general rule and not the exceptions; and, moreover, that the father was looked to for compensation.

5. *Set-off*—A debt due to a defendant jointly with another can not be used as a set-off.

Ben T. Perkins, jr., for appellants; H. G. Petrie for appellees.

STILES' ADM'R v. RIGGS.

Filed May 23, 1888. Appeal from Robertson Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Settlement of partnership—In this action by a surviving partner against the estate of his deceased partner for the amount alleged to be due him upon a settlement of the partnership affairs, the court is satisfied that it is now impossible, from the books kept by the parties, to make a settlement of their affairs, and that the parties themselves, while both were living and while the matters were fresh in their memories, either recognized the fact that they could not settle justly, or that the business had settled itself, and that there

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was nothing left for dispute. Therefore, it is ordered that the petition be dismissed. The claim, being a stale one, should be supported by clear and convincing proof.

Cochran & Son for appellant; O. S. Deming and W. W. Kimbrough for appellee.

FIRST NATIONAL BANK v. GILTNER' ADM'R.

Filed May 23, 1888. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. *Continuance*—The court did not abuse a second discretion in refusing a continuance, asked for after the case had been submitted for argument, in order to enable the appellant to take evidence upon an issue made by a pleading filed a year before, of which appellant was ignorant, as it does not appear from the affidavit why appellant did not know that the issue had been made, and the affidavit does not show what evidence appellant expected to produce if the continuance had been granted.

2. *Weight given evidence*—The issue, though tried in an equity case, was really an issue at law, and in such cases the judgment of the chancellor is to have the same effect as the verdict of a properly instructed jury.

George C. Drane for appellant; J. A. Donaldson for appellee.

GAUSMAN, EX'R v. PAFF.

Filed May 23, 1888. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Bowden, affirming.

1. *Witnesses*—As the plaintiff was competent to give evidence in her own behalf as to *some* fact involved, an objection by the defendant when she was offered as a witness was of no avail. It was proper to permit questions to be asked her, and if any were asked which she could not legally answer, objection should have been made at that point.

2. *Verdict tested by instructions*—In determining whether or not the verdict is contrary to law it must be tested by the instructions given.

3. Services in caring for one afflicted with a loathsome disease are not ordinarily measured by the rule applied to mere labor or mere skill. The personal discomfort is considered; and in view of the repulsive conditions disclosed by the evidence in this case the court can not say that the verdict indicates passion or prejudice.

P. A. Gaertner for appellant; E. J. McDermott for appellee.

GRAYSON COUNTY COURT, &c. v. MORRISON, &c.

Filed May 23, 1888. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, reversing as to Morrison and affirming as to other appellees.

1. *County levy bond Sureties*—Where a county levy bond purports upon its face, in its body, to be the undertaking of all those whose names appear to it, if some of the sureties are not liable because their names were signed to the bond by another without written authority from them, the remaining sureties, except such as may have known all the facts, are not liable. Each surety has the right to rely upon the vigilance of the county judge, to the extent at least of his knowing that the signatures of his co-sureties are genuine.

2. *Same*—Although one of the signers of the power of attorney pursuant to which the bond was executed was permitted to erase his name after the power had been signed by several of the sureties, it is useless to discuss the question as to whether the county judge should have taken notice of that fact, and, therefore, as to what effect the erasure had upon the liability of those whose names were signed to the bond, as there is no finding as to what was the appearance of the paper when presented to the attorney in fact or to the county judge.

3. *Sheriff*—As against the balance found due by the sheriff on account of the levy of 1881, neither he nor his surety is entitled to credit by payment made on claims allowed in 1881, but directed to be paid out of the levy for

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1882. The presumption must be that the sheriff paid the claims out of the fund out of which he was directed to pay them.

J. S. Wortham and J. M. McClure for appellants; G. W. Stone and J. P. Hobson for appellees.

KEMPER, &c. v. MILLER, &c.

Filed May 23, 1888. Appeal from Laurel Circuit Court. Opinion of the court by Judge Bowden, affirming.

Res judicata—As the only issue tried by the court was that presented by the first paragraph of the defendant's answer, and the matters set out in the other paragraphs were obviously treated as not in the case, they are still open and may yet be inquired into in other proceedings.

W. R. Ramsey and R. L. Ewell for appellants; J. W. Jones for appellees.

DAVIS & BAKER v. FORD.

Filed May 23, 1888. Appeal from Owen Circuit Court. Opinion of the court by Judge Bowden, reversing.

Landlord and tenant—In this action by a landlord against his tenant and a purchaser from the tenant of property upon which a lien is claimed, it is alleged that the rent was to be paid at the time when the tenant "could dispose of the crop raised on the farm." *Held*—That if the contract alleged is regarded merely as fixing the date when the rent was to be paid, a distraint for rent in arrear could have been made at any time that the tenant could sell; and if the lien was not asserted within 120 days from that time it was lost. Therefore, as it is not alleged when he *could* sell, the petition does not show that there was a lien when he *did* sell. But taking the language more strongly against the pleader, it implies that the tenant was expected to sell the produce and pay the rent out of the proceeds. In that case the tenant was authorized by the contract to sell, and the purchaser can not be disturbed.

J. W. Greene and G. C. Drane for appellants; E. E. Settle and T. R. Gordon for appellee.

HOGLAND v. HOGLAND.

Filed June 6, 1888. Appeal from Campbell Chancery Court. Opinion of the court by Presiding Judge Ward, affirming as delay case.

1. *Alimony*—An action for alimony may be maintained in this State without a prayer for divorce.

2. *Same*—While the wife, to be entitled to alimony, must show that she is without fault, and that the husband is in fault, similar to that which is a cause for divorce, yet if this is shown alimony may be allowed, though the wife does not show the jurisdictional facts necessary to authorize the court to grant a divorce. And it is immaterial whether the facts necessary to be shown appear from the plaintiff's evidence or that of defendant.

3. *Same*—The facts in this case are sufficient to show an abandonment by the husband under cruel circumstances, and the amount allowed as alimony, not being one-third of plaintiff's annual income, was very moderate.

E. W. Hawkins for appellant; George Washington for appellee.

KIMBROUGH'S ADM'R v. GRADY.

Filed June 6, 1888. Appeal from Todd Circuit court. Opinion of the court by Presiding Judge Ward, affirming.

1. *Evidence*—A general exception that a witness is incompetent does not raise the question as to whether a particular part of his evidence is illegal.

2. *Same—Account books*—The mere fact that a witness has made an account of matters of indebtedness as to which he testifies, does not require that he shall produce his account book, although his memory may have been aided by his book and by memoranda made therefrom. It is only where a party is seeking to make evidence of original entries in an account book kept according to the usual course of business that subsection 7 of section 606 of the Civil Code applies.

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3. *The judgment of the chancellor upon a purely legal issue* is entitled to the same effect as the verdict of a properly instructed jury, and can not be disturbed unless palpably against the evidence.

4. *Assignment—Set-off*—In this action upon an assigned note, in which the defense was that the immediate assignor of plaintiff was indebted to the maker, the defendant, at the time defendant received notice of the assignment in a sum greater than the note, it devolved upon defendant to show such an indebtedness, which he had the right to set-off against the debt sued upon, which the court can not say from the evidence that he has done.

Ben T. Perkins, jr., for appellant; H. G. Petrie for appellee.

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KENTUCKY COURT OF APPEALS.

DOUGLAS, RECEIVER, &c. v. THE PEOPLE'S BANK OF KENTUCKY.

(Filed October 18, 1887.)

1. Bills of lading—A bill of lading does not possess the characteristics of bills of exchange or other negotiable instruments placed upon the footing of bills of exchange. When it is said that a bill of lading is negotiable it is only meant that its true owner may transfer it by endorsement or assignment, so as to vest the legal title in the assignee.

2. Same—Pledge—The owner of a bill of lading may pledge it as collateral security for a debt, the transfer of the bill of lading being regarded as equivalent to investing the pledgee with the actual possession of the property, which is essentialy to the validity of a pledge. The pledgee, however, does not acquire title to the property, but merely a lien, which, as long as he retains possession of the property, either actual or symbolical, is paramount to, and will prevail against, any prior equities of third parties of which he had no notice, or of which he was not required by law to take notice.

3. Same—Liability of carrier—Where, by the terms of a bill of lading, the property mentioned in it is made deliverable to the shipper's order, the carrier has no right to deliver it to the consignee or any other person unless he manifests his right to the property by the exhibition of the bill of lading indorsed by the shipper, and if the carrier does so, it renders itself liable to the true owner of the property, or to one having the actual possession of the bills of lading as collateral security for the value of the property. If, however, the pledgee of bills of lading, by his conduct, enables the pledger to obtain possession of the bills and exhibit them as his own, and the pledger thereby obtains the delivery of the property to himself, the pledgee is without remedy against the carrier.

In this case the court is of the opinion that it sufficiently appears that the property represented by these bills of lading, which had been pledged to appellee by the consignees, the legal owners of the property, was delivered to the consignees upon the presentation of the bills of lading, properly indorsed, of which they had been enabled to obtain possession by the conduct and authority of appellee; and, therefore, the appellee is without remedy against the carrier.

Ramsey, Maxwell & Matthews and C. H. Gibson for appellants.

Wm. Lindsay and E. E. McKay for appellee.

Appeal from Louisville Chancery Court.

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Opinion of the court by Judge Bennett.

The appellee brought suit in the Louisville Chancery Court against the appellant and the firm of Moise, Barbour & Co., partners in the grain business in the city of Louisville. The appellee sought, by the suit, to recover judgment against the firm of Moise, Barbour & Co. on a note for $5,000, which the firm executed to the appellee. The appellee also sought to recover judgment against the appellant for the value of corn and rye, the title to which was evidenced by six bills of lading, executed by the appellant as a common carrier, by which the appellant undertook to deliver to the firm of Moise, Barbour & Co., in the city of Louisville, the grain mentioned in the bills of lading. Each bill of lading shows that the grain therein mentioned was shipped to the order of the shipper, per advice of Moise, Barbour & Co., and each bill of lading was endorsed by the shipper, and that the firm of Moise, Barbour & Co. was the owner of each of them. It was alleged by the appellee that Moise, Barbour & Co., while they were the owners of these bills of lading, transferred and delivered them to it in pledge as collateral security to the above-named note, and that the note was due and unpaid, and that the appellant refused to deliver the grain to the appellee. The appellee, upon the foregoing allegations, asserted its lien upon the grain, and sought judgment against the appellant for its value. The appellant put in issue the allegations of the appellee in reference to these matters, and a trial of the case resulted in a judgment against the appellant for the value of the grain. This appeal is prosecuted from that judgment.

A bill of lading does not possess the characteristics of bills of exchange or other negotiable instruments placed upon the footing of bills of exchange. The peculiar characteristics of these instruments rest either upon statute or commercial usage sanctioned by express decision. A bill of lading has neither of these foundations to rest upon. It does not represent money, but property. No one ever supposed that a written obligation to pay so much in property, or to deliver such and such property, possessed the characteristics of negotiability in the sense of a bill of exchange or other instrument placed upon the footing of a bill of exchange. Such instruments represent money in commercial usage, and the innocent holder for value, in the usual course of trade, is protected against all equities of the antecedent parties. Nor is such innocent holder's right affected by any informality in such instruments. They are protected in some cases against the claim of the rightful owner; whereas, the endorsee or assignee of a bill of lading which is made to the order of the shipper must trace his title back to its true owner. He has no greater right than the true owner. When it is said that such a bill of lading is negotiable it is only meant that its true owner may transfer it by endorsement or assignment so as to vest the legal title in the endorser. (Pollard v. Vinton, 105 U. S., 7.)

A sale and delivery of personal property by the owner perfects the title in the vendee. He thereby acquires a right to the property which is superior to antecedent equities and liens of which he had no actual notice, or such notice as the law requires him to take cognizance of.

Both a contract of sale and delivery of personal property are necessary to the completion of title in the vendee. He thereby acquires a right to the property which is superior to antecedent equities, liens or executory sales as between the vendor and third persons, of which he had, at the time of his

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purchase, no actual notice or such notice as the law requires him to take cognizance of. And where the property is in transit by the carrier the owner may deliver it to the purchaser symbolically. This may be done by the owner's endorsement of the bill of lading to the purchaser. It is said, in Newsom v. Thornton, 6 East., 41, that "a bill of lading will pass the property upon a bona fide endorsement and delivery when it is intended so to operate in the same manner as a direct delivery of the goods themselves would do if so intended. 'But it can not go further.'" In Hatfield v. Phillips, 9 M and W., 648, it is said: "As soon as the goods are landed and warehoused in the name of the holder, that holder then becomes possessed of the goods themselves in the eye of the law, and any power he may have over them arises not from the bill of lading, but from such possession." But while the cargo is still at sea, or the transit continues in any other form, the bill of lading stands for and represents the goods themselves, and will, therefore, enable the assignee to do as much, but no more, than he could have done if they had actually arrived and come to his possession." In Meyerstein v. Barber, 2 L. R. C. P., 45, it is said: "The bill of lading represents them (the goods) and the endorsement and delivery of the bill of lading operates exactly the same as a delivery of the goods themselves to the assignee after the ship's arrival would do."

So the assignment of a bill of lading, for value, while the goods are in transit, is limited to the effect of symbolizing their sale and delivery, and the assignee is thereby invested with all the rights of a purchaser with actual delivery of possession, but no more. It is also well settled that the owner of a bill of lading may pledge the same as collateral security for a debt, and as it is indispensable to the validity of a pledge that the actual possession of the property pledged should pass to the pledgee, the possession of the property which is sought to be pledged while it is in transit may be effected by transferring the bill of lading. Such transfer of the bill of lading is regarded as equivalent to investing the pledgee with the actual possession of the property. Such pledge does not invest the pledgee with title to the property; the title remains in the pledger, but the pledgee acquires a lien upon the property for the security of his debt, and this lien, as long as he retains the possession of the property—either actual or symbolical—is a legal lien, which is paramount to, and will, therefore, prevail against any prior equities existing on behalf of third parties, of which the pledgee had no notice or of which he was not required by law to take notice. (Pettit & Co. v. First National Bank of Memphis, 4 Bush, 338.)

As before stated, the grain mentioned in the six bills of lading in controversy was made, by the terms of the bills of lading, deliverable to the shipper's order, therefore, the title to the grain did not pass to the consignees, Moise, Barbour & Co., but remained in the shipper, and he could only pass his title to the grain to the consignees by an endorsement of the bills of lading. And the appellant, the railroad company, had not the right to deliver the grain to the consignees, or any one else, except upon the order of the shipper. The shipper reserved to himself the right of property in the grain, and the railroad company undertook to transport it as his property, and to deliver it only upon his order. And it was the contract duty of the railroad company so to do; and if the company delivered the grain to Moise, Barbour & Co. without their being the owners of it, which fact should be established by the exhibition of the bills showing that they were the owners of them by the endorsement of the shipper, the company thereby rendered

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itself liable to the true owner of the grain for its value. (Daniel on Negotiable Instruments, volume 2, section 1740; Hutchinson on Carriers, sections 130, 133.)

The appellant, the railroad company, delivered the grain to Moise, Barbour & Co., and there is no doubt that, at the time of the delivery, they were the owners of the grain which the bills of lading represented. The appellee concedes this fact. But it contends that, at the time of the delivery, it was in the actual possession of the bills of lading, and was the owner of them as pledgee for the security of Moise, Barbour & Co.'s indebtedness to it, whereby it had a lien on the grain itself to secure said indebtedness.

If it be true that at the time the railroad company delivered the grain to Moise, Barbour & Co. the appellee held the actual possession of these bills of lading in pledge for the security of their indebtedness to it, and the railroad company delivered the grain to Moise, Barbour & Co. notwithstanding that fact, and without requiring them to show, by the production of the bills of lading, that they were the owners of the grain, they are, in that case, liable to the appellee for its value. On the other hand, if the grain was delivered to Moise, Barbour & Co. by their exhibiting the bills of lading to the railroad company, which showed that they were the owners of them and entitled to them, and that Moise, Barbour & Co. were enabled, by the conduct of the appellee, to thus exhibit said bills as their own for the purpose of obtaining the delivery of the grain to themselves, and whereby they did obtain its delivery to themselves, then the appellee should not be allowed to recover the value of the grain from the appellant.

The railroad company's cashier swears that the company's place of switching its freight trains was in Jeffersonville, where the freight remained until orders were received to deliver it; that the bills of lading were presented by Moise, Barbour & Co. at the window of the cashier's office, and the numbers of the cars transcribed from the bills of lading to the books of the company, and the cars ordered over to Louisville and the grain there delivered. While the cashier swears that he could not remember that these identical bills were presented at the cashier's office by Moise, Barbour & Co., yet he is positive that they were so presented, properly endorsed, for the reason that all bills of lading, made to order of the shipper, were required to be exhibited, properly endorsed, before the company would deliver the grain; and that a memorandum of each car containing the grain was taken directly from each bill of lading, from which memorandum the car was ordered over to Louisville. And while unable to recall to memory the particular bills of lading in controversy, he remembers that no grain was delivered to Moise, Barbour & Co. on bills of lading requiring the grain to be delivered to the order of the shipper unless they presented the bills properly endorsed. The chancellor was of the opinion that the cashier of the company was mistaken as to these particular bills of lading having been presented by Moise, Barbour & Co. We think the evidence in the case fails to show a different state of case. The cashier's evidence is strong, consistent and direct, and is circumstantially corroborated by the evidence of the appellee's cashier. He swears that it was the agreement between the appellee and Moise, Barbour & Co. that the latter might withdraw the bills of lading, deposited from time to time, by depositing other bills of lading of equal value in their place. The object of allowing the withdrawals and substitutions was to enable Moise, Barbour & Co. to recover the freight on the bills of lading withdrawn. He also swears that not only Moise, Barbour & Co., but their clerk, came to the bank whenever it suited them, took the bills of lading in

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hand and made such withdrawals and substitutions as they saw proper, without the supervision of any of the bank officers, and without their knowledge of what bills of lading were withdrawn or what left in their place, if any. So we have no proof that these bills of lading were in the actual possession of the appellee at the respective times the grain was delivered, but we have proof that Moise, Barbour & Co. had the appellee's authority to withdraw these bills of lading for the purpose of recovering the freight that they represented. We also have proof that they and their clerk handled the bills of lading at pleasure, and made such changes as they pleased. It also appears that they had the opportunity, furnished by the appellee, to withdraw these bills for the purpose of receiving the freight thereon and then return them. With these facts before us we find nothing in the record that directly, or by necessary implication, contradicts the evidence of the company's cashier. While it may be admitted that the railroad company was not punctiliously exact in dealing with Moise, Barbour & Co. as to the delivery of the grain, yet it may be regarded as an established fact that the bills of lading, properly endorsed, were presented to the company by Moise, Barbour & Co., who were, in fact, the legal owners of the grain which the bills represented, but subject to the appellee's lien; and that the grain was delivered to them on the faith of the presentation of the bills of lading, properly endorsed, and the apparent ownership in Moise, Barbour & Co., and that the bills of lading were presented and the grain delivered by the conduct and authority of the appellee. Therefore, the proposition to allow the appellee to recover the value of the grain from the appellant, under these circumstances, contains no element of fair dealing, no equity, no legal right. The appellee is estopped to gainsay and undo what was authorized and sanctioned by its conduct.

The judgment of the lower court is reversed and the cause remanded, with directions to dismiss the appellee's petition.

NETHERCUTT, &c. v. HERRON, &c.

(Filed April 5, 1888—Not to be reported.)

1. Abandonment of homestead—In this action by a creditor to subject land from which the debtor had removed two years prior to the commencement of the action, it is held that the facts, which are recited in the opinion, fail to show a fixed and continuous purpose of returning to the place and occupying it as a homestead, and that the court erred in allotting it to the defendant as such.

2. Same—Assignment for creditors—As there was no reservation of this land in a deed of assignment executed by the debtor, it passed to the assignee for the benefit of creditors, although both the debtor and the assignee may have supposed that the debtor was entitled to it as a homestead.

3. Same—Attachment—The levy of appellant's attachment, which was obtained after the deed of assignment, created no lien on the land as against other creditors.

E. F. Dulin, Jas. D. Jones, E. B. Wilhoit and R. D. Davis for appellants.

L. T. Moore for appellees.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Bennett.

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The first question to be determined is whether the appellee, Geo. W. Herron, is entitled to the one hundred and thirty acres of land (not worth over $1,000) in controversy as a homestead.

The facts are that in 1880 he purchased two hundred and eighty acres of land, and in 1881 he sold one hundred and fifty acres of this land, which included his homestead; and he, in January, 1882, moved with his family to the town of Grayson, a distance of about six miles from the land, where he engaged in the hotel business and operating a saw mill about three miles from Grayson, in which business he continued until this action was commenced in 1883. After moving from the land he tried often to sell the remaining one hundred and thirty acres; also after moving to Grayson he contracted the debts that are now the subject of this action; also in the fall of 1882 he, becoming insolvent, made a deed of assignment of all of his estate for the equal benefit of his creditors. In the deed of assignment he made no express reservation of this land. Also he deeded said land to his wife "in order that she might have a home for herself and children." Also, after selling the one hundred and fifty acres of land, which included her homestead, he made no preparation to occupy the remaining one hundred and thirty acres as a homestead, but almost immediately moved to Grayson and embarked in the business enterprises above indicated. These facts, unexplained, clearly show that he abandoned the one hundred and thirty acres as a homestead. But do other facts show that he did not intend to abandon the one hundred and thirty acres as a homestead? They are: First. That he rented out the land and cultivated a part of it one year in a garden himself. These facts are not inconsistent with an intention to abandon the land as a homestead. Second. He says: "When I left the place I expected to return to it at a future time; the exact time I would return I did not know." This language and additional facts relied on fail to show that he left the place for temporary purposes only, and he had a fixed and continuous purpose of returning to the place and occupying it as a homestead. We think, therefore, that the lower court erred in allowing him said land as a homestead. The deed of assignment, although the appellee and the assignee might have thought that the appellee was entitled to the land as a homestead, embraced it, and as the appellee was not entitled to it as a homestead it passed by the deed of assignment for the benefit of his creditors.

The appellant's attachment was obtained after the deed of assignment was made, and as the land in controversy was in fact included in the deed of assignment which passed the title for the benefit of the appellee's creditors, the levy of the appellant's attachment upon the land created no lien thereon as against said creditors.

The mortgage lien on said land is superior to that of the appellee's creditors.

The judgment of the lower court is reversed, with directions for further proceedings consistent with this opinion.

CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO. v. McMANNON.

(Filed April 16, 1888—Not to be reported.)

1. Master and servant—Incompetent servants—Where the master has employed, or retained in his employment, an incompetent servant, knowing that he was incompetent, or when he might, by reasonable care, have ascer-

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tained that fact, and another servant in his employ is injured through the negligence of such incompetent servant, he, the master, is liable therefor, although both servants were in the same grade of employment, provided the injured servant did not know of the incompetency of his fellow servant, or have the same means of knowledge that the master had.

2. Reversible error—Special verdict—There can be no reversal for an error in instructions under which a general verdict was found where the special findings were sufficient to authorize the judgment.

Holmes, Cummins and P. H. Darby for appellant.

R. C. Davis and Matt O'Doherty for appellee.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action was instituted in the court below to recover compensation for a personal injury received by the appellee by reason of the gross negligence of certain employes of the appellant, the one a switchman and the other an engineer. The appellee, while uncoupling cars in the capacity of switchman, at Central City, on appellant's road, had his arm badly mashed between two freight cars, rendering amputation necessary, the arm having been taken off above the elbow. The injury was caused by the engineer moving the engine back in response to a signal given by one Kittinger, who was a fellow switchman with the appellee in the same yard.

The right of recovery for the nelgect of Kittinger, who was in the same grade of employment, consists in his alleged incompetency for the position, and the further averment that his incompetency was known to the appellant, second, that Campbell, the engineer, by the exercise of the slightest care, might have known the danger of the appellee at the time and avoided the injury; that he was guilty of gross negligence. The appellant, after traversing the material facts alleged in the petition, pleaded that the injury was caused alone by want of proper care on the part of the appellee. Upon these issues the case went to the jury, and a verdict returned for $5,750. A number of special interrogatories were propounded to the jury, thirteen in number, for the plaintiff, and forty-five at the instance of the defendant.

In regard to the alleged negligence of a fellow laborer, by reason of his incompetency, in the same grade of employment, it must appear not only that the employe was incompetent, but that the principal knew he was incompetent; or, by reasonable inquiry, could have ascertained that fact; in other words, "he must, at his peril, exercise reasonable care in the selection of the appliances of his business and of coservants," and if he failed to do this the employer will be responsible to the employe who is injured by the neglect of a fellow servant while in his employment, although in the same grade of labor. (Wood's Law of Master and Servant, page 825.) This rule is qualified to the extent that if the colaborer complaining of the neglect knew, or had the same means of knowledge as to the incompetency that the employer had, then no recovery can be had. The jury, in response to interrogatory No. 1, find that Kittinger was an incompetent switchman; and, in response to No. 2, say that this incompetency was known to defendant's agent prior to and at the time of the injury. They also find that McNair, the yardmaster, knew that Kittinger was incompetent when he employed him.

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The appellant insists that these special findings are not sanctioned by the evidence, and, therefore, this judgment should be reversed.

We have examined this record carefully, and the facts developed show a clear case of negligence on the part of these employes, by which this appellee lost his arm, and while the alleged incompetency of Kittinger may be doubted from the testimony, it appears from the statement of McNair, who was at the time in the employ of the company as assistant yardmaster, that he employed Kittinger under protest, and by reason alone of the direction of his superior. He knew of his unfitness for the place, and so informed his superior, and although contradicted in these statements, it was with the jury to determine to which of the statements they would give credence, and this court will not interfere to say they should have decided otherwise, when Kittinger's own conduct shows a degree of neglect on his part that fully corroborates the statement made by McNair, and shows him unfit for the position assigned him. He seems never to have seen or heard the cars move the one way or the other at the time of the injury, although he was giving signals that resulted in this serious injury, and while others standing near saw appellee's danger, those of the employes, whose duty it was to exercise some skill and judgment to prevent such accidents, failed to exercise the slightest caution. Appellee gave what is known as the steady signal, indicating to the engineer that he was about to uncouple the cars. This signal was reported by the fireman to the engineer, who stopped the cars, and as the appellee went in to uncouple the cars, when Kittinger gave the signal to back, which was done, and the appellee's arm crushed. The fireman had notified the engineer of the appellee's position, and knew, as he swears, that the injured man had not been given time sufficient to uncouple the cars and avoid danger from the time of the steady signal, given by him, to that of the fast signal, given by Kittinger. The fireman called to the engineer to stop, but it was then too late, as it was then impossible to have prevented the accident. This court is not conversant with the manner in which these signals should be given, but where the coupling and uncoupling of cars is of constant occurrence, it seems to us that the party entering and performing the task should give the signal of its completion, and not leave the signal to be given by those who might not even be aware, at the time, that any one was engaged in the act of uncoupling, as seems to have been the case here. We are not disposed to question the truth of the finding by the jury that the engineer was guilty of gross neglect, and while his act is to be attributed to the incompetency of Kittinger, it seems to us that he should have been as well informed at least as the fireman, May, as to the dangerous position of the appellee when this fast signal was given by Kittinger.

We have devoted but little time to the consideration of the instructions given by the court or those refused because the findings of fact by the jury determine the right of recovery by the appellee. The general instruction, No. 2, given for the plaintiff embodies, in substance, the law of this case. The jury was told that if Kittinger was incompetent to discharge the duties of yard watchman in defendant's service, and that the defendant, or any of its agents charged at the time with the duty of employing and discharging such employes, knew of, or, by the exercise of ordinary care, would have known of such incompetency on the part of Kittinger, and notwithstanding such knowledge, or means of knowledge, retained him, and that said unfitness was unknown to the plaintiff, and the plaintiff, while in the discharge of

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his duty, and without any contributory fault on his part, was injured, by reason of the incompetency of Kittinger, etc., they should find for the plaintiff. While this instruction may have omitted to convey the idea that if the appellee had the same means of knowledge that the defendant had, and nevertheless continued in the service, they should find for the defendant, the jury has in effect said, by their special finding, that the appellee was ignorant of his incompetency and had no means of ascertaining it, and, therefore, this omission could not have prejudiced the defendant in any manner. Besides, the jury was told for the defendant that while it was the duty of the defendant to exercise reasonable care and judgment in the selection of its employes, it does not guarantee the competency or fitness of its employes, and if it did exercise reasonable care in the employment of Kittinger it is not liable to the plaintiff on account of said employment, although the jury may in fact believe he was unfit for the position. The jury was also told that if the plaintiff and Kittinger were in the same grade of labor when the accident occurred, the law is for the defendant unless they believe the defendant was guilty of negligence in employing and continuing Kittinger in its service.

The jury was also instructed as to contributory neglect, if any, on the part of the plaintiff, and we find nothing in the record authorizing a reversal unless this court could invade the province of the jury and determine the issues upon the mere weight of the testimony, and then it could only be argued that a bare preponderance of the testimony established the competency of defendant's employes.

The judgment, in our opinion, should be affirmed.

KENTUCKY CENTRAL R. R. CO. v. KENNEY.

(Filed April 28, 1888—Not to be reported.)

Railroads—Lease—Limitation—The provision in appellant's charter prescribing the limitation of six months, within which an action for killing cattle may be commenced does not apply to the road from Paris to Lexington, which was originally constructed and owned by the Maysville and Lexington R. R. Co., but which was, at the time of the injury sued for, and now is, in the possession of appellant. The fact that the Maysville and Lexington R. R. Co. still has a corporate existence shows it retained and has an interest in the road, and that the provisions of the charter govern and regulate the operation of the road. Therefore, this action having been commenced within one year from the time the cause of action arose, is not barred, the general limitation law being applicable.

G. C. Lockhart for appellant.

McMillan & Talbott for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Lewis.

It seems to be conceded in argument that the railroad from Paris to Lexington, passing over the land of appellee, was originally constructed and owned by the Maysville and Lexington R. R. Co. But, although the road between those two points was, at the time appellee's cow was killed, and now is, in the possession of appellant, the Kentucky Central R. R. Co., it does not appear in what manner or upon what terms it was so ac-

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quired, whether by lease or purchase. Nor does it make any difference, for, in the absence of evidence to the contrary, it must be presumed the road is now operated under the authority conferred by the charter incorporating the original company and owner, and subject to the terms and conditions therein prescribed. And the fact that the Maysville and Lexington Railroad Co. still has a corporate existence, shows it retained and has an interest in the road, and that the provisions of its charter govern and regulate the operation of the road. It may be, and doubtless is, true that the possession and control of the road by appellant is legal, and exists in virtue of statutory enactment. But it does not follow, any more than it would if an individual had become the owner or lessee, that the original charter has been repealed, and the conditions and restrictions under which it was intended the road should be operated have been abrogated.

In our opinion, therefore, the provision in the charter incorporating the Covington and Lexington Railroad Co., under which appellant claims title, prescribing the limitation of six months within which an action for killing cattle may be commenced, does not apply to the road from Paris to Lexington, but such action may be maintained if commenced within one year from the time the cause arose.

As the lower court so ruled, and no other ground for reversal is made, the judgment is affirmed.

TIPTON v. TIPTON.

(Filed May 12, 1888.)

1. The plaintiff in an action for divorce must allege and prove an actual residence in this State for one year next before the commencement of the action, and not merely a legal residence.

In this case the actual residence of the plaintiff, the husband, being out of the State, his legal residence in the State did not entitle him to maintain an action for divorce.

2. A legal residence, as distinguished from an actual residence, defined in the opinion.

Wm. Lindsay and A. J. Reed for appellant.

W. B. Smith for appellee.

Appeal from Madison Common Pleas Court.

Opinion of the court by Judge Bennett.

The appellant, a citizen of Madison county, Kentucky, and owner of real estate, on which he lived with his wife and children, in May, 1880, abandoned his wife and children and left the State and remained out of the State until November, 1883, when he returned to Madison county and remained there about three months, not, however, visiting his former residence which had remained in the occupancy of his wife and children. He then again left the State and did not return until April or May, 1885, when he remained in Madison county until the first of January, 1886, but did not visit his former home, where his wife and children still resided. He, on the 1st of January, 1886, again left the State and has remained out of it ever since. Since he left the State in 1880, and during his absence, except one year, when he was in Maryland, he has lived on one of the West India Islands, in the employ-

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ment of a phosphate Company. He says in his deposition, which, by consent, was read in this case, that he always regarded Madison county as his home, and never voted at any other place since he left the county, and did not leave the county with the intention of "remaining away any great length of time, not any longer than I could get things in a shape to return." The evidence also shows that he paid poll taxes, through his brother, in Madison county, and during his second visit he voted at the August election, 1885; that when he left in 1886 he told his brother that he was going away for a year or two, but would return. On the 4th of October, 1886, he commenced this action against the appellee, his wife, for a divorce upon the ground of a continuous separation for the period of five years. The chancellor dismissed his petition for the reason that he was not a resident of this State for one year next before the bringing of his action. He has appealed to this court.

Section 423 of the Civil Code provides: "The plaintiff, to obtain a divorce, must allege and prove, in addition to a legal cause of divorce—

"1. A residence in this State for one year next before the commencement of the action."

There is a broad distinction between a legal and actual residence. A legal residence (domicil) can not, in the nature of things, co-exist in the same person in two States or countries. He must have a legal residence somewhere. He can not be a cosmopolitan. The succession to moveable property, whether testamentary or in case of intestacy, except as regulated by statute, the jurisdiction of the probate of wills, the right to vote, the liability to poll tax and to military duty, and other things, all depend upon the party's legal residence or domicil. For these purposes he must have a legal residence. The law will, from facts and circumstances, fix a legal residence for him unless he voluntarily fixes it himself. His legal residence consists of fact and intention; both must concur, and when his legal residence is once fixed it requires both fact and intention to change it. As contradistinguished from his legal residence he may have an actual residence in another State or country. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purposes above indicated, may be merely ideal, but his actual residence must be substantial. He may not actually abide at his legal residence at all, but his actual residence must be his abiding place. His legal residence subjects him to the duties and confers upon him the rights and privileges above mentioned, but nevertheless he may in fact be a nonresident; for it is well settled that although he may have a legal residence in this State, yet if his actual residence is another State, the latter fact is sufficient to authorize an attachment against his property upon the ground of nonresidency. His domicil or legal residence may be in this State, but in fact he may be a nonresident. It is upon this distinction that a proceeding is allowed against him as a nonresident.

Had the appellee motioned him in this case to execute a nonresident's bond for cost doubtless it would not be denied that the motion should have prevailed. The mere fact of his legal residence—his actual residence being out of the State—would not have been a sufficient response to the motion. Doubtless the appellee could have proceeded against him as a nonresident for a divorce. According to these views we think that the residence required by the section of the Code, supra, means that of an actual residence,

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and that a mere legal residence in this State, with an actual residence out of the State, is not sufficient to entitle the appellant to maintain his action.

The judgment of the circuit court is affirmed.

THE PHŒNIX INSURANCE CO. v. SPIERS & THOMAS.

(Filed May 24, 1888.)

1. Insurance—Proof of loss—Conditions in an insurance policy relating to the mode of establishing a loss are not so strictly enforced as those affecting the risk itself. In this case the company, by notifying the insured that it would not pay because it considered the policy void by reason of additional insurance obtained without the consent of the company, waived the condition requiring proof of loss, and the duty of the assured to make such proof was not revived by the subsequent statement of the company that if it had been misled it would entertain proof to that effect.

2. An agent ordinarily has no power to appoint a subagent without the knowledge or consent of his principal; and while an agent may confer upon a clerk, or subordinate, authority to exercise certain powers, yet the circumstances of this case show that the person who it is claimed acted as subagent acted under a private arrangement between him and the agent, and he can not be regarded as having acted as the agent of the company.

3. Additional insurance—Waiver of condition—Where a policy of insurance provides for a forfeiture in case of additional insurance without the written consent of the company endorsed upon the policy, the condition may be waived, either by parol agreement or by the conduct of the company; and silence for an unreasonable time upon the part of the company after knowledge or notice of the breach of the condition will constitute such conduct.

4. Statute of frauds—Change of contract—As a contract of insurance is not within the statute of frauds it is not necessary that it should be in writing; and although in writing it may be changed by parol, even though the contract provides that it shall only be changed by writing.

5. A policy of insurance is to be construed most strongly against the company, and ambiguities resolved in favor of the insured.

6. Powers of agent—Where an agent is intrusted with the general management of a business he has implied general authority to do all that ordinarily enters into the conduct of that business, and to that extent the principal is bound by his acts unless the party dealing with him has notice that his powers are in fact limited. Therefore, an insurance agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public. And under this rule, an agent who solicits the insurance, takes the application, receives the premium and delivers the policy, may, by his conduct or acts, bind his company by way of waivers of a forfeiture on account of additional insurance, in the absence of knowledge upon the part of the assured that the agent's powers in this respect have been restricted. It follows, therefore, that the knowledge of the agent, under such circumstances, is to be imputed to the company.

7. Special findings against evidence—As the special findings in this case are inconsistent with each other, and some of them directly in the teeth of the testimony, the appellant is entitled to a new trial.

Wm. Lindsay, Warren Montfort and J. C. Strother for appellant.

O. B. Hallam and Montgomery, Lindsay & Botts for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Holt.

The appellant, the Phœnix Insurance Co. of Hartford, Conn., issued to the appellees, Spiers & Thomas, of New Liberty, Ky., a policy of insurance

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of $1,200, for six months from February 20, 1883, upon 12,000 pounds of tobacco.

It provided: "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * this policy shall be void. * * * The assured shall forthwith give notice of loss to the company, and as soon after as possible tender a particular account of such loss, signed and sworn to by them. * * * The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same are made by the assured and received at this office, in accordance with the terms of this policy. * * * Until such proof, declarations and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. * * *

"This policy may be cancelled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering a rateable proportion of the premium for the unexpired term."

The assured added other tobacco to the stock, and on May 4, 1883, the Liverpool and London and Globe Insurance Co. issued a policy for two months for $800 upon the entire lot, then amounting to 20,000 pounds. It was destroyed by fire on June 23, 1883, being then worth $3,000, and the total insurance on it being $2,000.

The appellant never consented to the additional insurance by writing endorsed upon the back of its policy. The appellees now seek to enforce it.

But two of the several defenses need be considered. They are: First, that the preliminary proofs were not made; and, second, that the policy is not enforcible because of the additional insurance, taken without the written consent of the appellant.

Soon after the loss occurred the appellant had it investigated by its adjusting agent, and thereupon notified the appellees, in writing, that it considered the policy void by reason of the taking of the additional insurance without its consent, and distinctly refused to pay upon this ground alone.

This was equivalent to the company saying that it would be useless to furnish any preliminary proofs; that no form or degree of them would induce payment, and it would be but an idle ceremony to present them.

Such conduct waives the necessity for their production before suit, although required by the policy. The stipulation is in favor of the insurer, and his conduct renders it an idle formality, the observance of which the law will not, therefore, require. (Manhattan Insurance Co. v. Stein, &c., 5 Bush, 652; Martin v. Insurance Co., 20 Pick., 389; Thwing v. Insurance Co., 111 Mass., 110.)

Conditions affecting the risk itself are more strictly enforced in favor of the insurer than those relating to the mode of establishing a loss.

In Wood on Fire Insurance, section 496, it is said:

"The production of proofs of loss, or defects therein, may be waived, and such waiver may be implied from what is said or done by the insurer."

Another leading writer upon this subject says:

"A distinct denial of liability and refusal to pay on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proof of the loss." (May on Insurance, section 469.)

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It is insisted, however, that there was a nonacceptance of this waiver; that the matter was re-opened at the instance of the assured, and that they, therefore, could not thereafter sue without first furnishing these proofs.

It appears that soon after the refusal to pay the attorneys of the appellees wrote to the company, saying that they believed it had been misled as to the facts, and requesting an investigation and remittance of the amount of the policy.

The company replied that if it had been misled it would "entertain proofs to that effect."

Evidently the letter of the attorneys related alone to the refusal to pay upon the ground that the policy had been avoided by taking other insurance without the company's consent. The assured were induced by the insurer to believe that it based its refusal to pay upon this ground alone, and did not intend to insist upon the production of the preliminary proofs; and this refusal, so grounded, it never did withdraw, and is now insisting upon it.

One of the special findings of the jury is that the company refused to pay upon this ground; and we think its conduct lulled the appellees into the belief that the mere preliminary proofs would receive no consideration. It will not, therefore, be heard to now defend because they were not furnished before suit.

It is insisted that the forfeiture provided by the terms of the policy in case other insurance should be taken without the written consent of the appellant endorsed upon its policy was waived by it.

A brief statement of facts is necessary to a proper understanding of this question. One Curtis was the agent of the company at New Liberty. Sometimes he styled himself its surveyor. He took applications for insurance, made the surveys, received the premiums, countersigned and delivered the policies to the insured, but did not issue them. He was the sole representative in that locality of the appellee, a corporation located in a distant State.

One Vallandingham was loaning money upon tobacco in the vicinity of the appellees, and, therefore, desired its insurance. He agreed with Curtis if he would divide his commissions with him that he would bring to him the insurance upon all the tobacco in which he might thus become interested. This arrangement was unknown to the company. As between it and Curtis the powers of the latter as its agent appear to have been limited.

It is not certain whether Vallandingham suggested the insurance of their tobacco to the appellees or they to him. They doubtless believed he was an agent of the company. He so represented to them, and they obtained both policies of insurance through him, that is, he furnished the information and made the applications for the insurance; received the premiums and paid the same in one instance to Curtis, and in the other to one Gayle, who was the local agent of the Liverpool and London and Globe Co. The policies were delivered by the agents to him, that in the last-named company being still in his possession when the loss occurred.

There is evidence tending to show that it was the understanding between Vallandingham and the appellees that the additional insurance was to be taken out upon the 8,000 pounds of tobacco only. The testimony is conflicting as to whether he so applied for it. He signed the names of the appellees to the application for the insurance in the Phœnix Co., but in obtaining the additional insurance the agent of the Liverpool and London and Globe Co. merely obtained from him information as to the property, and no formal application was made out.

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The policy issued, however, upon the entire 20,000 pounds, and the appellees, after the loss, proved it as such, without qualification, explanation or objection, and obtained the $800 insurance. It must, threfore, as to them, be regarded as having been an insurance upon the entire lot of tobacco.

Vallandingham certainly was not even purporting to act as agent for the appellant in obtaining the second policy, nor can he be regarded as its agent as to the first one. The arrangement between him and Curtis was not binding upon the company. It had no knowledge of it. Curtis had no express authority from it to appoint another or a subagent.

An agent ordinarily has no power to do so without the knowledge or consent of his principal; and while an agent of an insurance company, who is authorized to contract for risks, receive premiums and deliver policies, may confer upon a clerk or a subordinate authority to exercise these powers, as the service is not of such a personal character as to come within the maxim delegatus non potest delegare, yet in this instance the circumstances show that it was the private arrangement of Curtis and Vallandingham, who was interested in the subject of the insurance; and if it were material to the question at issue, he can not be regarded as having acted as the agent of the company.

It follows that the testimony detailing what was said between him and Spiers & Thomas was incompetent.

It has been held in some few cases, as in Hutchinson v. Western Insurance Co., 21 Mo., 97, that where the policy provides for a forfeiture in case of additional insurance without the written consent of the insurer endorsed upon the policy, it can only be waived by a literal compliance with the condition.

The decided current of authority, however, is that this waiver may arise from the act or conduct of the insurer; and silence for an unreasonable time upon his part, after notice or knowledge of the breach of the condition, will constitute such conduct.

If notice be given to the company of the additional insurance or increased risk, and no objection be made within a reasonable time, fairness and good faith should estop it from insisting upon a forfeiture of the policy because its consent was not endorsed upon it according to its literal terms.

The assured has a right to infer therefrom that the company will not insist upon it. It has not spoken as to a matter for its benefit when it could and should have done so to prevent another from being misled to his probable injury. If it had done so he might have protected himself probably by other insurance. Its silence, under such circumstances, is a consent to the additional insurance. A forfeiture upon this ground is not for fraud. It may cancel the policy by reason of it, but if it does so it must refund a proper proportion of the premium. It can not, therefore, remain mute, with a knowledge of the existence of a ground of forfeiture, and if there be no loss, retain the entire premium; but if there be one, rely upon the breach of the contract.

The term "void," as used in the policy, is to be regarded as meaning that the insurer may, at his exclusive option, treat it so; and not that the contract becomes an absolute nullity as to either party. The insurer may, therefore, by his conduct, waive his right of forfeiture and estop himself from insisting upon it. (Baer v. The Phœnix Insurance Co., 4 Bush, 242.)

The contract of insurance may be by parol. It is not within the statute

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of frauds. Such a contract, although in writing, may be changed by parol, even though it provide that it shall only be done by writing because men can not so tie their wills as not to be able thereafter to do, by consent, what the law allows.

Conditions of forfeiture in a policy of insurance, as indeed the entire instrument, are to be construed most strongly against the insurer. The company prepares it, and is familiar with its details and many conditions. Its ambiguities are to be resolved against the insurer, but while all this is justly so, yet undoubtedly a condition of forfeiture like the one in question should be upheld. Its object is to guard against overinsurance and the consequent temptation to fraud and crime.

Experience teaches that in such matters the interest of men is more to be relied upon than their morality. Therefore, no prudent company ever insures property to its full value. It will not do to say that the first insurer should not complain of additional insurance since it aids him in case of loss by way of contribution, because overinsurance not only is likely to lead to fraud and the destruction of property, but it takes away the owner's incentive to care for and protect it, and, therefore, greatly increases the danger of loss. While, however, these reasons exist for upholding such a condition of forfeiture, yet it may now be regarded as settled law that insurance companies may, by conduct or parol agreement, waive it and become estopped from enforcing what is but a conventional condition of forfeiture. (Kenton Insurance Co. v. Shea., &c., 6 Bush, 174; Von Bories, &c. v. Insurance Co., 8 Bush, 133; Insurance Co. v. McCrea, &c., 8 Lea., 513.)

There is evidence in the record tending to show that Curtis had notice of the additional insurance, the special verdict so finds, and it is claimed that this was notice to the company, and that its silence, under these circumstances, operated as a waiver of any right of forfeiture. Upon the other hand, it is insisted that notice to him was not notice to it, and that no power of waiver existed in him because the contract of insurance had been closed, because his powers were limited and he then owed no duty to the assured. If the latter knew that his powers were limited and that he was invested with no power of waiver, or if there was anything connected with the transaction to put the assured upon inquiry, then any conduct of the agent in excess of his authority would not bind the company. Of course it could limit his power, and if the assured knew it had done so as prudent men should have known it, then they dealt with him at their peril in matters in excess of his power. The policy in this case contains no provision as to how or to whom notice of other insurance is to be given. If, however, the agent had apparent authority in the matter; if, under all the circumstances, he ostensibly had it; if his acts indicated general power as to the subject of insurance for his company, then, although in fact his authority was limited, yet it should be considered adequate as to third parties, unless those dealing with him had express or inferential notice of the want of power. The acts of an agent within his ostensible authority are binding upon his principal. If the latter has authorized the opinion that he has given more extensive authority than he has in fact, he will be estopped to deny it. If he holds him out as his general agent he will be bound by his acts and conduct, although, as between them, his powers are in fact limited, provided the party dealing with him has no notice of the restriction. Thus if the agent be instrusted with the general management of a business he has implied general authority to do all that ordinarily enters into the conduct of that business. (Williams v. Getty, 31 Penn. St., 461.)

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In the language of the Supreme Court of the United States (Ins. Co. v. Wilkinson, 13 Wall., 222): "The powers of the agent are, prima facie, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." The authority of the agent need not be express; it may be implied from circumstances, and may thus exist as to third parties, although in fact forbidden by agreement between the company and its agent.

Mr. May says: "The authority of an agent must be determined by the nature of his business, and is prima facie co-extensive with its requirements. It can not be limited by special private instructions unless the insured has notice, or there is something in the nature of the business, or the circumstances of the case, to indicate that the agent is acting under such special instructions." (May on Insurance, section 126.)

The tendency of recent decisions, and we think properly, is to hold the insurer bound by the acts and conduct of the local agent whenever it can be done consistently with the rules of law. The maxim, qui facit per alium facit per se, should apply with peculiar force to the acts of an insurance agent. He usually represents a company remotely located. Its patrons in his vicinity naturally look to him for direction generally as to the insurance obtained through him. He is generally regarded as having full power in reference to it. Being usually the only man upon the ground having anything to do with it, the persons insured in his company, with few, if any, exceptions would, in absence of notice that his powers were limited, regard his statement as to any matter relative to such insurance as authoritative, and any notice to him as to it as sufficient. They rarely know anything of the company or of its officers who issue the policies, and look to the agent through whom they have obtained the insurance as the complete representative of the company in everything connected with that insurance. If they did not consider that they were authorized to do so it would undoubtedly create distrust and cripple the business. As to third parties the agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public. Under this rule an agent who solicits the insurance, takes the application, receives the premium and delivers the policy may, in our opinion, by his conduct or acts, bind his company by way of waiver of a forfeiture on account of additional insurance, in the absence of knowledge upon the part of the assured that his powers in this respect have been restricted. This being so, it follows that the knowledge of the agent under such circumstances is to be imputed to the company.

In Wood on Fire Insurance, section 406, it is said: "In all cases where notice is required to be given, unless some special officer is named to whom it shall be given, notice to an agent of the company is notice to the company. Thus when notice of other insurance is required to be given, notice given to the agent is sufficient, and if no special mode in which it shall be given is provided, any notice conveying the requisite information, written or verbal, is sufficient; or if the agent knew of the other insurance when the contract was entered into, it is not only a waiver of notice but also a forfeiture on

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that ground. It is not necessarily essential that the agent should be clothed with authority to issue policies. It is enough if he is authorized to receive applications, make surveys, deliver policies and receive the premiums therefor, and is in any measure held out by the insurer as having authority to act for it in any or all of these respects."

In the case now under consideration there was a myriad of questions submitted to the jury. It is not surprising, therefore, that some of the findings are inconsistent with each other, while others are directly in the teeth of the testimony. For instance, the jury found that the second policy did not cover the property embraced by the first one, and that the appellees, under the second policy, only proved for the loss of 8,000 pounds of tobacco. This finding is directly in the face of all the evidence, both verbal and written. In answer to question number nine of the appellees they say that Spiers & Thomas had no notice, prior to the loss, of any limitation upon the authority of Curtis as agent; and then, in response to the second question submitted by the court, they declare that the appellees knew the extent of his powers when the application for the insurance was made, and that both they and the public knew his agency was limited. It is apparent from what has already been said that this was a vital point in the case. It is unnecessary to further review the findings, but sufficient to say that they are too inconsistent and conflicting to support the judgment, and a new trial should have been awarded. We have indicated our view of the law governing the case at length, not only upon account of its legal importance, but because it must, upon another trial, be submitted to a jury, under proper instructions, for a general verdict, a special one being no longer authorized.

Judgment reversed and cause remanded for a new trial in conformity to this opinion.

HUTCHCRAFT'S EX'OR v. THE TRAVELERS INSURANCE CO. OF HARTFORD, CONN.

(Filed May 29, 1888.)

1. Accident insurance—Where one, by the act of another, receives an injury which he had no agency in bringing on himself, and which was not foreseen by him, from which death results, it is a death through "accidental means" within the meaning of a policy of insurance against death through "external, violent and accidental means;" and this is true, although the deed was wilfully directed against the person killed. To make out a case of injury by accidental means, so far as the injured party is concerned, it is not essential that the person injuring him should not have intended to do so.

2. Same—Under such a policy which further provides that no claim shall be made thereunder "when the death or injury may have been caused by dueling, fighting, wrestling, lifting or overexertion, or by suicide (felonious or otherwise, sane or insane), or by intentional injuries inflicted by the insured or any other person," there can be no recovery if the insured was intentionally killed or injured by any other person by the infliction of bodily wounds. The proviso quoted was not intended to be confined to such injuries inflicted by other persons as were inflicted with the consent of the insured or at his instance. To prevent a recovery, however, such injuries must have been intentionally directed against the insured, and not against another or against a class of individuals.

W. Lindsay and Russell Mann for appellant.

Jas. Pirtle for appellee.

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Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Bennett.

During the time that the appellant's testator held two tickets of insurance in the appellee's company, insuring his life in the sum of $3,000 each against death "through external, violent and accidental means," he was waylaid and assassinated for the purpose of robbery. The appellee interposed two defenses to the appellant's action to recover these sums: First, that the appellant's testator having been killed by intentional "means," his death was not accidental within the meaning of the terms of the policy which insured him against death "through external, violent and accidental means;" second, that the proviso in the policy expressly exempted the appellee from liability in case the appellant's testator came to his death through injuries intentionally inflicted by another person. These defenses will be disposed of in their order.

First. In each ticket the appellee covenanted to pay $3,000 to Hutchcraft's representatives if he should be killed "through external, violent and accidental means."

Accidents are of two kinds: First, those that befall a person without any human agency, as the killing of a person by lightning. Here the elemental properties of lightning and its flash are not caused or contracted by human agency, but the fact the person was struck by unintentionally placing himself within its range is, as to him, an accident; second, those that are the result of human agency. The latter are divided as follows: First, that which happens to a person by his own agency, as, if he is walking or running and accidently falls and hurts himself. Here he falls by reason of his agency in walking or running, but he did not intend to fall; he did not foresee that he would fall in time to avoid it; the fall was, therefore, accidental. Second, that which befalls a person by the agency of another person without the concurrence of the latter's will, as, where one standing on a scaffold unintentionally lets a brick fall from his hand and it strikes a person below. Here the dropping of the brick, as it was not intended by the former and was unforeseen by the latter, is, in the broadest sense, an accident. Third, that which a person intentionally does, whereby another is unintentionally injured, as where one intentionally fires a gun in the air and accidentally shoots another person. Here the act of firing the gun was intentional, but the shooting of the person was unintentional; therefore, on the part of the person firing the gun the shooting of the other would be accidental, though not in as broad a sense as in the former case, because some part of his act was intentional; but, as to the person shot, it was by purely accidental means. Fourth, so, also, as we think, if one person intentionally injures another, which was not the result of a rencounter or the misconduct of the latter, but was unforeseen by him, such injury as to the latter, although intentionally inflicted by the former, would be accidental.

When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is as to him accidental, although inflicted intentionally by the other party. It is conceded that in the three instances first named the injury would be by "accidental means." Nor, doubtless, will it be denied that if a person were to maliciously fire his gun into a crowd of persons for the purpose of general mischief, or were to maliciously wreck a train of cars for the purpose of injuring whatever might be on board, whereby one or more persons were shot or mashed, that the

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casualty befalling these persons, as far as they were concerned, would fall within the term of accidental means. In other words, we do not regard it as essential, in order to make out a case of injury by accidental means, so far as the injured party is concerned, that the party injuring him should not have meant to do so, for if the injured party had no agency in bringing the injury on himself, and to him it was unforeseen—a casualty—it seems clear that the fact that the deed was wilfully directed against him would not militate against the proposition that, as to him, the injury was brought on by "accidental means."

Second. That part of the proviso that is germane to the second ground of defense is as follows: "And no claim shall be made under this ticket when the death or injury may have been caused by dueling, fighting, wrestling, lifting or overexertion, or by suicide (felonious or otherwise, sane or insane), or by intentional injuries inflicted by the insured, or any other person."

The fact that the insured engaged in a duel or fight, though forced upon him; the fact that he engaged in a wrestling match, however innocent; the fact that he engaged in lifting, though never so cautious; the fact that he overexerted himself, though never so innocent of an intention of doing so, whereby he received injuries, are expressly excluded from the operation of the policy. Also the fact that the insured commits suicide, although insane, therefore, in a legal sense, accidental, excludes him from the benefit of the policy.

The remaining clause stipulates for the further exemption of the appellee's liability, in the event that intentional injuries are inflicted upon the insured by himself or any other person. It is contended by the appellant that the meaning of this clause is that "if the injured intentionally inflicted injuries upon himself, or if any other person intentionally inflicted injuries upon him with his consent, or at his instance, then the appellee should not be liable." A moment's reflection will show that the clause will not admit of this construction. The clause, when placed in juxtaposition with its antecedent, reads as follows: "No claim shall be made under this ticket when the death or injury may have been caused by intentional injuries inflicted by the insured or any other person." The sentence, though awkwardly expressed, is complete, and clearly expresses the idea that if the insured intentionally kills or injures himself by the infliction of bodily wounds he thereby breaks the condition of the policy; or that if he is intentionally killed or injured by any other person by the infliction of bodily wounds, the condition of the policy is thereby broken; therefore, to add the words "with his consent, or at his instance," would have the effect of torturing the meaning of the language used beyond its legitimate import. By the terms of the contract the company undertakes to indemnify against death or injury effected "through external, violent and accidental means." By virtue of this undertaking the company would be liable if the death or injury should be effected by any external and violent means whatever, that was, as to the insured, accidental, except in so far as the company, by the proviso, limited its liability; for it is a well-known rule of construction that where the undertaking of a party is expressed in general terms, as in this case, and specified things, as in this case, are excepted from the operation of the general terms, such terms are to be construed as covering all things coming within their scope, except those that are expressly excluded. As, therefore, the assassination of Hutchcraft was, as to him, an unforeseen event—a casualty—his taking off was, through external, violent and acci-

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dental means. But we also think the clause of the proviso that excludes the appellee's liability in case of death or injury if intentionally inflicted by any other person applies to this case. We think, however, that said clause was intended to apply to such injuries by other persons as are intentionally directed against the insured, and not to such injuries as the injured may receive at the hands of third persons who are attempting to do mischief generally, or who are attempting to injure any particular individual other than the insured, or class of individuals, or any kind of property, for in such cases it can not be said that the injury was intentionally aimed directly and individually at the insured.

The judgment of the circuit court overruling the demurrer to the appellees' answer is affirmed.

KENTUCKY SUPERIOR COURT.

MULHOLLAND v. TROUTMAN'S ADM'R.

(Filed February 22, 1888.)

1. Judgments—Limitation—Land was sold under a decree directing its sale to satisfy a personal judgment previously rendered, and the proceeds of the sale, which were sufficient to satisfy the judgment, were paid to the plaintiff. Subsequently the decree for the sale of the land was reversed, and the plaintiff required to restore to another than the defendant the money he had received thereunder. The plaintiff then had execution issued upon h judgment. The defendants instituted this action to enjoin that execution, claiming that the judgment is barred by limitation, more than fifteen years having elapsed between the rendition of the judgment and the issue of the execution. Held—That the statute ceased to run when the judgment was satisfied by the sale of the land, and did not begin to run again until the plaintiff was compelled to restore the money improperly collected, and deducting this time the judgment was not barred.

2. Same—Execution—No valid execution can issue upon a judgment after the death of the plaintiff unless it is indorsed by the clerk, as provided in the Code of Practice, and the issual of an execution without such indorsement does not suspend the operation of the statute of limitation.

3. Injunction—Damages—The object of an injunction being to stay the collection of money, the court had the power to award damages, in its discretion, not exceeding 10 per cent. on the amount enjoined.

4. Supersedeas—Damages—A judgment dissolving an injunction restraining the collection of an execution is not a judgment for the recovery of money, and although the supersedeas bond recites that judgment was rendered for so much money the appellee is not entitled to damages upon the affirmance of the judgment, as the court will look to the judgment itself to see what it is for. The mere fact that a judgment states in an advisory way what sum the officer is authorized to collect does not give the right to damages.

5. Error too small to authorize reversal—An error of $12.15 in a judgment for over $1,200, involving a calculation of interest and partial payments, is too small to authorize a reversal.

James Montgomery, A. E. Willson, Hargis & Eastin and J. S. Pirtle for appellant.

J. P. Hobson for appellee.

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Appeal from Hardin Circuit Court.

Opinion of the court by Presiding Judge Ward.

The matters involved in this controversy, simple, and at one time, well understood and acted upon by all the parties, have, by the lapse of time and differences in opinion among new actors, stimulated by conflicting interests, become much involved. Its proper solution can be now best reached by recurring to facts once admitted by all, and following them to their just conclusion.

In 1860 appellee's intestate instituted a suit against Samuels, Jacobs & Co., of which firm appellant, Mulholland, was a member, to recover an alleged balance due to him for land sold to the firm. A lien was asserted, and it was alleged that Thomas Florence was in possession, and he was made a defendant. There seems to have been no dispute between Troutman and Samuels, Jacobs & Co. as to the amount due the former. If there was any it was concluded by a judgment rendered December 13, 1865, which neither of the parties questioned in any respect for many years. That judgment was as follows: "It is adjudged that the plaintiff, W. L. W. Troutman, recover of the defendants, W. T. Samuels, Jas. C. Mulholland and I. Robin Jacobs, the sum of $1,500, no interest to be collected thereon; also, interest on $2,000 from the 1st day of April, 1859, at the rate of 6 per cent. per year; also, $70, with like interest, from the 1st day of January, 1859, being uncontested; the remainder of the sum claimed by plaintiff, and the question as to the liability of the land mentioned in the pleadings, is reserved for future adjudication, and this judgment is no release of any lien the plaintiff claims on said land, and plaintiff may have execution."

In order to state the questions presented by this appeal we may, for the present, omit what occurred between the rendition of this judgment and the 20th day of December, 1883. On the last-named day appellee, in right of his intestate, caused an execution to be issued upon this judgment, which was placed in the hands of the sheriff of Jefferson county on the 22d of December, 1883, that being the county of appellant's residence. This suit was instituted to enjoin the collection of said execution upon various grounds to be hereinafter stated. The court dissolved the injunction, and, as one of the principal questions involved in the case was the meaning or construction to be given to the judgment above set out, the court instructed the sheriff as to the amount he should collect on the execution. From that judgment this appeal is prosecuted.

In so far as the grounds relied upon for said injunction involve the validity or effect of the judgment of December, 1865, it is sufficient to say that the judgment appealed from is in conformity to this court's opinion as to these matters, as expressed in the case of Mary Hall Stuart, &c. v. W. L. W. Troutman's Adm'r, rendered December 8, 1884, and affirmed by the Court of Appeals January 26, 1888. (9 Ky. Law Rep., 752.) The judgment appealed from fixes the amount due upon the judgment of 1865, on the 17th day of January, 1870, at $12.15 more than this court ascertained it to be, but that sum, as affecting a judgment for over $1,200, and involving a calculation of interest and partial payments, is too small to be regarded as substantial.

The statute of limitations is also relied upon, and about this we, at one time, entertained much doubt, but a careful examination has removed that doubt.

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In considering this question it may be admitted that no execution issued upon the judgment of December, 1865, until December, 1888, a period of eighteen years. It is true appellee claims that an execution was issued on said judgment on the 21st day of September, 1875, but an inspection of that execution shows that it issued upon a judgment recovered by F. M. Troutman, administrator of W. L. W. Troutman, not upon a judgment in favor of W. L. W. Troutman. There was no indorsement on that execution by the clerk showing the death of W. L. W. Troutman, or that anyone had qualified as his administrator. Whether such an indorsement would have corrected the error in the body of the execution, as to the party in whose favor the judgment had been rendered, we need not say. It is manifest from the provisions of section 432, Myers' Code, and the construction given to that section in Morgan, &c. v. Winn's Adm'r, &c., 17 B. Mon., 241, and in Ardery's Adm'r v. Tanner, MS. opinion, December, 1857, cited in Myers' Code, notes to section 432, that no valid execution could issue upon the judgment of 1865, after the death of the plaintiff in the judgment, unless it was indorsed by the clerk as provided. Without such an indorsement the sheriff would have no authority to act under it, and without an execution being issued upon which the officer might lawfully act the operation of the statute of limitations would not be suspended.

So we are left to inquire if there are any other reasons why the statute of limitations can not be held to apply. To answer this we must go back to the pleadings in the original action and that provision of the judgment by which the court reserved control of the case as to the enforcement of the lien on the land.

Thomas Florence, who was alleged to be in possession of the land, filed an answer, in which he claimed that he had bought the land from Samuels, Jacobs & Co., under such circumstances, now unnecessary to state, as that Troutman had no lien upon it, at least no lien to any other or greater extent than the balance due by him, Florence, to Samuels, Jacobs & Co., and in order to determine what he owed them he set out the payments made to them, made his answer a cross petition against them, and expressed a willingness to pay what it might be adjudged he owed to whomsoever the court should adjudge. The answer of Samuels, Jacobs & Co. to this cross petition was in every way an answer in the interests of Troutman, to the end of an enforcement of a lien on the land for the amount adjudged him in December, 1865. When the question as to this lien was tried the court, by its judgment rendered July 6, 1868, determined that the land was subject to a lien for the full amount due by Samuels, Jacobs & Co. to Troutman, as fixed in the judgment of 1865, and directed its commissioner to sell the land to that end. From that judgment Florence prosecuted an appeal without supersedeas.

The master executed the judgment and sold the land on the 17th of August, 1868, for enough to satisfy the judgment of December, 1865, and that report of sale was confirmed in December, 1868. From this sale Troutman's administrator realized $200 on the day of sale. The purchaser failing to pay for the land, it was again sold, on the 17th day of January, 1870, for the debt, interest and costs due appellee's intestate. And it is worthy of remark that the master, in making these sales, must have given to the judgment of 1865 the same construction since given by this court, as the amount found to be due thereon, at the date of sale, about corresponds with the sum ascertained by this court. The money arising from this sale was paid to appellee, and the judgment of 1865 satisfied. Upon the appeal taken by Florence

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the judgment of July 6, 1868, was reversed by the Court of Appeals on the 7th of December, 1870. The effect of this reversal was that there was no lien upon the land except for the amount due by Florence to Samuels, Jacobs & Co. After the filing of the mandate and opinion of the Court of Appeals various steps were taken to ascertain what sum Florence owed Samuels, Jacobs & Co., what sum the latter were entitled to have credit for on the judgment of 1865, by reason of the sale of the land and the receipt of the purchase money therefor by Troutman's administrator, and what sum the latter should refund to Florence out of the purchase money. In this controversy all the parties took an active part. The court by its judgment rendered February 27, 1874, determined that Florence was not indebted to Samuels, Jacob & Co. for as great a sum as his land was sold for, by the sum of $1,316.23, as of the date of sale, January 17, 1870, and rendered judgment against Troutman's administrator therefor. It also determined that Samuels, Jacobs & Co. were entitled, by reason of their claim against Florence, to have from the proceeds arising from the land sale the sum of $200, as of date August 17, 1868, and $1,552.41 as of date January 17, 1870; and Troutman's administrator, having received all of the purchase money for the land, these two sums were credited upon Troutman's judgment of December, 1865, against Samuels, Jacobs & Co., and these credits were endorsed on the execution enjoined herein.

The facts show that from August 17, 1868, to February 27, 1874, a period of more than five years, the judgment of 1865 was satisfied of record, during which time there was a litigation pending as to whether Troutman's administrator was entitled to the funds which had been paid to him, and in which all parties recognized the fact that, to the extent he was not entitled to them, he had a subsisting and unsatisfied demand against Samuels, Jacobs & Co. It might be questioned whether the statute would run during the time that this litigation was protracted in order to ascertain the extent of the lien on the land, as it was to the interest of Samuels, Jacobs & Co. that their debt should be paid by their interest in the land; but if the statute began to run it certainly ceased when the judgment was satisfied, and did not begin again until the appellee was compelled to restore to Florence the money improperly collected from him, and deducting this time the judgment was not barred.

The object of the injunction being to stay the collection of money the court had the power to award damages in its discretion, not exceeding 10 per cent. on the amount enjoined. The damages fixed by the court were much less than at that rate.

No motion was made to have the judgment for costs rendered in favor of appellant set-off against the judgment upon which the execution issued. That right the court may yet exercise if the parties demand it and their rights require it.

The judgment appealed from is not a judgment for the recovery of money, but a judgment dissolving an injunction. The judgment in an advisory way, and doubtless to prevent further litigation, stated what sum the officer was authorized to collect on the execution, but no affirmative relief was or could have been granted. The recital in the supersedeas bond that a judgment was rendered for $1,240, with interest and costs, is of no value. We look to the judgment to ascertain what it was for. The judgment for costs and damages does not seem to have been embraced in the supersedeas bond.

The judgment is affirmed, but for the reasons stated, without damages.

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STEVENS v. GREGG, &c.

(Filed April 4, 1888.)

Lex loci contractus—Set off—The laws of the State where a note is made payable determine its validity, nature, obligation and interpretation. Therefore, where by the laws of the State where a note is executed and made payable it is made negotiable paper, freed of the defense of set-off on account of any indebtedness by the payee to the maker, our courts must, in an action upon it in this State, give to it the same interpretation and effect. And while a set-off allowed by the lex fori is to be treated as a part of the remedy, and may be pleaded in a suit upon a contract in this State, though it may not be admissible by the law of the State where the contract which is sued upon was made or was to be performed, still as by the laws of this State a set off can not be pleaded to an action upon a bill of exchange, or a note placed by statute upon the footing of a bill of exchange, and the paper sued upon is a bill of exchange under the laws of Ohio, where it was executed and made payable, comity requires that our courts shall give to it the same interpretation and effect, and for the purposes of this action treat it as a bill of exchange.

C. L. Raisin, Jr., and Geo. H. Ahlering for appellant.

Geo. Washington for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Barbour.

On the 14th of August, 1882, the appellant executed his promissory note to W. E. Hampton, whereby he promised to pay to his order $93, twelve months thereafter, at the Exchange National Bank, Cincinnati, O. This note was, before its maturity in the State of Ohio, for value, indorsed and delivered by the payee to the appellee, who had no notice of any defense against it. In an action upon the note by the appellee against the appellant the latter pleaded, as a set-off, an indebtedness by the payee to him which existed before the maturity of the note and before appellant had notice of the assignment to the appellee. By the laws of Ohio, where the note sued on was made payable, it is placed upon the footing of a bill of exchange, and in the hands of an indorsee for value is not subject to the defense of set-off on account of any indebtedness existing between the original parties to it of which he had no notice. The sole question presented upon this appeal is, can the defense be sustained?

It is conceded that if the note had been made payable in this State the appellee would have taken it subject to all the defenses existing against the payee before notice of the assignment. As the note was made payable and was assigned in Ohio the laws of that State determine its validity, nature, obligation and interpretation, and as by the laws of that State it is made negotiable paper, freed of the defense of set-off on account of any indebtedness by the payee to the maker, our courts must, in an action upon it in this State, give to it the same interpretation and effect. While a set off allowed by the lex fori is to be treated as a part of the remedy, and may be pleaded in a suit upon a contract in this State, though it may not be admissible by the laws of the State where the contract which is sued upon was made or was to be performed, still as by the laws of this State a set-off can not be pleaded to an action upon a bill of exchange or a note placed by statute upon the footing of a bill of exchange, and as by the laws of Ohio the paper

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sued upon is, in effect, a bill of exchange, comity requires that our courts shall give to it the same interpretation and effect, and for the purposes of this action treat it as a bill of exchange. But counsel for appellant insists that the case of Davis v. Morton, Galt & Co., 5 Bush, 162, is directly in conflict with these views, and is conclusive of this case. There the note was executed and payable in Tennessee, where such paper was negotiable, and in the hands of an innocent indorsee for value not subject to the defense of set-off. Such a note, if made payable in this State, would have been subject to such a defense. In an ac ion by the assignee of the note in this State the maker pleaded as a set-off a demand against the payee. The answer, to which a demurrer was sustained, denied that the plaintiff received the note in the usual course of business. This averment made the answer good, and the judgment sustaining the demurrer was properly reversed for that reason, the court saying, "even if this note should, for all purposes, be regarded as an inland bill of exchange, yet, as it is denied that the plaintiff received the note in the usual course of business, it would be subject to any legal or equitable off-sets as between the original parties." The court, however, Judge Williams delivering the opinion, went on further to say, that "a set-off is but a part of the remedy: and as this paper would be regarded by the laws of Kentucky as a mere promissory note, to which the right of set-off would attach, and as comity does not require us to reject any right of defense permissible under our laws because a paper was made in Tennessee, where such defense would not be allowed, and as our own and all other citizens seeking our forums should be satisfied with the administration of remedies according to our laws, this set-off, if established according to the allegation of the answer, should be allowed."

We have carefully examined the text books and adjudged cases bearing upon the question, and find no authority which sustains the reasoning in that case. On the contrary, it seems to us that the opinion is in conflict with the prior and subsequent adjudications in this State. The discrimination which Judge Williams seems to think would be made against the citizens of this State, in favor of the citizens of other States, is not made by denying to the appellant the right to plead the set off. In denying him the right the court simply says that by the execution of the note payable in the State of Ohio, you thereby intended and did bind yourself as you would have done had you become the acceptor of a bill of exchange. You have by your own contract precluded yourself from relying upon the defense you attempt to set up. To allow such a defense would impair the obligation of the contract, and would, in effect, enable the appellant to perpetrate a fraud by the interposition of a defense which he had agreed should not be made, and upon the faith of which agreement the plaintiff parted with his money. In McDonald v. Underhill, 10 Bush, 588, the court limits the sale that the lex fori controls in matters relating to the remedy, so as in no wise to affect the construction or the obligation of the contract. In Hyatt v. Bank of Kentucky, 8 Bush, 193, it was held that the liability of the assignor of a note is fixed by the law of the place when the assignment is made. There the note, which was a simple promissory note, was executed in Louisiana, where such notes are placed by law upon the footing of bills of exchange. It was assigned in this State by the payee to a bank in this State. The bank sued its assignor, seeking to make him primarily responsible, as if he were the indorser of a bill of exchange. The court held that the action

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could not be maintained, for the reason that, as the assignment was made in this State, the liability of the assignor was fixed by the laws of this State, "whereas, if the assignment had been made in Louisiana, the laws of that State would have controlled, and the action could have been maintained." These cases, it seems to us, are inconsistent with the ruling in Davis v. Morton, Galt & Co. That notes and bills, payable at a particular place, are governed as to their validity, nature, obligation and interpretation by the law of the place of performance is a rule recognized everywhere. And the rule that a set-off is a part of the remedy, and that the lex fori must prevail, is also well settled. There is no necessity for the conflict between these propositions which would exist if the reasoning in Davis v. Morton, Galt & Co. is adhered to. By the laws of Ohio the note in the hands of the appellee has the same effect, as to the nature and extent of the maker's liability, as if the paper was a bill of exchange which the appellant had accepted. Comity requires that we shall give to the note the same interpretation and effect that is given to it by the laws of Ohio—that is, we must treat it as if it were a bill of exchange. And as in an action by the indorsee against the acceptor of a bill the latter can not, in this State, plead as a defense a demand of his against the drawer or endorser, the appellant can not, in this action plead as a set-off an indebtedness of the payee of the note to him, for the reason that the note must be regarded, for all the purposes of the action, just the same as if it were a bill of exchange. On the other hand, if, by the laws of this State, a bill in the hands of a bona fide indorsee were subject to such defenses the appellants' defense would be good, though, by the laws of Ohio, such a defense would not have been allowed to a suit by the assignee upon the note there. In view of the later cases, which we conceive are in conflict with Davis v. Morton, Galt & Co., we do not feel bound by that case.

The judgment is affirmed, with damages.

McKINSEY v. EDWARDS, &c.

(Filed April 11, 1888.)

Corporations—Liability of directors on note executed by them—The directors of the road named therein signed the following writing: "The directors of the Jonesville and Glencoe Turnpike Road promise to pay to Andrew Hearne $200, this note bearing 10 per cent. until paid." The holder of the note seeks by this action a personal judgment against the directors individually. Held—That the writing does not import a personal undertaking upon the part of the directors, and that a demurrer to the petition was, therefore, properly sustained.

J. J. Landram for appellant.

J. W. Greene for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Barbour.

This action was instituted by the appellant, as assignee of the payee, against the appellees, whose names are signed thereto, upon the following obligation:

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"Jonesville, Ky., August 12, 1879.

"The directors of the Jonesville and Glencoe Turnpike Road promise to pay to Andrew Hearne $200, this note bearing 10 per cent. until paid.

"J. W. EDWARDS,
"G. W. HERNDON.
"JOSEPH BROCK,
"J. L. GREEN,
"SAMUEL BEATTY,
"JOHN McKINSEY."

The appellant sought a personal judgment against the appellees. A demurrer was sustained to the petition and a judgment rendered dismissing it.

It seems to us that the writing does not import a personal undertaking upon the part of the appellees, and that, therefore, the judgment was correct.

The case of Yowell v. Dodd, 3 Bush, 582, is directly in point, and is conclusive. The contention of counsel that there is a material distinction between that and this case, in that in the cited case the writing sued upon reads "The president and directors of the H. and B. Turnpike Co. will pay," etc., while the writing in this case omits the word president and simply reads "The directors of the Jonesville and Glencoe Turnpike Road promise to pay," etc., can not be sustained. We know that the directors of a corporation are those persons who are appointed or elected, according to law, for the purpose of managing and directing its affairs. The president is but one of their number, selected as the presiding officer; and when we speak of the directors of a company we speak of all, including the president. In Trask v. Roberts, 1 B. M., 201, the writing read: "We, as trustees of the town, etc., jointly and severally promise to pay." And in Whitney v. Sudduth, 4 Met., 296, the writing read: "We, or either of us, Jos. Cantrill, president, Jos. Cantrill, L. G. Sudduth, etc., directors of C. and J. Turnpike Co., promise to pay." In those cases great importance was given to the fact that the undertaking was several as well as joint by the parties to the instrument, and these facts, more than any others, controlled in the determination of the case. In Caphart v. Dodd, 3 Bush, 585, the writing read: "The president, by order of the board of the H. and B. Turnpike Road Co., promise to pay," etc. The court said: "This writing is different from the one sued on in the case of Yowell v. Dodd; here the president, by the order of the board of directors of said corporation, promises with the others who signed the instrument. The board of directors, as such, do not promise, and the recitals in the writing imply that it, the board, had funds in the hands of the president to pay said debt, and said writing is rather an acceptance of the order of the board to pay the amount." In Pack v. White, 78 Ky., 243, the writing was: "We, the directors of the Big Eagle and Harrison County Turnpike Co., promise to pay," etc. The court said: "If parties do not intend to create a personal liability in such cases it is an easy matter to so express it on the face of the instrument, and, instead of a joint or several undertaking, substitute the corporation as the party bound or making the promise. 'The Big Eagle and Harrison Turnpike Co. promises to pay,' etc., would indicate clearly the liability and leave no room for construction as to the intention of the parties." In this case the language is altogether different. Quoting Yowell v. Dodd, "the persons signing the writing do not promise to pay individually; they only stipulate that the directors of the company named will pay. The corporation, as must be assumed, con-

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tracts by its directors, and when they, in that character, undertake to pay money it must be understood that they intend to bind the corporation, and not themselves, personally." Unlike the cases relied upon by counsel for appellant, in the writing sued on in this case no personal pronouns are used, nor is there a several promise to pay. The amended petition offered by the appellant was not made a part of the record, and, therefore, is not before us for consideration. But even if it were it could not affect the result. Wherefore, the judgment is affirmed.

LYONS v. HODGEN & MILLER.

(Filed May 23, 1888.)

1. Gambling in futures—Recovery of money lost—Section 1 of article 1 of chapter 47 of the General Statutes, which provides that "every contract, conveyance, transfer or assurance for the consideration, in whole or in part, of money, property or other thing won, lost or bet at any game, sport, pastime or wager, shall be void," embraces gambling in futures, and section 2 of the same article authorizes the loser to recover the money of the winner. The fact, if it be a fact, as is contended, that at the time the statute was passed there was no such thing known as dealing in futures, as is now practiced, should not control the construction of the statute.

2. Same—Repeal of statute—The fact that since the abolition of the General Statutes the legislature has passed an act, applicable alone to the city of Lexington, declaring contracts for the sale of bonds, grain or other commodities for future delivery, where there was no intention upon the part of either party of making an actual delivery or of receiving the property, to be gaming, is no evidence of the intention of the legislature to exclude gambling in futures from the General Statutes. In the first place, the special statute prescribes a different penalty from that prescribed for other gambling. In the second place, it makes that gaming which our courts have held to be a valid contract, as it makes the intention of either party not to receive or deliver invalidate the contract; and, in the third place, it does not follow, of necessity, from the fact that the legislature has declared that such transaction shall be deemed gaming if had in Lexington, that, if had elsewhere, they shall be valid.

3. Same—In such transactions the difference between the amount pretended to have been paid for the commodity and the market price at the close of the deal represents the amount then lost by the one party or the other, and as each deal is thus closed the money is lost at "one time" within the meaning of the statute. The right to recover is not restricted to cases where the bet is pending not longer than twenty-four hours.

4. Construction of penal statutes—In this State penal statutes are construed with a view to carry out the intention of the legislature, and under this rule the language of a penal state should be held to include cases clearly within the mischief the statute was intended to remedy, unless such construction does violence to the language used.

5 Pleading—An objection to a petition upon the ground that it is not sufficiently definite or certain can not be made by general demurrer.

D. M. Rodman and Brown and Humphrey & Davie for appellant.

Willson & Thum and Rozel Weissinger for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour.

This is an action by the appellant to recover of the appellees $1,600, lost and paid by him to them in a series of dealings in futures. The appellant

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alleges that these transactions were bets and wagers made by him with the appellees upon the future prices of stocks, grain and other commodities, and that it was intended and agreed that in no case was either party to actually sell or deliver, or purchase or receive, any of the articles, but that the bet or wager was to be determined, and the settlement made, upon the basis of the difference between the contract price and the market price at the close of each deal or transaction. A demurrer was sustained to the petition and it was dismissed, and from that judgment this appeal is prosecuted.

We will not attempt a dissertation upon the evil consequences of such transactions as those described in the petition, or to distinguish them from those dealings in futures which are recognized by the courts as legitimate. That the transactions described are clearly bettings or wagerings upon the price of commodities pretended to be bought or sold, are mere schemes to gamble upon the chance of prices, and are deserving of the severest censure, has been held by the courts of this and every other State where the question has been made. The problem presented for our consideration is, admitting, as is in fact confessed by counsel, that the transactions are gaming or wagering contracts; can the appellant, the loser, who has paid the losses, recover them? Both parties have engaged in transactions which are contrary to public policy, if not expressly inhibited by statute, and, independent of a statute authorizing the loser to sue, the courts would afford no assistance to either, and the amount lost could not be recovered back. The real questions, then, are: First, is gambling or wagering in futures a bet at a game, sport, pastime or wager, within the meaning of section 1 of article 1 of chapter 47 of the General Statutes, and if such transactions are embraced by that statute does section 2 of the same article authorize the loser to recover the money of the winner? The two sections are as follows: "Section 1. Every contract, * * * transfer, or assurance for the consideration * * * of money, property, or other thing won, lost or bet at any game, sport, pastime or wager, * * * shall be void." Section 2. "If any person shall lose to another at one time, or within any twenty-four hours, $5 or more, or property or other thing of that value, and shall transfer or deliver the same, such loser * * * may recover the same or the value thereof from the winner."

Counsel has cited us to decisions from several States where the statutes, it is insisted, are similar to ours. But, so far as we have been able to examine, in no case where the loser was denied a right to recover was there any reference made, either in the opinion of the court or argument by counsel, to the statute which is now cited by appellees' counsel in connection with the opinion of the court.

In several of the States where the cases cited were decided there were statutes which made dealings in futures, under certain circumstances, a species of gambling of itself, distinct from other kinds of gaming or wagering, and such statute not giving to the loser a right to recover he could not claim that by implication he had the right to recover under statutes aimed at other kinds of gaming, and which did, in the cases of such gaming, authorize the loser to recover of the winner. On the other hand we are referred to Grace v. McIlvoy, 1 Allen, Mass., 564, in which it was held that a statute (much more restricted than ours) providing that "if any person shall, by playing at cards, dice or other game, or betting on sides or hands of such as are gaming, lose to any person so playing or betting any sum of money or any goods whatever, and shall pay or deliver the same * * * to the winner, the person

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so losing or paying or delivering may sue for and recover," etc., authorized the plaintiff to recover back money lost and voluntarily paid to the defendant on a wager on a dog fight. And the statute of 9 Anne, chapter 14, section 1, which was almost identical with the Massachusetts statute, was held to embrace horse racing, foot racing, dog fighting, cock fighting, etc. But, independent of the judicial constructon given to the statutes of other States by the courts of those States, it seems to us that the rules of construction, as laid down in our own statutes, and in the adjudications of our Court of Appeals, will enable us to arrive at a proper conclusion. An examination of the Virginia statutes of 1748 and 1779, incorporated into the statute law of this State, and the statutes of this State of 1798, 1833 and 1852 the latter of which is the same as the statute now under consideration, shows that the purpose of the legislature was, as each law was enacted, to make it more comprehensive than that preceding. And in the case of Conner v. Ragland, 15 B. M., 635, the court said that "under the statute of 1852 all gaming contracts are void. A bet at any game, sport or pastime may not embrace a bet on an election, but the term 'wager' is more comprehensive and includes every description of betting A bet on an election is embraced by it." But counsel insists that this case is virtually overruled by the case of Harris v. Love, 18 B. M., 123. We think not. All that the court decided in the latter case was that the statute of 1854 (passed after the bet which was the subject of the action in the Conner case had been made) gave to the Commonwealth the exclusive right to sue and recover money bet and lost on an election, and the doubt which the court therein expressed as to whether the act of 1852 embraced a bet or wager on an election was mere obiter and should not have the effect of discrediting a case decided by the same court where the question was squarely presented and as squarely decided. We, however, think that a proper construction of the statute requires that section 2, which authorizes the loser to sue, section 3, which provides for relief in chancery, section 4, which gives the right to any person to sue if the loser or his creditor does not sue within six months, and section 5, which authorizes a recovery from a stakeholder who refuses to pay over on demand, all refer to section 1, and to money or property lost as mentioned in that section. That being the case the person who could recover from a stakeholder under section 5 must be one who had lost at a bet on a game, sport, pastime or wager denounced by section 1. And in Hutchings v. Stilwell, 18 B. M., 777, the court held that a person who had bet on an election could recover of the stakeholder the money in his hands under section 5. This case following Harris v. Love, taken in connection with its reference to that case, is a virtual re affirmance of Conner v. Ragland It, therefore, seems to us that if a bet on an election comes within the statute—barring the statute of 1854—that a bet on the future price of grain clearly is within it The rule of the common law requiring penal statutes to be construed strictly has been long since abrogated in this State. (General Statutes, chapter 21, sections 15, 16; Commonwealth v. Davis, 12 Bush, 240.) And now such statutes are construed with a view to carry out the intention of the legislature, and under this rule the language of a penal statute should be held to include cases clearly within the mischief the statute was intended to remedy, unless such construction does violence to the language used. (Commonwealth v. Helm, 9 Ky. Law Rep., 532.) The difference between a construction under the rule as laid down in the statute and the strict construction required by the common-law rule is that a case may come within the former unless the

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language excludes it; while it is excluded by the latter unless the language clearly includes it. It is conceded that the transactions between the parties to this action were gaming or wagering transactions. If they were it seems to us that it does no violence to the language of the statute, which provides that "every contract, * * * transfer or assurance for the consideration * * * of money or property won, lost or bet at any game, sport, pastime or wager, shall be void." To hold that such transactions are embraced by the statute, the words "game" and "wager" as used in the statute must be taken in their most comprehensive sense. It was so held by this court in the case of the Commonwealth v. Helm, supra, in construing section 11 of the same article. The fact, if it be a fact, as is contended, that, at the time the statute was passed, there was no such thing known as dealing in futures as is now practiced, should not control the construction of the statute. The object the legislature had in view was to deter persons from the pernicious practice of betting or wagering money or property upon the result of any contingent issue, as well as from gaming by the ordinary and well-known methods, and such purpose of the legislature can not be defeated by the invention of new schemes, no matter by what names they may be called, provided they are, as is clearly the case in this instance, betting, gaming or wagering contracts.

That the legislature, in 1884, passed an act applicable alone to the city of Lexington, making contracts for the sale of bonds, grain or other commodities for future delivery, where there was no intention upon the part of either party of making an actual delivery or of receiving the property, gaming, is no evidence of the intention of the legislature to exclude from the general statute such transactions as we have been discussing. In the first place, it prescribes a different penalty from that prescribed for other gaming. The legislature may have had reasons for imposing a larger penalty for such offenses if committed in Lexington than if committed elsewhere. And in the second place, it makes gaming that which our courts have held to be a valid contract; it makes the intention of either party not to receive or deliver invalidate the contract, whereas our courts hold that such contracts are valid unless they are entered into with the mutual agreement, tacit or express, that they are not to be performed by the delivery of the goods, and payment of the price. And in the third place, we can see no reason why the legislature declares that such transactions shall be deemed gaming if had in Lexington, that it, therefore, follows, ex necessitate, that such transactions if had elsewhere shall be valid. Would it be seriously contended that if the legislature had enacted that the betting on a horse race shall be deemed gaming at Lexington, and the person so betting subject to a fine of $25 to $250, that it would, therefore, follow that the betting on a horse race elsewhere in the State could not be embraced by the general statute against gaming?

It is, however, insisted that even if the transactions in question are embraced by section 1 of the statute that there is no statute which authorizes the recovery of money so lost; and this contention is based upon the phraseology of the second section, which is the only statute authorizing the recovery of money lost at a game or wager. "If any person shall lose to another at one time, or within any twenty-four hours, $5 or more * * * and shall pay, transfer or deliver the same, such loser, or any creditor of his, may recover the same, or the value thereof, from the winner," etc. It is argued that from the language of this statute it can only apply to games proper, and to sports and pastimes. If the words, "or within any twenty-four

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hours," were stricken from the statute the seeming difficulty would not exist. The words were inserted, not, as is contended, for the purpose of limiting the cases in which a loser might recover, but for the purpose of making the statute more comprehensive. It might frequently occur that parties would engage, for example, in the playing of cards, and at no one time during the playing, or in no one game would one party lose to another as much as $5, but as the result of the continued playing, or the playing of numerous games, one party would lose to another considerably more than $5, and the statute was framed as it is to meet such cases as that. The words were clearly not intended to restrict the meaning of the whole section so as to enable a party who has lost and paid money on a bet to recover only in cases where the bet was pending not longer than twenty-four hours. A man may lose money at one time on a bet that had been pending for several days or for several months—as when a party bets upon a future event—as, for example, upon a horse race which is to be run, or a prize fight to be fought between two pugilists at a certain place ten days hence. As the result of the race or the fight one party loses. He has then lost at one time. Will it be seriously claimed that the statute does not authorize the loser to recover in such case?

So in the case of the appellant and the appellees; they made bets upon future events—that is, bets as to the price of wheat or other commodities at a stated time in the future. The bets were made under the guise of a buying or selling. The appellant, for example, would, on the 1st of May, pretend to buy of the appellees 1,000 bushels of wheat, at $1 per bushel, to be delivered on the 1st of June, and as the amount of the bet appellant would deposit with the appellees $100, it being understood that there was in fact to be no delivery, but that the bet was to be determined on the basis of the difference in the price paid and the market price at the time fixed for delivery. On the 1st of June wheat has declined, and is only worth in the market 90 cents per bushel. As the result of this decline, appellant loses his whole $100. Or it may be that on the 1st of June wheat will be worth $1.10 per bushel; in that event appellant wins $100. It is true appellant has, in the one case, sustained his loss; in the other case the appellees have lost. As under the agreement either party had the right to close the deal, or determine the bet, at any time, whenever they did so, the difference, whatever it may have been, between the amount pretended to have been paid for the wheat, and the market price at the time of the close of the deal, represents the amount then lost by the one party or the other, as the case may be. And as each deal is thus closed the money is lost at one time, within the meaning of the statute. As to the difficulty in determining the amount lost at any one time in a series of transactions we have nothing to do. However, it seems to us to be no more difficult than it would be to determine the amount lost on a horse race which took place a month subsequent to the time the bet was made.

It is agreed that the allegations of the petition are not sufficiently certain or definite as to the losses, etc. This is not an objection which can be made by general demurrer (78 Ky., 162; 14 Bush, 625); and further, the action is an equitable action under section 3 of the statute.

As we are of opinion that the transactions set out in the petition are em-

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braced by section 1 of the statute, and that under section 2 the appellant is entitled to recover, the judgment is, therefore, reversed and the cause remanded, with directions to overrule the demurrer and for further proceedings.

CONTINENTAL INSURANCE CO. v. HAYNES, &c.

(Filed May 30, 1888.)

1. Insurance—A contract of insurance takes effect from the acceptance by the agent of the application, the cash premium and the premium notes, subject to the right of the company within a reasonable time to reject the application. If the application is not approved it is the duty of the company to notify the insured and return the premium, and if it does this before loss the contract is discharged; otherwise not. And the fact that the application provides that the policy is not to issue until the application is approved does not alter the liability of the company in this regard.

In this case the agent received the application, the cash premium and the premium notes, and mailed the application to the company. The receipt for premium recited that "policy will be issued if application is accepted," and contained a request to the assured to address the superintendent if policy should not be received within thirty days. The property was burned twelve days after date of application. The application was mailed by the agent to the company, but never received, and, therefore, no policy was issued. After the loss the premium was tendered back to the insured, but refused. Held—That the company can not reject the application on the sole ground that it was not received before the loss, and is, therefore, bound, the risk having been fairly and honestly contracted for.

2. Same—The fact that the insured stated in the application, in answer to a question, that the property was not encumbered, when in fact there was a vendor's lien upon it, is not sufficient to avoid the contract, as the insured stated to the agent the character and extent of the lien, and the agent indorsed the fact upon the application.

Blue & Blue for appellant.

Nunn & Cruce for appellees.

Appeal from Crittenden Circuit Court.

Opinion of the court by Presiding Judge Ward.

On the 1st day of March, 1883, and for some time before and after, H. A. Hodge was the soliciting agent of appellant at Marion, Crittenden county. By his commission he was "authorized to receive applications for insurance upon dwellings and their contents * * * in accordance with written or printed instructions from this company, and to receive and transmit with such application the premiums therefor, in accordance with the terms of the form of application issued by this company." * * * On the day named above appellees applied to said agent for insurance upon a dwelling house owned by them. The application was made upon one of the forms furnished by the company, the caption of which was as follows: "Application of ——— for insurance by the Continental Insurance Co., of New York, against loss or damage by fire or lightning in the sum of ——— dollars for the term of ——— years from the date the risk is approved by the company at its office in Atlanta, Ga. And it is understood and agreed that the insurance hereby applied for shall be binding until so approved." The application was filled, as required by the facts and terms, except in one par-

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icular to be hereinafter considered, signed by appellees, delivered to the gent, and by him mailed in a printed envelope, directed to the agency amed. Appellees, at said time, paid to the agent the cash premium, and xecuted and delivered to him four notes for the remaining premiums, and eceived from said agent a receipt as follows:

"Received of H. A. & S. C. Haynes, by H. A. Haynes, an application for ısurance by the Continental Insurance Co. of New York, to the amount of 00, on his property for the term of five years, subject to the approval of said ompany; also a note for the payment of premiums in installments, as repre-nted on the back of this receipt; also cash, $3.60; also ———, survey fee; ll to be returned if policy is not issued.

"Dated at Marion this 1st day of March, 1883.

"H. A. HODGE, Agent."

On the back of the receipt a note of four installments, due March 1, 1884, 885, 1886 and 1887, was described, and then among other provisions were rinted: "For which policy will be issued if application is accepted. * * * f you do not receive a policy within thirty days from date of this receipt, r if notice to pay an installment at the proper time fails to reach you, lease address

"GEO. S. WOLFORD, Superintendent,

"Atlanta, Ga."

The property was, on the night of the 13th of March, 1883, without fault pon the part of the insured, destroyed by fire, and the company, upon roper proofs of the loss and demand for indemnity, having refused pay-ıent, this suit was instituted, resulting in a judgment against it.

It is claimed by the company that the application was never received, and hat it never approved the application or issued a policy to appellees; that he cash premium received by its agent was, after the destruction of the roperty, tendered back and refused; that it never received the notes, and hey could not be returned; and so there was no contract of insurance and o liability on its part. There is but little evidence that the application ras received at the Atlanta office; none, it may be said, except that fur-ıished by the evidence of the agent that he mailed it, and this is opposed by he officers, two in number, who prove that they had charge of the mail at hat office, and the application was not received. There is no evidence hatever that the application was in fact approved, but if received at the ime found by the jury it might stand approved in law if not disapproved rithin a reasonable time. But if the appellee's property was, by the con-ract made with the agent of appellant, insured until he was notified to the ontrary, then, as the duty was not devolved on him to see that his applica-ion was accepted or to anticipate its rejection, then it can not be said that ppellant was prejudiced by the erroneous finding of facts no way necessary o fix its liability. They may be regarded as surplusage. So the question rises, what contract was made by the agent of appellant with appellee as videnced by the application and receipt before referred to? Did the con-ract of insurance take effect from the acceptance of the application, the ash premium and the premium notes by the agent, subject to the right of he company, within a reasonable time, to reject it for cause, or was the ap-plication and transaction with the agent simply a proposal for insurance ot to take effect until the company approved and issued its policy?

Mr. May, in his work on Insurance, says: "But a company which has in-

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formed its agent that they will be liable for a loss after the payment of the premium to him and pending its receipt by them, subject, however, to their right to reject the risk if, from the rate of premium or otherwise, it be not satisfactory, will not be allowed arbitrarily to reject it and refuse a policy, or to reject it merely because a fire has intervened. So where an agent is merely authorized to receive and forward applications on which the company are to issue policies, if approved, as of the date of the application. And this rule was applied where the loss had occurred before the company had received, or in due course of mail would regularly receive, the application and premium forwarded by their agent, and, therefore, had no opportunity to disapprove: and where tere was no agreement for intermediate insurance, except what is to be inferred from the rule that if approved the policy was to bear the date of the application. The contract was held to be consummated on the day when the premium was paid, and it was said that the reservation of the right to approve did not give to the insurer the arbitrary right to set aside any contract, however fair, made by their agent, but only in cases where the agent had been imposed upon, or where the contract made by the agent would operate as a fraud upon the right of the company." (May on Insurance, section 57.) The doctrine of the text is fully supported by Perkins v. Washington Insurance Co., 4 Cowen, 645; Lightbody v. The North American Insurance Co., 23 Wendell, 18; Palm v. Medina Insurance Co., 20 Ohio Reports, 529; Insurance Co. v. Webster, 6 Wallace, 129; Taylor v. Merchants' Fire Insurance Co., 9 Howard, 390; Patterson v. Royal Insurance Co., 14 Grant's Ch., 119, cited in 3d edition of Bates' Digest Insurance, 464.

The case of Palm v. Medina Insurance Co. is very much like this case as to the powers of the agent, and the provision that the policy was not to be issued until the application was approved, and the reasoning of the court seems conclusive

The proof is that it was the habit and custom of this company to make the policy of insurance correspond in date with the application; this being so, if the contract did not take effect until the application was approved then there would be a payment for insurance without any corresponding liability on the company for the time intervening between the application and the approval, and that this time may, without exciting inquiry, last for thirty days seems to be conceded by the receipt. On the other hand it may be said if the application is not accepted the company would be carrying a risk without compensation, as the premium must be returned unless the application is approved. But this is simply a liability resulting from the selected mode of transacting the business, and really amounts to but little, as it must be supposed that a very large per cent. of the applications are approved, and that no agent would be retained whose work did not meet this demand.

Insurance companies have, in each community where they solicit business, agents upon whom they must and do rely for the information necessary to enable them to take judicious risks. These agents are intrusted, as was the one in this case, with power to make surveys, to collect information affecting the risk, and from these facts and general instructions to fix rates in each case and collect premiums according to the rates fixed. This being done, to hold that the contract is at this point suspended until the application can be sent to a distant agency by mail, without any one being charged to look after its transmission, and without its absence, short of thirty days, exciting reason for inquiry, and to further hold that during this time of suspension the property of the applicant is uncovered, it seems would be

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ontrary to the usages and practices of such business and the common un-
erstanding of business men, and to further hold that an application made
nder such circumstances may be rejected on the sole ground that it was
ot received before the property was destroyed would certainly be to trifle
ith the rights of those who seek protection from these chartered agencies.
If insurance companies do not wish to incur responsibility until the ap-
lication has passed through a number of agencies then it seems that they
ight, in respect to the common understanding and the usual mode of doing
ich business, refuse to accept premiums and premium notes until satisfied
ith the risk. The premium is the price paid for indemnity, and is earned
soon as the risk attaches; the converse is, and ought to be, true, that
rotection is purchased so soon as the rate is fixed and agreed upon, and the
remium paid to one authorized to receive it. It is to be assumed that the
ompany will accept the risk if advantageous to it, which it must be if
irly and honestly contracted for, because that is the business in which it
engaged, and that is the object for which its agent acted; and, therefore,
allow it, under the reservation of the right to approve, to reject simply
ecause a loss has occurred would destroy the mutuality of the contract and
iflict upon one party the misfortune he had provided against.

Our conclusion, therefore, is that the contract secured indemnity during
e interval required for further examination, and for the whole time
imed if the contract for that time was approved. If it was not approved
was the duty of the company to notify the insured and return the pre-
ium. And if it did this before loss the contract was discharged; other-
ise not. And it, therefore, follows that the instructions given upon this
anch of the case were more favorable to appellant than it was entitled to
ceive.

But it is claimed that the application was fraudulent because the appli-
nt said in his application, in answer to a question, that there was no in-
imbrance on the property when in fact it was incumbered by a vendor's
en.

The fact that there was a lien upon the property, and the extent and char-
ter of it, was made known to the agent, and he endorsed the facts upon
e application. So there was no fraud in this respect, and the question
as properly submitted to the jury.

The judgment is affirmed, but without damages, no supersedeas appearing.

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SUPERIOR COURT ABSTRACTS.

HILL & ALCORN v. LELAND.
WELCH & SAUFLEY v. SAME.

Filed May 2, 1888. Appeals from Lincoln Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Attorney and client—Contract construed—Attorneys were employed, as evidenced by a written agreement, "to appeal" to the circuit court an order of the county court probating a will, and also to appeal to the Court of Appeals if the client "should deem it necessary," the attorneys to be paid for their services a fixed amount, an additional named amount to be paid in the event the attorneys should succeed in defeating the probate of the will. In an action by the attorneys upon this obligation the defendant alleges, for defense, that he demanded of his attorneys that an appeal be taken from the circuit court to the Court of Appeals, which was not done. Held—That the answer does not present a defense. The contract was intended to bind the attorneys to serve the defendant in the Court of Appeals in the event an appeal should be taken to that court, but was not intended to bind them to take the appeal.

W. O. Bradley and P. M. McRoberts for appellants; Robert Harding for appellees.

ALLEN v. COMMONWEALTH.

Filed June 6, 1888. Appeal from Ohio Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. An indictment for keeping a tippling house need not charge anything more than the defendant has kept a tippling house, the term "tippling house" having a definite and well understood meaning.

2. To constitute the statutory offense of keeping a tippling house for three months at one time the tippling house must have been kept for three consecutive months. Therefore, under an indictment for keeping a tippling house three months the court erred in instructing the jury upon the theory that the indictment charged the offense of keeping a tippling house for three months at one time, and in rendering a judgment upon the verdict for $200.

3. Local option—In localities where the local option law is in force persons who illegally sell liquor violate that law, and if proceeded against at all it must be under the provisions of that law.

E. D. Guffy for appellant.

BROWN v. BRADY.

Filed June 6, 1888. Appeal from Carter Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Pleading—Although the petition was defective yet as the answer tendered an issue in regard to every item in the account, and the record shows that the case was prepared with reference to those issues and that they were tried by the jury, after verdict nothing more is required

2. Agents—Counterclaim—In an action by an agent to recover compensation for his services, lost time goes in diminution of the value of his services, and is not matter for a counterclaim, no fixed salary having been agreed on.

Thomas W. Mitchell for appellant; E. B. Wilhoit for appellee.

MULLINS, &c. v. SIMPKINSON.

Filed June 6, 1888. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Bowden, affirming.

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1. Partnership—Bar—One partner has no authority by implication to bind his copartner, after dissolution and notice thereof, by a note in the firm name, even though executed for a firm debt; but the partner refusing to be so bound is not discharged from liability on the firm debt for which the note was given. Therefore, a judgment in his favor, when sued on the note, is not a bar to an action on an account for which the note was given.

2. Same—Pleading—An allegation that when the plaintiffs accepted the note they released the defendant means that they thereby released him, which is an erroneous legal conclusion and does not amount to an averment that they consented to release the defendant and look to the member of the firm who executed the note.

L. T. Applegate for appellants; J. T. Simon for appellee.

DOOM v. SNYDER'S ADM'R.

Filed June 6, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, reversing on original and affirming on cross appeal.

1. Bankruptcy—New promise—In an action to recover upon an absolute promise by the defendant to pay a debt from which he has been discharged in bankruptcy there can be no recovery upon proof of a conditional promise to pay.

2. Same—There can be no recovery upon a conditional promise to pay such a debt without an avernient that the condition has happened.

3. Same—Bar—A judgment for the defendant in an action upon an unconditional promise to pay such a debt is no bar to an action to recover the same debt on a conditional promise.

Thomson & McChord for appellant; John D. Wickliffe for appellee.

HECK v. HECK.

Filed June 6, 1888. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour. Judge Bowden, dissenting.

In an action by a son against a father to recover compensation for personal services there must be proof either of an express agreement for pay, or such facts and circumstances as satisfactorily and fairly show that both parties at the time expected and understood that the services were to be paid for, and the court is of the opinion that this idea was embodied in the following instruction for plaintiff (appellee): "The jury are instructed that if they believe, from the evidence, at the time or soon after plaintiff became of age he applied to the defendant for an agreement for compensation for services to be thereafter rendered, and the defendant induced the plaintiff to work for him under the expectation of compensation for services, either in money or property, and plaintiff did continue so to work for him under such expectation, the law is for the plaintiff." The facts which the jury were thus required to find possess all the elements of an express contract.

Judge Bowden, dissenting, holds that the instruction is erroneous in that it does not require the jury to find that the "expectation of compensation" was produced by anything said or done by the father.

C. B. Seymour for appellant; O'Neal, Jackson & Phelps for appellee.

BULLOCK v. SECREST.

Filed June 6, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Obstruction of passway—The grantee of a way over another's land can not stand by and see his way obstructed by a tresspasser and then demand of the grantor another way over some other part of his land.

2. Allegation and proof—Variance—If the road which had been used by the plaintiff, and which it is alleged had been obstructed, was not over the grantor's land, and is not the way which was contemplated by the grant, as is insisted by the plaintiff in her testimony, then the plaintiff was not entitled to recover, for the reason that there was a complete variance between the

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allegations and the proof, the road which it is alleged was obstructed and that which is proved to have been obstructed being different roads.

D. A. Glenn for appellant; J. P. Tarvin for appellee.

BRANNIN, BRAND & GLOVER v. LOUDEN.

Filed June 6, 1888. Appeal from Henry Circuit Court. Opinion of the court by Judge Bowden, affirming.

Practice—"The instructions are not made part of the record either by an order of the court or by bill of exceptions. All of the evidence is not contained in the bill, therefore, none of the errors complained of can be considered."

Wm. Carroll, W. B. Moody and John W. Rodman for appellants; John D. Carroll for appellee.

THE DWELLING HOUSE INSURANCE CO. v. WALSH.

Filed June 13, 1888. Appeal from Grant Circuit Court. Opinion of the court by Judge Barbour, affirming.

Fire insurance—Condition as to occupancy—Where a tenament house is insured as such, a provision in the policy that it shall become void if the house shall become vacant or unoccupied does not apply to a temporary vacation of the premises between the time of the going out of one tenant and the time in which another tenant could enter, during which the owner exercised control over the property, provided the delay was not unreasonable.

In this case, as soon as one tenant ceased to occupy the premises the assured took possession and was diligently preparing the house for some other tenant when it was burned, five weeks after the former tenant left it. Held —That the time occupied in making the preparation for the new tenant was not unreasonable, and that the house was, at the time of the fire, under the actual supervision of the assured, who was, in legal contemplation, in the occupancy of it.

Westover & Points for appellant; DeJarnette & Dickerson for appellee.

CITY OF HENDERSON v. ALLEN & CO.

Filed June 13, 1888. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Bills of exceptions—The court has no power to extend the time for filing a bill of exceptions beyond the next term after the motion for a new trial was overruled, either by an original order to that effect or by successive orders extending the time from term to term. And a bill filed after one term has intervened between the overruling of the motion for a new trial and the filing can not be considered.

2. Same—A bill of exceptions not signed by the judge can not be considered, although an order of court recites that it was signed and made part of the record.

John L. Dorsey for appellant; T. E. Ware for appellees.

THOMPSON v. FARMERS MUTUAL INSURANCE CO.

Filed June 13, 1888. Appeal from Boone Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Insurance—Severable contracts—Where separate valuations are placed on different kinds or classes of property insured the contract is severable, although the premium is entire.

2. Proof of loss—Waiver—Where a barn and the tobacco contained in it were separately valued and insured for different amounts, the prompt payment of the loss on the barn was not a waiver of proof of loss as to the tobacco.

S. F. Tolin for appellant; Riddell & Stevenson for appellee.

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MAHLMAN v. WILLIAMS.

Filed June 13, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Bowden, reversing.

Supersedeas—B. and W., separate creditors of T., each claimed a superior right to a sum of money due to T. from L., in whose hands it was garnished. The court decided the contest in favor of W., and B. appealed with a supersedeas. The judgment was affirmed, and W. brought this suit on the bond claiming that the surety was liable for the amount which the garnishee was ordered to pay to him, the garnishee having become insolvent. Held—That the surety is not liable for that sum. The supersedeas did not cause its loss, as it did not prevent W. from having the garnishee pay the money into court.

J. M. Tisdale for appellant; O'Hara & Bryan for appellee.

PHŒNIX INSURANCE CO. v. WILKES & CO.

Filed June 13, 1888. Appeal from Henderson Circuit Court. Opinion of the court by Judge Bowden, reversing.

Principal and agent—Insurance—He who deals with one claiming to be the agent of another must, in all cases, satisfy himself that such person has the authority to contract; if that exists there may be powers implied from the nature of those expressly conferred, even to the extent of binding the principal, notwithstanding he has instructed his agent not to exercise them. But when the only express power of an agent is to receive applications for insurance and forward them for the action of others, the power to make a contract can not be implied.

In this action upon an alleged oral contract of insurance, in which the defendant denied that such contract was made, it was error to give an instruction which placed the right to recover on the declaration of the agent that he had authority, and not upon its existence.

Yeaman & Lockett for appellant; M. Merritt for appellees.

REITZ & SONS v. McPHERSON.

Filed June 13, 1888. Appeal from Butler Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Practice--Neither instructions nor depositions in cases at law can be considered by the appellate court unless made part of the record by order of court or by bill of exceptions.

2. Same—In the absence of a part of the evidence the only question that can be considered is whether the instructions were authorized under the issue made and whether the judgment is supported by the pleadings.

N. T. Howard for appellants; E. D. Guffy for appellee.

WILLIAMSON v. FIRST NATIONAL BANK OF NEWPORT.

Filed June 16, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Transfer to United States Court—Where a petition and bond are filed for the removal of a cause to the United States Circuit Court, the jurisdiction of that court attaches and the jurisdiction of the State court is divested upon the approval of the bond, provided the question involved depends for its solution upon a law of the United States, and the amount in controversy is sufficient to authorize the removal.

C. J. Helm for appellant; John S. Ducker for appellee.

FISHER v. FISHER.

Filed June 13, 1888. Appeal from Boyd Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Divorce and alimony—Although a divorce was obtained by the husband, yet if, in the opinion of this court, it should have been denied, and the wife should have been divorced from bed and board, and should have been

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awarded alimony, so much of the judgment as refused alimony may be considered and reversed.

2. Same—To obtain a divorce on the ground of abandonment it is essential that the applicant should not have been in fault. The wife may defeat the husband's prayer by reason of the fact that his conduct was such as to excuse her for leaving his home, yet may not be entitled to a divorce herself.

In this case the husband upon his cross petition was granted an absolute divorce, and the wife was refused a divorce from bed and board, and alimony. The wife appeals. Held—That the judgment refusing alimony should, upon the facts stated in the opinion, be affirmed. The question is one of fact chiefly, and great deference must be paid to the conclusion of the judge who tried the case.

W. C. Ireland for appellant; John F. Hager for appellee.

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KENTUCKY COURT OF APPEALS.

SHAFER V. COMMONWEALTH.

(*Filed Nov.* 19, 1887—*Not to be reported.*)

1. *Criminal law—Use of force in preventing trespass*—In preventing a trespass upon property merely, the owner or possessor will not be justified in wounding the trespasser unless, in the attempt to prevent the trespass or remove the trespasser, the latter assaults him; then he may wound, if necessary, in defense of his person.

2. *Same*—The fact that the owner or possessor of the property uses more force than is necessary to prevent the trespass, does not justify the trespasser in wounding him.

3. *Rights of joint owners of chattel as to possession*—While one of several joint owners of a chattel is as much entitled to the possession as another, one joint owner can not enter the premises of another and take from him the possession of the joint property, when, at the time, the tenant in possession is protesting against the removal. In so doing he becomes a trespasser *ab initio.*

The appellant, one of two joint owners of a plow, entered upon the premises of the other, who was in possession of the plow, and, having expressed his purpose to remove it, placed it upon his shoulder. The owner in possession protested against the removal, but the appellant disregarded his protest, and thereupon the former and his son showered stones upon appellant, who shot and wounded the father. *Held*—That the appellant was a trespasser and had no right to wound his assailant, although the latter may have used more force than was necessary to prevent the trespass.

4. *Self-defense*—One who provokes a quarrel and begins an attack is not justified in slaying his adversary to protect his own person from bodily harm, although, in making the attack, he may not have used such violence as would have justified his adversary in taking his, the assailant's, life.

Cochran & Son for appellant.

P. W. Hardin for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Shafer, was indicted for maliciously shooting and wounding John T. Sears with the intent to kill him, and, upon the

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trial, was found guilty of shooting and wounding, in sudden heat and passion, and fined $490. The two were neighbors, living on adjacent farms or near to each other, and each claimed the right to the use and possession of a plow valued at eight or ten dollars. Sears, the man shot, was in the possession and using the plow on his farm. The two had owned and used it jointly in the construction of a turnpike road, and, the work having been completed, Sears took it into possession, and claims to have purchased the interest of Shafer for three dollars and fifty cents. Shafer admits the sale, but says that if the money was not paid on a certain day, by its terms, he was still to retain his half interest. Some arrangement was made by which, as Sears says, he was to loan the plow to Shafer when through with it, while Shafer says they were to use it alternately for so many days each. Such is, in substance, the statements of the two as to what transpired prior to the shooting.

The appellant, with his horse and sled, went on the premises of the wounded man to get the plow, and, informing Sears of his purpose, and going to the field where the plow was, Sears said to him he could not get the plow, and that he must leave his premises. Shafer expressed his determination to take it, and did place the plow on his shoulder and start for the sled, when Sears approached him, picking up some stones and throwing one or two at him, being followed by his son, who threw stones likewise. One or two struck the appellant, who, in return, pulled his pistol from his pocket and shot Sears in the leg, and snapped the pistol several times at the son.

From the testimony of both Sears and Shafer, they were on friendly terms until Shafer informed him that he intended to take the plow, and, from the testimony of Shafer's own witness, the latter had expressed that intention prior to his entry on the premises of Sears on the day of the shooting. There was evidently a bad feeling between the two, although expressions of friendship were made by each when Shafer approached the home of Sears on the day of the difficulty. It is argued by counsel for the appellant that, if Sears had killed his client when throwing the stones at his head he would have been guilty of murder, or, at least, manslaughter; and that, if the appellant believed, and had reasonable grounds to believe, that he was in danger of great bodily harm, at the time he shot, from either the father or son, had, in self-defense, the right to use such force as was necessary to prevent the injury. An instruction based on self-defense was given, at the instance of the appellant, with a slight modification by the court, that seems to us, if erroneous or abstract, was not prejudical to the substantial rights of the accused, and we are inclined to adjudge more favorable than the facts authorized.

The entry on the premises of Sears was certainly not forcible or against the objection of Sears, because the latter had said to the appellant that he could get the plow when he was through with it; and the latter, supposing that he could get it either from his own version of the arrangement or that of Sears, entered the premises for that purpose.

The court said to the jury, at defendant's instance, that if, at the time of the shooting, the defendant, Shafter, and Sears were the joint owners of the plow, and the defendant entered on Sears' premises peaceby [and not against the objection of Sears] and without force took possession of the plow, and was proceeding to carry the same away, and thereupon said Sears and his son, or either of them, assaulted Shafer, and that he then and there believed, and had reasonable grounds to believe, that he was in immediate danger of losing his life or suffering great bodily harm, and that said shooting was

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necessary to avert said danger, then the shooting was in self-defense and they must aquit.

This instruction makes the peaceable entry jusify a wrongful taking because actual force was not used by the appellant when taking the plow, placing the one in the lawful possession in no condition to resist the taking if possession of the joint property was obtained without actual violence. The peaceable entry did not authorize Shafer, when on the premises, to take the plow from the possession of Sears against his objections, although Shafer may have been a joint owner. The modification of the instruction, inserted in brackets, was intended to say to the jury: *If not taken against* the objection of Sears, and without force, then Shafer, as joint owner, could not be deprived of that possession. This was erroneous, when applied to the facts of the case, for the reason that both Shafer and Sears state that the latter objected to Shafer's having the plow, and the latter, in not very becoming language, expressed his purpose to take it, and in the attempt Sears had the right to prevent it, using no more force than was necessary for that purpose, and then not to the extent of inflicting on the appellant great bodily harm or taking his life. The doctrine is well settled, at least by this court, in several reported cases, that, in preventing a trespass upon property merely, the owner or possessor will not be justified in wounding the wrongdoer unless the latter, in the attempt to prevent the trespass or remove the trespasser, is assaulted by him; then he may wound, if necessary, in defense of his person or family. See McIlvoy v. Cockran, 2 Mar., 277; Robinson v. Hawkins, 4 Monroe, 134.

While the owner may use sufficient force to prevent the trespass or the taking of his property, the doctrine is not so unlimited as will authorize the infliction of great bodily harm or the taking of the life of the trespasser in order to retain the possession.

While one joint owner of a chattel is as much entitled to the possession as another, we are not disposed to adjudge that one co-tenant can enter the premises of another and take from him the possession of the joint property against his consent for the reason that he can seize it without violence, when at the time the tenent in possession is protesting against the removal. He becomes a trespasser *ab initio* in such a state of case, and to sanction such conduct would be to authorize acts of violence in refusing to afford the party in possession any relief for the wrong done him. The question presented in this case, however, is not as to the rights of the party to protect his premises as against the trespasser or the extent to which he may defend that possession, but, on the other hand, the question arises as to the right of the trespasser to shoot or slay the owner or one in the lawful possession who attempts to exercise more force than is necessary to prevent the trespass. It is certain that one who is the assailant or who provokes that quarrel and begins the attack is not exempt from responsibility because he was compelled to slay his adversary to prevent his own person from bodily harm, although in making the attack he may not have used such violence as would have justified his adversary in taking his, the assailant's, life. In this case the decided weight of the testimony is that the accused had made known his intention to take the plow before his peaceable entrance into the premises of his neighbor, and of that fact Sears was aware. He entered with a loaded pistol in his pocket, and, when told not to remove the plow but to leave the premises, announced his purpose to have it, with an oath, expressive of his meaning, and proceeded at once to take it into possession in the presence of Sears and his family. He knew full well that his action would provoke the difficulty and had

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evidently prepared himself for the conflict, and when the stones began to shower upon his person he drew his pistol and fired, the ball striking Sears in the thigh. Either would have been guilty of homicide if the blow struck by the one had taken the life of the other. It does not follow, because Sears used more force than was necessary, that Shafer, the accused, becomes justified in his action. He had excited and inflamed the passion of Sears, not only by the language used at the time by him in the presence of his family, but by taking *forcibly* the plow from the possession of Sears and reducing it to his own. He was asserting his right of property by brute force, and armed doubtless for the purpose of slaying his adversary if resistance was made to his unlawful conduct, as the result of the quarrel clearly demonstrates. We perceive no self-defense in this case but a plain purpose on the part of the accused to take what he regarded as his own from the possession of Shafer regardless of consequences.

Judgment below affirmed.

WATSON, &C. V. CARMON'S ADM'R.

(*Filed Jan.* 21, 1888—*Not to be reported.*)

Gifts—Causa mortis—Res judicata—A father, a few minutes before his death, asked his daughter, the appellant, who was his housekeeper and kept his keys, to hand him a certain promissory note out of the drawer where he kept his papers, which she did. He then tried to write something on the back of the note, but being unable to do so he folded the note, returned it to his daughter, and fell back and died. Some time prior to this, when about to start on a journey, he had made a conditional assignment of the note to appellant, by which she was to have it in the event he never returned. After the testator's death appellant delivered this note to her father's administrator, asserting no claim to it. In a suit subsequently brought for a settlement and distribution of the estate, to which appellant was a party, and in which an account was taken of advancements, appellant asserted no claim to the note, and no such claim was ever asserted until this action was instituted, more than six years after the death of the appellant's father, for a recovery of the note or its proceeds. *Held*—

1. That nothing else appearing than the scenes transpiring at the time of the intestate's death, and the conditional assignment of the note prior thereto, the court would hold that there was a valid gift of the note to appellant and that she is entitled to recover; but her subsequent conduct shows that she surrendered all claim, if any she had, to the note, in order that it might be distributed between all the children.

2. A judgment in an action determines all questions that ought to have been presented, and such as are essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the action, both in respect to matters of claim and defense. Therefore, the judgment in the action for a settlement and distribution of the estate of appellant's father in which the question of advancements were litigated is a bar to the recovery sought in this action.

Hargis & Eastin and D. G. Park for appellants.

Robertson, Smith & Robbins for appellee.

The facts are stated in the Syllabus.

Appeal from Graves Circuit Court.

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Opinion of the court by Chief Justice Pryor.

If there was nothing else appearing in this case but the scenes transpiring at the death-bed of Thomas Carmon when he delivered the note on McElrath to his daughter, conneced with the assignment made prior to his departure for Hot Springs, by which she was to have the note in the event he never returned, we would have but little difficulty in determining that it was a valid gift *causa mortis*, and vested her with title. His intention to give the note to his daughter was manifest, but whether he designed to annex any condition to it or upon what terms does not appear; nevertheless, if there were no other facts with reference to the gift of the note but those occurring prior to and almost at the moment the intestate ceased to live, we would, as a matter of law, adjudge that she was the owner under the gift from the father.

Thomas Carmon, the father of the appellant, died in February, 1876, leaving several children, among them the appellant. He owned considerable real and personal estate and had made advancements in land and personalty to all his children. In September 1876, his children united in a petition in which it is alleged that he owned certain land and lots that were indivisible; that advancements had been made to all of his children, describing the nature and character of the advancements to each; then asking a sale of certain land and lots, and that each child account for the advancements made and for an equitable settlement and distribution between the children. The administrator, H. S. Hall, although not named in the caption, is named as a defendant in the body of the bill, and after this, and before or at the time the judgment was rendered, asks for such a judgment as will guide him in the settlement of the estate. During the progress of the action one of the children filed an answer making it a cross-petition against the present appellant, claiming the title to certain land that the appellant held by an unrecorded deed, from her father. She answered this cross-petition, being represented by able and experienced counsel, in which she states that she knew very little about the objects of the petition, not being present when it was drafted. All she knew was that it was designed to settle her father's estate. She alleged the existence of certain mistakes in the petition and that her father had made her a deed to the land claimed but not to be recorded until after his death. That this accounted for the deed being with his papers at his death. *That she is the rightful owner of the land, and, by the gift of it, she believed her father only intended to make her equal with his other children in what he had already given them. And, in addition to this property, she should share equally with the other children in the distribution of the balance of his estate not yet distributed.* She will not undertake to state how much each has received as she does not know. She asked that she be quieted in her title, and for an equitable settlement of the balance of the estate. The deed referred to gave to the appellant 160 acres of land; also the family residence and all the household and kitchen furniture. A great number of depositions were taken in the case on the subject of advancements and among them that of the appellant, who testifies directly on the subject both as to advancements made to herself and to others. A judgment was rendered in the action determining the value of the advancements, their character and amount, to each child, and directing a sale of the land and lots not conveyed to his children, with the further statement in the judgment that out of this land and lots and personal assets the children will be made equal or as nearly so as the assets will permit. The

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administrator was directed to distribute the assets in his hands to the children, observing strictly the directions given as to the *distribution*. The directions were that those who had received less than others should be *made equal*.

When Thomas Carmon died H. S. Hall was appointed his administrator, and the note now in controversy was delivered up to him by the appellant. The appraisers and others were present, and no claim whatever, as they state, made by the appellant to the note or its proceeds. The administrator lived in the town of Mayfield; was a man of business intelligence and capacity, and entirely disinterested in the settlement of the estate between Carmon's children. He took this note, together with the other evidences of debt, into his possession, collected the money, and has distributed the proceeds between the children. The notes and papers of the intestate were delivered to him shortly after the death of the intestate, in the year 1876, and he swears that no claim whatever was made by the appellant upon him at any time, for the note or its proceeds, until this action was instituted in December, 1882. The original action was filed by the appellant and others for a settlement and distribution of the estate, charging the advancements made to each child as early as September, 1876. In appellant's deposition given in that case, in which she alludes to the deed that is proven was with the note when taken from the bureau of her father a few minutes before his death, she testifies as to advancements, but sets up no claim to a note that now amounts, principal and interest, to a sum equal to each child's portion of the entire estate. She also asks, in that case, for an equitable settlement of the estate between the children; and, while she may have been ignorant as to the facts alleged in the original petition when she filed her answer to the cross petition, she was represented by counsel, learned in law, and in every way capable of advising her as to her rights in the estate. She made no claim to him in regard to this note, but, on the contrary, alleged in her pleading that her father conveyed to her the tract of land described in her answer. His house and lot in Mayfield, including all his household furniture in order to make her equal with the other children, and that the balance of the estate was to be distributed equally between them. She knew then the administrator had this note, and, perhaps, collected it; and with an attorney conversant with the facts alleged in the pleadings, and aided by a client of more than ordinary intelligence, as her disposition shows the appellant to be, no such statement would have been made in a pleading by the attorney for the client if she had informed him of her claim to this note; and her own conduct, with reference to the claim, conduces clearly to show that she had surrendered all claim, if any she had, to this note in order that it might be distributed between all the children. If not, when this petition was filed it was her duty to have disclosed the gift and the nature of the advancements to her; and, if ignorant of what the petition contained when filing her answer and asking for a settlement, she should have asserted this right. If not, then when the court had rendered a judgment charging her with the advancements received, as well as her brothers and sisters, she should have made this advancement known. The principal object of that original action was to ascertain what each child had received in order that a distribution might be made. It was a question directly in issue and much proof taken on the subject, and this note or its proceeds, then in the hands of the administrator, was as much a part of the assets to be distributed as any part of the estate of the intestate. It had gone into the hands of the administrator for that pur-

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pose, and if the appellant can now set up claim to it there is no reason why the other children may not say that other notes collected by the administrator were given to them, and the judgment of 1878 rendered a complete nullity. The administrator has distributed the estate except some claims in litigation. He has not in his hands enough to make the other children equal to the appellant, and, to give her the note and interest, would be to distribute to her twice as much as any of the other children receive. The appellant swears that she asserted claim to the note when it was delivered up. In this she is not sustained by the administrator or the appraisers, and it is unreasonable to suppose that, from 1876 to December, 1882, she stood by with this claim collected by the administrator, and to which she now says she was entitled, and never, at any time, demanded it of him in any manner whatever. Now this fact conduces strongly to show that she did not regard the delivery of the note as a gift, but if so, the subsequent proceedings in the suit to settle the estate already noticed estops her from setting up the claim against the administrator or the other children.

It is well settled that a judgment in an action determines all questions that ought to have been presented, and, as Mr. Freeman on Judgments says, "such as are essentially connected with the subject matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defense." Third edition, section 249.

It is insisted that this present action for the recovery of the note, or its proceeds, is a distinct and separate cause of relief, because the title to the note was not involved in the action for a settlement of the estate, and in support of this view of the question the case of Mallory v. Horan, 49 New York, 111, is cited, where, in an action to set aside a deed, the wife failed to allege that she had an inchoate right of dower in the land that, if pleaded, constituted no defense to the action or entitled her to any relief. If it was proper, or could have been used as a defense against the claim of the plaintiff, it should have been set up. Suppose the appellant was adjudged entitled to this note, then the judgment rendered in the former action was erroneous, because it failed to charge the appellant with that gift as an advancement. The appellant was bound to present the claim in that action or be forever barred. Why was all the mass of testimony taken in that case if the subject of advancements was not involved? Such was the relief sought, and the appellant, being one of the plaintiffs, is as much bound by the judgment as if she had been a defendant; and in the same action, when she comes to answer the cross-petition of one of the defendants, she alleges the advancements made to her and claims that, as to the balance of the estate, she is to share equally with the rest of the children. The doctrine of res adjudicata can not well be applied to any case if not to the one before us.

It is said that the judgment in the original action was not final, as no final order of distribution had been made. This is immaterial. The judgment settled the nature and amount of advancements. The administrator and the heirs have distributed under it as directed, and if rendered by mistake, or there was an omission to charge all with advancements made, that case might have been re-opened for grounds shown.

The judgment below must be affirmed.

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DICKINSON V. GRAY.

CINCINNATI & SOUTHWESTERN RAILWAY CO. V. GRAY.

(*Filed June* 16, 1888—*Not to be reported.*)

1. *Clerical misprision*—The defendant having admitted that he owed the plaintiff $787.40, and paid that amount into court, the court erred in giving credit in the judgment by only $747.40 on that account, but this was only a clerical misprision, and no motion having been made to correct it, the defendant can not complain upon appeal.

2. *Exceptions waived*—As the defendant's exceptions to certain portions of the evidence were never called up and acted upon, he can not now insist upon them or complain of the failure of the lower court to act upon them.

3. *Contract to build railroad construed*—D. contracted with a railroad company to build a certain part of its road. G., as a sub contractor, entered into a contract with D. to furnish the materials and construct the piling and trestling upon the road for a certain distance, the contract providing for monthly payments, based upon estimates to be made by the chief engineer of the railroad company, it being further agreed that the engineer should be the sole judge and arbiter in all cases of disagreement, difficulty or dispute, as to the quality or amount of work performed, and that his decision, given in writing, should be in the nature of an award, and conclusive upon the parties. The work having been suspended by G., under notice from D., and never resumed, G. brought this action to recover an alleged balance due him for work done and materials furnished under the contract, and for profit which he claimed he would have made if he had been permitted to complete the work. *Held*—That the provision that the decision of the chief engineer should be in the nature of an award and conclusive was not intended to apply to the ordinary estimates that might be made from time te time, but only in case of a *dispute* between the parties, submitted to the engineer; nor can a "final estimate," made in the absence of one of the parties, and without his knowledge, be regarded as an award under this procision of the contract.

4. *Same*—The contract between D. and G. provided that in the event the railway company should fail in negotiating its bonds fast enough to meet the monthly estimates of D. he should have the right to cancel the contract upon giving G. ten days' notice in writing, and that upon giving such notice the contract for future work should be considered null and void, and that D. should be liable only "for work and labor done and materials furnished up to the date of such cancellation and termination." *Held*—That the work having been stopped under notice from D., G. is entitled to recover for what he actually did under the contract; nor is his right to recover restricted to such materials as had been delivered, inspected and received at the time he received the notice. He is also entitled to recover *the contract price* for materials purchased and on hand for use in the road when D. terminated the contract.

5. *Same*—Although the notice under which G. stopped work was a notice to suspend work, and not a notice to stop it finally and to cancel the contract, yet, as he then ceased the work and never resumed it, he must be regarded as having accepted the notice given in lieu of the ten days' notice named in the contract. His claim for prospective profits can not, therefore, be allowed.

6. *Garnishment—Notice*—The railway company was made a party defendant to G.'s action against D. It objected to the filing of an amended petition seeking to subject its indebtedness to D., and upon the amended petition being filed demurred to it. Upon this pleading an attachment was issued September 16, 1882, which was not served on the railroad company until September 25, 1882. On September 20, 1882, the company settled with D. *Held*—That the company can not now be heard to say that it had no notice of the proceeding to subject what it owed D. until the attachment was served.

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7. *Pleading—Judgment*—The company filed an answer alleging that it had paid D. in full prior to September 20, 1882, and denying that it owed him anything on the 16th of September, 1882. The affirmative averments of the answer appearing not to be traversed, the lower court, at the first hearing, dismissed the action as to the company, but. at the same term of the court, a motion was made to set aside this much of the judgment. The court, by an order, reserved the question arising on the motion until a subsequent term, when it rendered judgment against the company also, it appearing that when the answer was filed it was agreed that its affirmative statements should be regarded as traversed. *Held*—That the judgment against the company was proper. It was not out of court when the judgment was rendered. It was a defendant to the suit, and had made an issue as to its indebtedness which it failed to sustain.

8. *Pleading*—A statement by the defendant in his answer that he had "no knowledge or information" as to certain matters which were not presumptively within his knowledge, was equivalent to saying that he had no "sufficient knowledge or information to form a belief."

9. *Rererseible errors*—The fact that the lower court allowed certain items of an account because it *erroneously* thought that no issue as to them had been formed does not authorize a reversal of the judgment, the evidence being sufficient to support the allowance of those items.

Simrall & Mack for appellants.

J. G. Carlisle, Chas. Eginton and Raymond C. Gray for appellee.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Holt.

Prior to June, 1881, P. P. Dickinson contracted with the Cincinnati & Southeastern Railway Company to build its road from Newport, Kentucky, to Hazelgreen, Kentucky, a distance of about 135 miles. On June 23, 1881, the appellee, John Gray, as a subcontractor, entered into a contrat with the appellant, Dickinson, to furnish the materials and construct the piling and trestling upon the road between the towns of Dayton and Augusta, a distance of forty miles, the work to be completed by November 1, 1881, and to be done under the supervision of the chief engineer of the railroad. Shortly after the making of the contract Gray began to make contracts with third parties for the necessary materials. The appellant, Dickinson, was to furnish to Gray bills for the work. The record clearly discloses that there was much delay in doing so, and that Gray frequently complained of it.

The proposed road was located along or near the Ohio river, and it was desirable to obtain the material by water transportation and as soon after making the contract as possible, owing to the then price of lumber and the stage of the water. The work was not completed at the time named in the contract, but progressed until May 20, 1882, when it was stopped under notice from Dickinson to Gray to suspend until further orders. The work was never resumed, and on July 17, 1882, Gray brought this action against Dickinson to recover an alleged balance of $16,586.55 for work done and materials furnished under the contract, and $20,940.78 profit which he claimed he would have made if he had been permitted to complete the work. The railroad company was made a defendant, it being averred that Dickinson was a nonresident, and that it was indebted to him, upon

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its contract with him for the building of its road, in the sum of $42,-706.80, and that a suit, brought by Dickinson against the company, was then pending in the United States Court to recover it and enforce a lien upon the road.

An attachment against this indebtedness, or enough of it to satisfy Gray's claim, was sued out in this case on *September* 16, 1882, and of it the company had notice, as it was then a party to the suit, and first objected to the filing of the amended petition upon which it issued, and, upon its being filed, demurred to it. It settled with Dickinson *September* 20, 1882, paying him in money and bonds more than the amount of Gray's claim. Dickinson denied that he owed Gray anything, save $787.40, which he tendered and paid into court. The company filed an answer, which, by the understanding or under the agreement between counsel, must be regarded and treated as a mere denial of indebtedness to Dickerson.

The lower court rendered judgment for Gray against Dickinson, and also against the company as a garnishee defendant, for $15,410.13, with interest from May 20, 1862, subject to a credit of $747.40, as of May 7, 1883, by reason of the amount paid into court. Dickinson has appealed, and also the company. The two appeals are upon the same record and are heard together. The appellee, Gray, has a cross petition in each case, contending that his claim for profits should have been allowed. We will consider the questions upon Dickinson's appeal first.

It is manifest that the credit given by the court below in its judgment should have been $787.40 instead of $747.40, but the appellee, Gray, subsequently came into court and acknowledged, by an entry upon the record, the receipt of $787.40 "paid into court by P. P. Dickinson, defendant, as the uncontested portion of the claim sued on."

Conceding, however, that Dickinson could still complain because the credit was not properly given in the judgment, yet it was but a clerical misprision, and, no motion having been made to correct it, he can not rely upon it upon appeal.

There is a large volume of testimony in the case. It has been carefully read and considered. Much of it consists of hearsay, opinion, argument and copies of papers, the originals not being produced or their absence accounted for in a legal way. The most of all this is, of course, incompetent.

The appellant, Dickinson, filed exceptions to the competency of certain portions of the evidence taken by Gray. They were, however, never acted upon in the lower court. This is now a ground of complaint.

The appellant never called them up, however, nor did he ask that they be acted upon, nor, when the cause was submitted, was it also submitted upon the exceptions. The lower court never refused to act upon them and it had a right, under the circumstances, to consider them as waived, and the appellant can not now, for the first time, complain of their non-disposition. It is proper, however, to add that if it had done so it would not have affected the conclusion now reached.

The judgment of the court below was based on the allowance of the following claims:

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Under the head of Work done and Materials furnished:	
20,283 feet piles driven at 50 cents per foot	$10,141 50
14,836 feet 7 in. piles delivered, worth 32 cents per foot	4,765 68
7 days grading at 3 miles	12 25
390 tenons cut on piles, at 60 cents each	234 00
163,472 feet 8 in. B. M. trestle timber, at $27.50	4,495 48
220 feet sawn piles, estimated	71 00
1,108 pounds pile shoes, delivered at 8 cents	88 64
1,768 pounds bolts and washers, at 6 cents	106 08
26 pounds bolts in piles at 3 miles	1 56
Total	$19,916 19
Less amount received	10,242 11
Balance due	$9,674 08
Under the head of Materials prepared to be delivered:	
7,784 lin. feet piles at 11 cents where they lie	$856 24
4,705½ pounds rods, bolts, etc., at 6 cents	282 33
167,181 feet 6 in. B. M. trestle timber, at $27,50 per M	4,597 45
Total	$5,736 02
	9,674 08
Grand total	$15,410 10

We shall not consider them, save in some particular respects, further than to say that the evidence is conflicting as to quantity and value; their determination was a question of fact, and the lower court has passed upon it.

With a view, however, to noticing some questions as to them that have been discussed by counsel it is necessary to refer to some portions of the contract between Gray and Dickinson. It is provided, *inter alia*, as follows:

"*It is hereby expressly agreed*, that in case the Cincinnati and Southeastern Railway Company should fail in negotiating their first mortgage bonds fast enough to meet, from the proceeds thereof, the monthly estimates of the party of the second part thereto, then, and in that event, the said party of the second part hereby reserves the absolute right and privilege to terminate and cancel this contract, upon giving the party of the first part ten days' notice, in writing, of his determination so to terminate and cancel said contract; and upon giving such notice the said contract for all future work shall be considered null and void, and the party of the first part shall have no further rights or privileges under it, or by virtue of its terms, except for the amount then due in payment thereof, and the said party of the second part shall be, and he is hereby, released from all further liability under said contract, except as mentioned hereinbefore, and shall only be required to pay the said party of the first part the actual amount of the estimate of the engineer of the said Cincinnati and Southeastern Railway Company in charge, for work and labor done and materials furnished up to the date of such cancellation and termination."

* * * * * * * * * * * * * *

"On or about the first day of each month, during the progress of the work, an estimate shall be made of the relative value of the work done, to be judged by the engineer, and upon his certificate of the amount being presented to the party of the second part (appel-

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lant), or such disbursing agent as said party may appoint, eighty-five per cent. of the amount of said estimate shall be paid to said party of the first part (appellee), and when all the work embraced in this contract is completed, agreeable to the specifications, and in accordance with the directions, and to the satisfaction and acceptance of the engineer of the Cincinnati and Southeastern Railway Co., there shall be made a final estimate of the quantity, quality, character and value of said work, agreeably to the terms of this agreement, when the balance appearing due to the said party of the first part shall be paid to them, upon their giving a release, under seal, to the said party of the second part, and furnishing the engineer of the Cincinnati and Southeastern Railway Co. a sworn statement that all their obligations due for labor and material have been paid."

* * * * * * * * * * * * *

"The parties to this contract hereby mutually agree that the chief engineer of the Cincinnati and Southeastern Railway Co. shall be the sole judge and arbiter in all cases of disagreement, difficulty or dispute as to the quality or amount of work performed under this contract, and also in relation to all other matters of difference that may arise between the parties hereto, in relation to or touching the proper performance of any or all the conditions thereof, and his decision, given in writing, shall be in the nature of an award, and the same shall be conclusive upon and between the parties hereto, as a final judgment in a court of competent jurisdiction, and no appeal shall be taken or suit instituted or prosecuted in any court to set aside or contest the same, or to readjust or question the validity or correctness of any matter upon which he has passed."

* * * * * * * * * * * * *

"That all measurements made by the said engineer or his assistants shall be considered and accepted as correct, full and final."

The contract fixed the price of driven piles at twenty-five cents a lineal foot; but it was "further agreed that the price of twenty five (25) cents per lineal foot is to be advanced to fifty (50) cents per lineal foot, provided that an application to the Cincinnati and Southeastern Railway Co. to be made for an increase of said price to fifty cents, is successful; if otherwise, the party of the first part agrees to furnish the piles at the said price of twenty-five cents per lineal foot; and the party of the second part agrees to pay the party of the first part the sum of fifteen hundred and sixty-nine ($1,569) dollars, and two ($2) dollars per 1,000 feet, board measure, for trestling, in addition to foregoing prices."

It is contended that the estimates of the quantity of work made by the company's engineers are conclusive. Copies of them are in the record, but some of them are altogether uncertified, others are signed by one Patton, who was the general manager of the company or its superintendent of construction, but not an engineer, while others are certified by some one of the assistant engineers. It does not satisfactorily appear where they were made, but it is certain that Gray was no party to them and was not present when they were made. These estimates and the testimony offered by Gray are conflicting as to the quantity of work done and material furnished. There is evidence tending to show that at least one of the assistant engineers was hostile to Gray and seemed determined to break him down if possible. Circumstances appear which need not be enumerated, tending to raise suspicion as to the correctness in all respects of these estimates.

Conceding that the confession by Gray of the demurrer to the petition places it beyond consideration and that, therefore, only the

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amended petitions can be considered, and that, therefore, these estimates are not attacked for fraud by the pleadings, yet we do not consider that they are of such a character that under the contract they are to be regarded as conclusive of the quantity of work done and materials furnished. It is not necessary to determine the power of parties to oust the courts of jurisdiction by entering into stipulations like those *supra*, because, in this instance, the engineer was made the arbiter or judge in case of "disagreement, difficulty or dispute," and "his decision, given in writing, shall be in the nature of an award, and the same shall be conclusive upon and between the parties hereto as a final judgment in a court of competent jurisdiction." These provisions certainly implied the existence of a controversy between Dickinson and Gray. They did not relate to the ordinary estimates that might be made from time to time. They were entirely *ex parte*.

When a controversy is to be decided each party has a right to be present and to be heard. It is not pretended that Dickinson and Gray ever submitted any matter of dispute to the chief engineer, nor did he ever attempt to decide any between them. It is true there was made out at some place and in the absence and without the knowledge of Gray what is termed a final estimate, but it can not be regarded as an award under the contract between these parties. Moreover the work was abandoned in May, 1882, and the railway officials in charge of it then left the State. There was no attempt to carry out this provision of the contract. The work was abandoned by Dickinson; he was absent from the State and Gray had a right to look to the courts for relief. Gray has a right to recover for what he actually did under the contract.

It is contended that the words, "labor done and material furnished up to the date of such cancelation and termination" restrict his right to recover to such materials as had then been delivered, inspected and received. This is not a reasonable interpretation of the contract. They were necessarily preparing materials for the work all the time. The word "furnished" in the contract is not to be held as equivalent to "delivered," but as authorizing Gray to recover not only for the work done and material furnished upon the line of the road, but also for material procured or prepared to be furnished for the work. Any other construction would work a forfeiture of all work and expenditure in the preparation of material not delivered upon the line of the road prior to the notice of cancellation of the contract, and bring ruin to a party proceeding in good faith to fulfill his contract.

An application was made to the company to increase the price of driven piles to fifty cents per lineal foot. The evidence tends to show that its president assented to it. Its chief engineer not only approved it, but the estimates of Gray's work for two months were so made out and not only approved by the proper officers of the company but in fact paid. After such action an attempted cutting down by the company to the old price of twenty-five cents per foot could not affect the price as it had been advanced as between Dickinson and Gray. Moreover, the chief engineer proves that it was worth fifty cents per foot to furnish and drive the piles. There is no dispute as to the quantity driven. It is proven that the cost of driving was 18 cents per foot, and it appearing that when driven they were worth 50 cents per foot, it follows that when undriven they were worth the 32 cents per foot allowed by the court.

The contract price of the trestle timber when put into the work was $35 per thousand feet. Gray was, however, prevented by notice

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from Dickinson from putting it in place and was, therefore, entitled to its reasonable value, which the chancellor fixed at $27.50 per thousand feet, and the testimony supports this estimate. It is noticeable too that while Dickinson was not allowed by the company for as large a quantity, yet, for this very material and in precisely the same condition, he was allowed $53.28 per thousand feet. He got for it $6,034.43, while Gray, by the judgment, gets but $4,495.48. Again, Dickinson was allowed, as damages for delays, over seven thousand dollars, while Gray gets nothing upon this score.

We shall not further notice the different items as allowed by the lower court for the reasons already stated.

We will now consider the appeal of the company. It claims: First. Want of notice of Gray's claim prior to the settlement with Dickinson, and that it was not in court before the payment to him. Second. That when the judgment against it was rendered it was out of court, having been dismissed at a prior term. Third. That its answer of non-indebtedness was conclusive.

The record shows that it demurred to the original pelition on September 7, 1882. Also, that it objected to the filing of the amended petition of September 11, 1882, and that its objection was sustained. Also, that it objected to the filing of the amended petition of September 16, 1882, upon which the attachment was sued out, and upon its objection being overruled it demurred to it. It certainly had notice of it. It is in law chargeable with knowledge of its purpose and contents. Indeed, the testimony shows that its general manager was in court at the time and of course its attorney knew the purpose and object of the amended petition when objecting to the filing of it. The company was a defendant to the suit. It objected to the filing of a pleading that sought to subject the indebtedness upon its part to Dickinson to what the latter owed Gray. Why the need of process to apprise it of what it already knew? It can not, under such circumstances, be heard to now say that it had no notice of the proceeding to subject what it owed Dickinson until the service of the attachment upon its agent on September 25, 1882. It knew that the claim of Gray against Dickinson was for the same labor done and materials furnished that was the basis of part of its indebtedness to the latter. It should have been disposed to protect Gray. Instead of doing so, however, as soon as it and Dickinson were, by the amended petition of September 16, 1882, aware of Gray's intention, its officers and Dickinson got together in a town in the distant State Pennsylvania, and there, on September 20, 1882, they settled and the company paid Dickinson. Up to this time the latter had appeared to Gray by letter and declaration to be very hostile to the company. The testimony tends to show that they united in an effort to defeat Gray in the collection of an honest claim, and after such collusion, they do not present themselves in a favorable light to a court of right and equity.

On May 19, 1883, the company fled this answer:

"The defendant, the Cincinnati and Southeastern Railway Company, denies that it is indebted to its co-defendant, Dickinson, in the sum of $42,706.80, or in any sum whatever. It says that for all the work and labor done and material furnished by the said Dickinson to this defendant, it had fully paid him, the said Dickinson, prior to the 20th day of September, 1882. It says it was in no wise indebted to said Dickinson in any amount on the 16th of September, 1882, nor has it in any wise or in any amount been indebted to said Dickinson at any time since the said 16th day of September, 1882.

"R. W. NELSON,
"*Attorney for C. & S. E. Ry. Co.*"

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The testimony shows that its statements were not true. The attorney, who filed it and who is known to the court as one of high integrity, acted doubtless upon information. The company had not paid Dickinson prior to September 20. 1882; nor was it true that it was not indebted to him on September 16, 1882.

The affirmative averments of the answer appearing not to be traversed, the lower court, at the first hearing, dismissed the action as to the company. At the same term of the court, however, a motion was made to modify and set aside this much of the judgment; and by orders, which, in substance, held up and continued the motion and reserved the question arising upon it, the court retained control of it until a subsequent term, when it rendered judgment against the company also. It appeared beyond question—in fact it was admitted by the company's attorney—that when the answer was filed it was agreed that its affirmative statements were to be regarded as traversed, or that the answer was to be treated as a mere denial. It was proven, however, that its indebtedness to Dickinson did exist on September 16, 1882, and continued until the 20th day of that month.

The company was not out of court when the the judgment was rendered. It was a defendant to the suit. It had made an issue as to the indebtedness, but failed upon the testimony to sustain it.

Gray's claim for prospective profits can not be allowed. If Dickinson, without right or the consent of Gray, had prevented the latter from completing his contract, then he would have a right to recover those profits, which are not merely conjectural and possible, but which would naturally and reasonably have resulted to him from its completion. The contract authorized Dickinson, however, to terminate it upon ten days' notice, in the event the company failed to negotiate its bonds fast enough to meet his monthly estimate. This ten days' notice was not given, but the following notice was received by Gray on May 20, 1882:

"NEWPORT, May 19, 1882.

"J. Gray, Esq., Contractor, Covington:

"DEAR SIR—The Cincinnati and Southeastern Railway Company having defaulted payments on its estimate for work done by us in April, 1882, you are hereby instructed to stop all work pertaining to your contract with us until further orders. Efforts are being made to secure a satisfactory adjustment of our matters with the company, but pending these we have deemed it for the best interest of our sub-contractors to suspend work along the entire line.

"Hoping that an early settlement of its affairs and early resumption of work by the company may be made, we remain, yours truly,

"P. P. DICKINSON & CO.,

"By C. O. COLTON, Atty."

It is contended that this notice was merely to suspend work, and not to stop it finally, and to cancel the contract. Gray must be regarded, however, as having accepted it in lieu of the ten days' notice named in the contract, because he then ceased the work and never resumed it. He then abandoned the work. He could, either by parol or conduct, waive the right to ten days' notice, and his right to insist upon a compliance with the letter of the contract. He abandoned or terminated the contract by stopping work and never resuming it; he treated the relation of contractor and contractee between himself and Dickinson as at an end. This was a waiver of the notice required by their agreement. He acted upon a defective notice, but he chose to do so and leave his contract

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uncompleted. He is not entitled, therefore, to recover profits which would likely have resulted from the completion of the work.

The judgment of the lower court in each case is affirmed, both upon the original and the cross-appeal.

(Response to petition for rehearing—Filed Sept. 25, 1888.)

It is now urged that the lower court, in so far as it allowed the claims of the appellee, Gray, for materials "prepared to be delivered" under his contract, did not do so upon the testimony, but because, in its opinion, there was no sufficient denial of them; and that, as it was in error in this respect, its judgment upon these claims should, therefore, be reversed.

The form of the plea is as follows:

"Defendant says he has no knowledge or information as to the amount of piles plaintiff has cut but not delivered; he, therefore, denies the number of feet claimed in the petition to wit: 7,784 feet, and calls upon him for proof as to the amount. He denies that said piles are reasonably worth eleven cents per foot."

A like denial, as to each item of the claim for "materials prepared to be delivered," was presented. This form of plea is not in exact conformity to the Code. Section 113 says:

"A traverse is a denial by a party of facts alleged in an adverse pleading, if they be presumptively within his knowledge; or a denial of them, or a denial that he has sufficient knowledge or information to form a belief concerning them, if they be not presumptively within his knowledge."

In this instance the matters were not presumptively within the appellant, Dickinson's knowledge, and the statement that he had "no knowledge or information" as to them was, in our opinion, equivalent to saying that he had no "sufficient knowledge or information to form a belief concerning them."

It does not follow, however, because an issue was formed as to these items, when the court below thought otherwise, that the allowance of them in the judgment should be reversed, provided the evidence supports their allowance. An error of the lower court, as to the ground of its conclusion, does not of course authorize a reversal of that conclusion if, upon other grounds, it be correct. The testimony is conflicting as to the quantity of material prepared to be furnished by appellee under his contract. After a review of it, however, we are of the opinion that it is sufficient to support the judgment. It is insisted, however, that although this material was purchased and obtained for this particular use, yet as it was not in fact delivered on the immediate line of the road when the appellant stopped the appellee from further work and terminated the contract, that therefore the criterion of recovery is not the contract price of the material but the difference between the contract price and its market value as situated.

Undoubtedly the general rule is that the measure of damages for a failure to receive and pay for property contracted for is not the contract price, but the difference between it and the actual value of the property when it should have been received under the contract. This is because the party should not be allowed to recover the value of the property and also retain it. Here, however, was a case where the appellee was compelled to make contracts for and procure the property in advance of its use upon the road. It was for a special use and of a particular character. He was liable in damages if his contract was not fulfilled by a certain time. It was a work of magnitude and would not admit of delay. It was, therefore, proper

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to hold, as we did in the opinion heretofore delivered, that a fair construction of the term "furnished," as used in the contract between the parties, included all material purchased by the appellee and on hand for use on the road when the appellant terminated the contract. The evidence shows that nearly all the piling "prepared to be delivered" was upon the river bank and near the line of the road when the work was stopped. The trestle timber had not only been procured but, in great part, prepared for use. A considerable portion of it had also been delivered upon the river bank. The balance was at the mill and in the woods. The piling and trestle timber had, for the most part, been sawn into the proper lengths and prepared for use according to the plans and specifications furnished by the engineers for the building of the road. They were to be used at certain places and for certain purposes; they had been fashioned to a certain size and length to suit the trestles and other works upon that particular road, and were in the main, if not altogether, worthless, save for the designated use. The same is, in the main, true of the iron rods, bolts, &c., that had been prepared for this express use. They were ordered and had been made for the appellee before the work was stopped. True they had not then been shipped to him by the maker or even boxed up for shipping, but they were ready for him, he was responsible for the price, and they were subsequently shipped to him.

All of the material prepared for use was, in the main, of no value save for the special purpose for which it had been designed. This is evident from the nature of the purpose to which it was to be applied. In such a case equity requires that the party contracting for the work should pay the party who has thus furnished the material the contract price, the former of course being entitled to the material. Were this not so, yet here the appellee would be entitled to the contract price as to the pile and and trestle timber, because it is a fair conclusion that it is at least substantially worthless, save for the use for which it was obtained. This may not be true of the iron material to the same degree, but made, as it was, under a contract for a particular use, and mainly valuable, as it doubtless is, for it alone, equity requires that, in a case of this peculiar character, the appellant Dickinson should pay the contract price, he being allowed the iron.

Petition for rehearing overruled.

WHEELER V. BRAMEL.

(*Filed May* 15, 1888.)

1. *Taxation—Land listed in name of one not the owner*—Reasonable diligence should be required of the assessor in listing, or causing to be listed, land in the name of the proper person, and where land is listed in the name of a person who is neither the owner nor the agent, the sheriff can not sell it for taxes and pass a valid title to the purchaser.

2. *A sale of land for taxes passed no title to the purchaser*, as no effort was made to subject the personal estate of the taxpayer, and no receipt tendered to him before the land was sold.

3. *Void tax sale—Right of purchaser to reimbursement*—In this action by appellant to recover land purchased by him at tax sale, the court having properly adjudged that he acquired no title to the land by his purchase, did not err in failing to give him a lien on the land for the taxes paid, as no such lien was claimed.

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W. W. Kimbrough for appellant.

A. Duvall for appellee.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Lewis.

The tract of forty acres, purchased by appellant at the sale by the sheriff for taxes, appears to have been listed in the name of W. V. Prather, or rather the assessor simply copied from the book of a previous assessor, without attempting to ascertain who was the owner of the land; and, according to the first report made by the sheriff, he sold it as the property of W. V. Prather, though subsequently, after the report was filed and recorded, he added words describing Prather as attorney.

The land, at the time it was assessed, belonged to Armstrong and Taylor, residents of an adjoining county, and there is no evidence showing that they authorized Prather, as their agent, or otherwise, to list the land for taxes, or to pay them. The statute requires real estate to be listed in the county where situated, against the owner of the first freehold estate therein, and to enable the assessor to ascertain the person in whose name to make the list he is empowered to swear witnesses and compel them to testify. He has also access to the evidence of title and ownership to be found in the clerk's office. It seems to us reasonable diligence should be required on the part of the assessor in listing or causing to be listed land in the name of the proper person, and while it is not, in all cases, practicable to ascertain the names of owers of land residing out of the county, the assessor is not excusable for listing land in the name of a person who neither owns nor claims the land, nor is authorized, as agent, to list or pay taxes on it. And we think when land is thus listed in the name of a person who is neither the owner nor agent that the sheriff can not sell it for taxes and pass a valid title to the purchaser.

The tract of two acres, purchased by appellant at the same time, appears to have been listed in the name of the owner, who, we think the evidence shows, continued a resident of the county sometime after the sheriff commenced collecting taxes due for that year; but no effort was made to subject his personal estate to payment of the tax due, nor was a tax receipt tendered to him before the land was sold. Appellee is now in possession of and claims both tracts, and we think the lower court properly adjudged appellant's deed from the sheriff did not invest him with the title nor the right to recover the land. But having bid for and paid the amount of taxes due on the two tracts, we think the court should have adjudged he had a lien thereon for the amount so paid by him, and have directed a sale to satisfy it upon the refusal of appellee to pay it; and for that error the judgment dismissing the action must be reversed for further proceedings in accordance with this opinion.

In response to a petition for rehearing Judge Lewis delivered the following opinion of the court May 15, 1888:

The only relief asked for in the petition of the plaintiff, appellant, is judgment for the two tracts of land. There is no lien on the land for the amount bid at the tax sale, $13.85, claimed, or judgment prayed therefor. On the contrary, it is proved that appellee, before the commencement of the action, offered to reimburse appellant all he had paid on account of the taxes, but he refused to accept it, preferring to sue for the land.

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While we should not have reversed the judgment upon the sole ground the lower court had required appellee to pay back to appellant the amount bid by him at the tax sale, if such had been the case, and appellant may still recover it, it does not seem to us, upon a rehearing, that the chancellor, as the record stands, erred in failing to render such judgment, and the former opinion is so changed as to simply affirm the judgment, and the mandate must be modified to correspond therewith.

PARK, &C. V. BOLINGER, &C.

BOLINGER V. HANSON'S ADM'R.

(*Filed May* 31, 1888—*Not to be reported.*)

1. *Final order*—A judgment declaring that a partnership existed, when taken in connection with a judgment distributing the assets upon that theory, neither of which is appealed from, must be regarded as final, and can not be reviewed upon appeal from a subsequent judgment.

2. *Appeals—Partial transcript*—As the judgment appealed from is based upon the accounts between the parties, and the appeal is prosecuted upon a partial transcript, the judgment must be affirmed. Any error not appearing might be cured by a complete record.

3. *The revisory power of the trial court over its judgment*, after the expiration of the term at which it was rendered, is now restricted to the cases enumerated in the Code.

4. *Right of infant to vacate judgment*—If it appears that a party who is seeking to have a judgment vacated was an infant when the judgment was rendered; that, according to the facts presented, an injustice has been done him, and that he has applied for relief within the time limited, the relief should be afforded. The burden, however, is upon the infant to show that an injustice has been done him, as the judgment is to be regarded as *prima facie* correct.

5. *Same*—Whether under the present practice, if the infant is proceeding alone upon the ground of error of *law* apparent in the record of the former suit, the defendant is limited to a defense by demurror or a plea of subsequent release of error, it is not necessary to determine, as the petition brings in question matters of *fact* that were in existence when the judgment sought to be annulled was rendered, and which were then considered by the court, and the right of a party to answer in such a case is unquestionable.

The defendant having filed a sufficient answer in this case, and the plaintiff having declined to plead to it, the judgment dismissing the action was proper.

6. *Same*—An infant is not bound to wait until he arrives at age before bringing his action to vacate a judgment by which he has been prejudiced.

Hugh Rodman and D. G. Park for Park and Hanson's administrator.

W. W. Tice, W. Lindsay and E. W. Hines for Bolinger.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Holt.

L. A. Hanson died in 1869, leaving an infant daughter, Nellie by name, as his only heir. The same person became his administrator and her guardian, and, styling himself in both these capacities, brought an action, soon after the intestate's death, seeking the sale of a certain mill property upon the ground that the interest of both

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the estate and the ward required it. She was not made a party to the suit. The petition averred that W. E. Bolinger had loaned certain sums of money to her father to aid in paying for the property, and he was made a defendant and called upon to answer as to the transactions between them. He did so, claiming that he had advanced certain sums toward the payment of the land and mill under an agreement with Hanson that the money, with interest, was to be returned to him from the profits of running the mill, and then they were to become joint owners of the property. Subsequently J. T. Bolinger was joined as a defendant upon the petition of both the Bolingers, stating that W. E. Bolinger had made the advances under an agreement with J. T. Bolinger that, whenever he returned the same to him with interest, he was to have all his (W. E. Bolinger's) rights under the contract; that he had repaid him, and that Hanson knew of and was a party to the entire arrangement.

Such a state of pleading was made up by the parties that they believed an issue had been fully and properly made as to whether Bolinger was a mere creditor or a partner of Hanson. All the parties to the action consented to the sale of the property, and it was sold, leaving the proceeds as the subject of contention. Testimony was taken upon the question whether the relation of creditor or partner existed, and on Novemer 19, 1874, a judgment was entered, declaring that there was a partnership between the parties; that J. T. Bolinger was substituted to W. E. Bolinger's rights and entitled to the money advanced with interest, disallowing the claim for Hanson's services, but not charging him with what he used of the firm assets for living, and providing that after repaying to either party any advances with interest the surplus of the firm's assets should be equally divided between Hanson's administrator and J. T. Bolinger, the commissioner to report on such basis. He did so, and the report was confirmed, and on May 13, 1876, another judgment was entered, appointing a receiver to settle with the commissioner; collect the firm assets; pay its creditors, including the advances made to it by the partners, and then divide any balance between Hanson's administrator and J. T. Bolinger. The receiver complied with this judgment; the assets were distributed accordingly; he filed his report, and it was confirmed. By way, however, of equalizing what had been paid to J. T. Bolinger and Hanson's administrator another judgment was rendered on May 21, 1879, in favor of the latter and against the former for $448.60, and from this judgment J. T. Bolinger has appealed.

In May, 1878, Nellie married D. G. Park, and in April, 1881, they brought an action to vacate the judgment of November 19, 1874. The petition sets forth in detail the history of the other suit, and seeks to annul the said judgment upon the ground that upon the pleadings of the Bolingers themselves the relation of creditor and debtor, and not of partner, existed between her father and Bolinger; also because the testimony did not show a partnership, because incompetent evidence was admitted, and because she was not made a party to the suit. It also avers that Bolinger was, by way of account, considerably indebted to her father, and asks that this indebtedness, less the $448.60 judgment, be credited on the amount advanced by Bolinger to her father, and that they have judgment for the difference between the balance of the advancement or loan, and what Bolinger has been paid as a partner under the decrees in the other suit. The record of the other suit was referred to as a part of the petition. The plaintiffs denied the right of the defendants to

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answer, and moved for a judgment in accordance with the prayer of their petition.

This motion was based upon the ground that the record of the former suit showed the nonexistence of a partnership, and what Bolinger had advanced and what he had received; that the court must act upon the record, as then made up, and that the defendant could only demur to the petition or plead a release of the errors complained of, or some similar matter of defense. The court overruled the motion, and permitted the defendants to answer. They did so by a denial, in the main, of the averments of the petition, and also set up affirmative matter, which, undenied, was sufficient to prevent a recovery by the plaintiffs. They declined to plead further, and thereupon the action was dismissed and Park and wife have appealed. Their appeal and that of Bolinger are now heard together.

The Superior Court reversed the $448.60 judgment against him upon the ground that the judgment of November 19, 1874, was merely interlocutory, and that the pleadings failed to show a partnership between him and Hanson. He appealed upon the ground that the statement of the accounts by the commissioner upon the theory of a partnership, and the judgment based upon it, were erroneous; and if corrected it would appear that no judgment should have been rendered against him. As this record now stands, although the judgment has been reversed by the Superior Court upon his appeal, yet the reversal is prejudicial to him, because, if he is to be treated merely as a creditor and not as a partner of Hanson, then he will fall more largely in debt to his estate. In effect, at least, the judgment was not reversed, because it was prejudicial to him. There was no cross appeal. It is unnecessary to determine, however, whether in the absence of one, such a reversal is proper, because the judgment of November 19, 1874, holding that a partnership existed, taken in connection with that of May 18, 1876, effectuating it, was clearly final. One was but in execution of the other, and certainly upon the rendition of the one last named either party could have appealed. Relief of a final character was given by them in and of themselves. No further action of the court was necessary to make them effective. They decided that there was a partnership, and distributed the assets upon that theory. Freeman on Judgments, secs. 23-25. Park and wife have so treated them by filing their bill of review. In fact both sides concede in argument their final character, and there is no appeal from them.

The judgment in question must be affirmed, first, because it is based upon the accounts between the parties, and the transcript is but a partial one. Any error now appearing might be cured by a complete record. Second, various issues of fact were involved, and the assignment of errors is too general to admit of their examination. O'Reagan v. O'Sullivan, 14 Bush, 184.

We now turn to the consideration of the other case.

Under the old chancery practice a bill of review would lie for error of law appearing in the body of the decree or upon the discovery of new matter of fact, material in character, and which the party could not, by reasonable diligence, have discovered before; and where it was brought to review or vacate a decree for error of law nothing could be considered but the decree, and, therefore, unlike our present practice, all of the pleadings and facts proven were embodied in the decree. The defendant to the bill could, in such a case, demur or plead a release of error, or some similar matter of defense. Infants to a decree were then given a day, after arriving at age, to show cause

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against it. These rules have been modified by our Code of Practice. Section 391 provides: "An infant—other than a married woman—may, within twelve months after attaining the age of twenty-one years, *show cause* against a judgment;" * * * and section 518 says: "The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it: * * * fifth, for erroneous proceedings against a person under disability, except coverture, if the condition of such defendant do not appear in the record, nor the error in the proceedings; * * * eighth, for errors in a judgment shown by an infant within twelve months after arriving at full age, as is prescribed in section 391."

Subsequent sections provide that any proceeding upon these grounds shall be by petition; that a judgment shall not be vacated until it is found that there is a valid defense to the action, or, if the plaintiff asks it, that there is a valid cause of action; and that the court may pass upon the grounds to vacate or modify the judgment before deciding upon the validity of the defense or cause of action; and section 520 says: "On the petition the proceedings shall be the same as those in the action in which the judgment was rendered."

The proceeding thus authorized is in lieu of the bill of review under the old practice; and the revisory power of the trial court over its judgment after the expiration of the term at which it was rendered is now restricted to the cases enumerated in the Code. Anderson v. Anderson, 18 B. M., 95.

If it appears that the party was an infant when the judgment was rendered; that according to the facts presented an injustice has been done him, and that he has applied for relief within the time limited, then it should be afforded. Allen v. Troutman's heirs, 10 Bush, 61. This is so, whether the error is one of law merely and apparent from the record, or is one of fact. The material question is, has a substantial injustice been done him? An inquiry of such a character implies the right to form an issue as to any material fact, and this can only be done by pleading. The burden is upon the infant to show the injustice, and that his substantial rights have been prejudiced by a judgment, which is to be regarded as *prima facie* correct.

The appellants, Park and wife, are not seeking to set aside the sale of the property. They have confirmed it. Mrs Park was an infant when the judgment of November 19, 1874, declaring the existence of a partnership, was rendered. It must be regarded as final for the purposes of this suit. It was certainly so, as effectuated by the judgment of May 13, 1876. This action to annul it was brought while she was yet under age. She was not bound to wait until she arrived at maturity before bringing it. She has presented herself properly, and the question arises whether the other side had the right to join issue by an answer to her petition. It seeks to vacate the judgment of May, 1874, for both error of fact and of law. It not only asserts the existence of legal error apparent upon the record of the former suit, but in the face of the fact that the petitioners have accepted the judgment for $448.60 rendered against Bolinger, it seeks to credit him therewith, correct the statement of accounts between the parties, as made in the former suit, and any errors of the court in reaching conclusions of fact.

It is unnecessary to decide whether, under the present practice, if the appellants were proceeding alone upon the ground of error of law apparent upon the record of the former suit, the appellee would

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be limited to a defense by demurrer or a plea of a subsequent release of error. They are not doing so, but relying both upon error of law and of fact. Their petition brings in question matters of fact that were in existence when the judgment, which they seek to annul, was rendered, and which were then considered by the court. Undoubtedly this may be done under the present practice; but when done it would be an anomaly in jurisprudence if the adverse party were denied the right to answer. If so, the one party would be given his "day in court," but it would be denied to the other. The right of a party to answer in such a case is unquestionable. Allen v. Troutman's heirs, *supra*. The appellee having done so, and the appellants having declined to plead to it, the judgment dismissing the action was proper, and must be affirmed.

The judgment in each case is affirmed.

KENTUCKY SUPERIOR COURT.

COMMONWEALTH V. ANDERSON.

(*Filed Oct.* 19, 1887.)

1. *Local option*—To be good an indictment under the "local option" law (approved January 26, 1874) must allege *facts* showing that law to be in force in the district in which the sale in violation of it is charged to have been made.

2. *Same*—The "local option" law, being made applicable to a district, supersedes the operation of other laws theretofore applying to that district and providing different penalties for unlawful selling of whisky, &c.

3. *Same*—Evidence that a defendant indicted under the "local option" law had a license from the United States authorizing him to sell whisky is incompetent.

4. *Same*—While a certificate of the examining board is *prima facie* evidence that the election was held, and that the vote was as stated, it does not show that the county court was authorized to order, or did order, the election as required by the statute.

(An abstract of this opinion was published in 9 KY. LAW REP., 406.)

Finlay Shuck and P. W. Hardin for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Ward.

In order to constitute a good indictment, charging a person with a violation of the act approved January 26, 1874, entitled "An act to regulate the sale of spirituous, vinous or malt liquors in this Commonwealth," known as the "local option" law, the indictment should allege facts showing that the law is in force in the district in which it is charged the sale was made. As said law can only apply to those districts wherein a vote has been taken as to its application, the facts showing that the steps named in the statute were taken in order to a submission; that it was submitted by the county court and voted upon, and the vote certified and entered on the records of the court, should all appear by proper averments. Ellison v. Commonwealth, 6 KY. LAW REP., 306; Commonwealth v. Myrick, Ibid, 520; Merrill v. Commonwealth, Ibid, 664.

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These allegations are necessary not only to show that the law is in force, but to inform the defendant of the offense with which he is charged, because under this act the penalty, and the proof necessary to a conviction, is different from what it would be for an unlawful selling in districts where the law is not in force. When the local option law, as it is called, is made applicable to a district in the mode provided in the act it supersedes the operation of other laws theretofore applicable to that district, providing different penalties for unlawful selling of whisky, &c. Young v. Commonwealth, 14 Bush, 165.

The evidence introduced by the defendant to show that he had a license from the United States authorizing him to sell whisky by retail was incompetent and irrelevant, as such license could not make a sale lawful which was unlawful under the laws of the State; and if not unlawful under our State laws, whether he had a United States license or not was immaterial, as the State has no power and does not pretend to punish its citizens for a violation of the United States revenue laws.

Not only was the indictment insufficient, but the proof likewise, as no evidence was introduced to show that an application was made to the county court to submit the question to the voters of the district; no proof to show that it had been submitted by order of the county court. The certificate of the examining board, as to how the vote stood at the election, is prima facie evidence that the election was held, and that the vote was as stated, but it affords no evidence whatever as to the existence of other facts necessary to show that the election was held in the mode provided for in the statute; that is, that the county court was authorized to order, and did order, the vote to be taken.

The instruction of the court to find for the defendant was, therefore, proper, and the fact that the reason assigned for giving it was not the correct one is immaterial.

The judgment is affirmed.

LEE V. GREEN.

(*Filed May* 23, 1888.)

1. *Misjoinder of actions*--When the owner of a note sues the obligor it is proper for him to make one who has possession of the note, claiming it as his own, a party. But it is not proper to join in an action against the obligor an action against the person holding the note to recover it, and also an action to recover of him an amount which he has collected on it, and while these several causes of action were joined in the petition in this case, yet as there was no motion to require the plaintiff to elect which he would prosecute, the objection was waived. As the plaintiff, who was the payee in the note, is the appellant, and the defendant, who had the possession of the note, is the only appellee, the court will treat the action as against the appellee alone.

2. *Res judicata*. A judgment operates as a bar to a subsequent action between the same parties only as to those matters which were in issue in the first action, and upon the determination of which the judgment was rendered.

In an action to recover the amount of two notes executed by the defendant to plaintiff the defendant pleaded that the plaintiff being indebted to him, had, in satisfaction of that indebtedness, delivered to him the notes for the amount of which judgment was asked, and also a note executed to

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plaintiff by T. These allegations were denied by the reply, and upon a trial of the issues judgment was rendered for the defendant, dismissing the petition. *Held*—That the title to the note on T. was not involved, and that the former judgment is not a bar to this action to recover of the defendant possession of that note.

Collins & Fenley, D. H. Clay and H. Clay White for appellant.

DeJarnett & Dickerson for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Barbour.

That there was in this case a misjoinder of causes of action is clear. When the owner of a note sues the obligor it is proper for him to make one who has possession of the note, claiming it as his own, a party. But it is not proper to join in an action against the obligor an action against the person holding the note to recover it, and also to recover of him an amount which he had collected on it. These several causes of action were joined in the petition in this case, but as there was no motion to require the plaintiff to elect which he would prosecute the objection was waived. The plaintiff, who was the payee in the note, is the appellant, and the defendant, who had the possession of the note, is the only appellee. We will, therefore, treat the action as against the appellee alone.

Among other defenses relied upon by the appellee was the plea of *res judicata*. The record in the former case, which was an action by the appellant against the appellee, was made a part of the answer, and as the issues in that case were considerably complicated it will necessitate a brief statement of the pleadings. In the original petition the plaintiff, in the first paragraph, which was subsequently amended, sought to recover of the defendant $174.50 for money had and received, and for the amount of two notes executed by the defendant to the plaintiff, one for $100 and the other for $200, which notes, it is averred, the plaintiff has wrongfully obtained the possession of. In the second paragraph he sought to recover the possession of a note for $700, executed by one Bob Turner to the plaintiff, and the possession of which the plaintiff had without right. Upon the defendant's motion to require the plaintiff to elect which cause of action he would prosecute the plaintiff dismissed without prejudice the paragraph of his petition which sought the recovery of the possession of the Turner note. The defendant traversed the allegations in regard to the $174.50, and admitted the execution of the two notes, but averred that he had paid off and settled them; that the plaintiff was indebted to him in a large sum for board, nursing, etc., and that as a full settlement of that indebtedness the plaintiff delivered to him the two notes executed by him, and also assigned and transferred to him the Turner note. The plaintiff, in his reply, denied all the material allegations of the answer, and upon the trial of the issues a judgment was rendered for the defendant, dismissing the petition. This is the judgment which is pleaded in bar of the appellant's right to recover of the appellee the $700 Turner note in this action. It is insisted that, notwithstanding the dismissal of the paragraph of the petition which sought the recovery of the Turner note, the ownership of the note was necessarily involved in and inseparably connected with the settlement relied upon by the defendant in his answer as a defense to the plaintiff's right to recover. We are, however, after a careful consideration of the question, of a different opinion. After the dismissal of the second paragraph of

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the petition the sole object of the action was the recovery of the debts sued for. The title to the Turner note was not in issue. If the plaintiff had succeeded in recovering a judgment for all he claimed it would not of itself have established any right upon his part to the note—this much we think must be conceded. Then it follows that a judgment adverse to him could not have the effect of divesting him of his right. We can not understand how it could be that a judgment for the defendant could have the effect of vesting a title to a thing in him, when, if the judgment should have been adverse to him, it would not have affected his right. The single issue was whether the defendant was indebted to the plaintiff, and the whole force of the judgment was to determine that he was not. The defense relied upon was accord and satisfaction, and the only relevant facts pleaded were that the plaintiff owed the defendant a board bill, and in part satisfaction thereof delivered to the defendant the two notes for which he sought judgment. The allegation that the plaintiff had, in addition to the delivery of the two notes, assigned and transferred to the defendant the Turner note, was irrelevant, and could not have been made pertinent to the issue. If the jury should find that the plaintiff owed the board bill and that it was settled by the delivery of the two notes executed by the defendant it would defeat the action, no matter what they might find as to the assignment and transfer of the Turner note. Suppose, as counsel insists we should, we should consider the answer as asserting ownership in the defendant to the Turner note, it would then follow that the plaintiff should be allowed by his reply to traverse the answer and assert title and the right to the possession in himself, otherwise his property would be taken from him without giving him a chance to be heard. But that such a pleading would be inadmissible is demonstrated by the motion which the defendant successfully made, requiring the plaintiff to elect which of the two causes of action set out in his petition he would prosecute—that is, the action upon the debts or the action for the recovery of the note. As the averments in the defendant's answer concerning the Turner note were irrelevant they should have been stricken out. Though they were not stricken out, they did not affect the real issue which was tried. A judgment operates as a bar to a subsequent action between the same parties only as to those matters which were in issue in the first action, and upon the determination of which the judgment was rendered.

We are of opinion that the judgment in the former suit does not affect the rights of the parties in this action. The question in this case, as presented by pleadings, is not what was proven upon the former trial about the transfer of the note, but was it in fact turned over?

The judgment is reversed and the cause remanded for further proceedings.

JENKINS V. BASS.

(*Filed May* 30, 1888.)

Parol evidence to explain ambiguity in note—It is a cardinal rule in the construction of all instruments and agreements to so construe them as to give effect to the agreement or instrument if possible, and if there is ambiguity in any of the terms of the instrument which can be explained by extrinsic

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facts, without contradicting the instrument, it is competent to show such extrinsic facts.

Appellant sued M. and B. upon a writing signed by them, whereby they undertook to pay "to the order of myself" a certain sum, which writing, by an indorsement signed by M., was made payable to appellant. The writing was declared upon as the promise of M. and B. to pay to the order of M., the plaintiff alleging that it was made by defendants to enable M. to obtain money, and they not kowing from whom he could get the money, B. signed the note, leaving a blank as to the payee, and directed M. to thereafter fill the blank with the name of any person from whom he could get the money, or to make the note payable to himself and by his endorsement order the payment to any person he should choose, and that pursuant to this authority M. wrote word "myself," whereby defendants intended to, and did, make the note payable to the order of M., who sold and delivered it to plaintiff. A demurrer to the petition was sustained and the petition dismissed. *Held*—That this was error. B. is liable, as shown by the extrinsic facts, to pay the amount of the note to M.'s order, and while it may not, on account of the uncertainty as to the payee as it appears on the face of the paper, be held to be a negotiable instrument, a holder for value should, upon showing the facts, be allowed to recover.

Dulaney & Mitchell for appellant.

Wright & McElroy for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Barbour.

The appellant, Jenkins, sued Murrell and the appellee, Bass, upon the following writing:

"$360. BOWLING GREEN, KY., July 8, 1886.

"Sixty days after date we promise to pay to the order of myself three hundred and sixty dollars, value received.

"E. R. MURRELL.
"J. V. BASS."

Upon which is this endorsement:

"Pay Jos. L. Jenkins or order. E. R. MURRELL."

The plaintiff declared upon this note as the promise of Murrell and Bass to pay to the order of Murrell, and in an amended petition averred that it was made by the defendants to enable Murrell to obtain money, and they not knowing from whom he could get the money, Bass signed the note, leaving a blank as to the payee, and directed Murrell to thereafter fill the blank with the name of any one from whom he could get the money, or to make the note payable to himself, and by his endorsement order the payment to any person he should choose, and that, in pursuance to this authority, Murrell wrote the word "myself" in the blank, whereby defendants intended and did make the note payable to the order of Murrell, who sold and delivered it to the plaintiff. A demurrer to the petition, as amended, was sustained and the petition dismissed.

Bass' liability, if he be liable, does not arise under sec. 13, ch. 22, General Statutes, which provides that when a note is made by the obligor payable to himself, and is signed by him on the back and then delivered, such signature shall operate as a promise to pay the face of the note to the party to whom it has been delivered. But we are of opinion that he is liable upon the ground that it is his undertaking, as is shown by the extrinsic facts which are averred, and upon this appeal must be taken as true, to pay the amount of the note to Murrell's order. If Murrell had been named as the payee in

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the body of the note, there is no question but what, nothing else appearing, it would have been legally obligatory on Bass, though Murrell also signed the note as one of the obligors. Quisenberry v. Acton, 1 Duvall, 30; Allen v. Shadburn, 1 Dana, 68. True, the note in this case, instead of naming Murrell as the payee, is in terms payable to "myself," and while it might not, on account of the uncertainty as to the payee as it appears on the face of the paper, be held to be a negotiable instrument, still we can see no reason why, when it has come to the hands of a holder who has paid value for it, as was the intention of the parties in its execution, he should not be allowed, upon showing these facts, to recover. It is a cardinal rule, in the construction of all instruments and agreements, to so construe them as to give effect to the instrument or agreement if possible, and if there is an ambiguity in any of the terms of the instrument which can be explained by extrinsic facts, without contradicting the instrument, it is competent to show such extrinsic facts. As a matter of law the court would not be able to say to whom it was the parties intended that the note should be made payable, and it is, therefore, competent to show by parol evidence who it was that the parties meant by "myself." Such evidence does not contradict the *writing*, but gives effect to it. Greenleaf on Evidence, vol. 1, section 282, etc.

Mr. Daniel in his work on Negotiable Instruments, section 102, says: "It has been held that when the promise is to pay '*you*,' as, for instance, where the paper runs 'I. O. U. the sum of $160, which I shall pay on demand to you,' parol evidence would be admissible to explain who was meant." But as there is no certainty about the payee on the face of the paper, and nothing from which he may be ascertained, such a paper could not, consistently with accepted principles, be held negotiable. *Pothier* puts a case quite similar: "If," says he, "the drawer should omit the name of the payee, but should draw the bill in this form: 'Pay a thousand livres at sight, value received of A. B.,' it appears to me reasonable to presume that the drawer intended that the bill should be payable to the person from whom the value had been received, as no other person is named to whom it ought to be paid."

If the allegations of the amended petition are true, as is admitted by the demurrer, the plaintiff is entitled to recover. The judgment is, therefore, reversed, and cause remanded with directions to overrule the demurrer to the petition as amended, and for further proceedings.

COLLINSWORTH V. DAVIDSON'S ADM'R.

(*Filed June* 13, 1888.)

1. *Proof of claim against decedent*—Every fact touching the validity of a claim against the estate of a decedent, which, in a suit thereon, it would be necessary to aver in the petition, should be proved by the evidence tendered to the personal representative, but it is not necessary that the witnesses should state that they know the claim is just, thereby meaning that it has not been paid, and is not subject to any discount or set-off. Only the claimant himself is required to purge his conscience as to the justness of the claim.

2. *Same*—As one item in the account sued on was properly proved, the majority of the court are of the opinion that it was error to dismiss the

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entire claim. It is the opinion of the writer (Presiding Judge Ward) that as the plaintiff presented his separate demands in one account, and so sued upon them, he thereby elected, as he had the right to do, to stand upon his rights as to the entire demand, and that the judgment dismissing the entire claim without prejudice should be affirmed.

J. E. Stewart for appellant.

R. T. Burns for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Presiding Judge Ward.

Appellant instituted this suit to recover judgment against the administrator of J. M. Davidson upon an alleged indebtedness due by account.

There were two items in the account, one for balance due on settlement for a lot of lumber sold and delivered to intestate. The second item was as follows: "To thirty-two bushels of corn paid J. M. Davidson for that he failed to get, at 74 cents per bushel, $22.40."

The action was on motion dismissed without prejudice for want of a demand upon the administrator, accompanied by the affidavits required by law, prior to the institution of the suit.

The affidavit of the claimant substantially complies with the law, and the defect, if any, is in the supporting affidavits.

It is insisted for appellee that the supporting affidavits are defective, because it is not averred in them that affiants knew that the claim is just. It is urged that all that they say may be true, and yet they may know that the claim has been paid, and that the witnesses, as well as the claimant, should purge their consciences as to the justness of the claim.

This contention seems to be supported by the case of Nuttall's adm'r v. Bannin's ex'ors, 5 Bush, 13, but that case seems to have been founded upon a misinterpretation of Trabue's ex'or v. Harris, 1 Met., 597. But, however this may be, we think the more rational and consistent, as well as most recent rule, is that laid down in Leach v. Kendall's adm'r, 13 Bush, 424, wherein it is held that every fact touching the validity of the claim, which, in a suit thereon, it would be necessary to aver in the petition, should be proved by the evidence tendered to the personal representative. Though neither of the cases first cited above were overruled in the latter case, or referred to in the opinion at all, yet it is said that the affidavits of the witnesses that they *knew* the sum claimed, &c., was due, and a just charge, &c., were not sufficient; that the facts should have been stated.

We do not know how a supporting witness could ever say that he *knew* a claim to be just, thereby meaning that it had not been paid, or was not subject to a discount or set-off. Knowing that the indebtedness existed rests upon facts which he states in the affidavit; if these facts show the indebtedness, then he could, at most, but express an opinion as to whether the demand had been paid or otherwise discharged in whole or in part, except he might say it had not, so far as he knew or believed. But to require this supporting and corroborating testimony as to an account is not only to require "other proof of the demand, as required by law," but is to require the witness to purge his conscience about a matter presumably not within his knowledge, that he may testify to facts about which he has personal knowledge. Not only this, but it is to require of the

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claimant evidence of a different character from that required where his demand is evidenced by a written contract.

All that the law requires is that the evidence furnished to the administrator shall show that the demand is presumptively correct. If the demand is supported by written evidence, and the claimant purges his conscience as required by the statute, then the administrator is presumptively safe in paying. On the other hand, if the demand is not so evidenced, then there must be such evidence as will show that the demand existed. This, with the expurgatory affidavit of the claimant, completes the presumptive case required by the statute.

But we are of opinion that the supporting affidavits were insufficient as to the second item in the account. The only reference to this item by the witnesses called to prove the demand was in the affidavit of B. L. Davis, who, referring to a conversation between appellant and intestate, says: "Mr. Collinsworth, said Jo, what about that corn? I never got but thirty-five and a half bushels. Mr. Davidson said go and get the corn, and when I come up I will pay you your money." This evidence is not sufficient to show that intestate owed appellant for thirty-two bushels of corn, at 70 cents per bushel, or any other certain amount at any price. It only shows that there was some unsettled matter between them about corn, but what or to what amount is not shown.

As the item in the account for $537.78, subject to the credit of $150, was properly proven, the administrator might have safely paid that, from all that now appears, and by refusing to do so he, in the opinion of a majority of this court, placed himself in default so that an action can be maintained as to that item, and it, therefore, results that the judgment dismissing the action as to the entire claim was erroneous; it should have been dismissed only as to that part of the claim not proven, to wit, the item for corn.

It is the opinion of the writer that it was not for the administrator or the court to split the plaintiff's cause of action. Though separate demands, they were properly joined, and as the plaintiff presented his separate demands in an account, and so sued upon and so stood when the motion to dismiss for want of affidavit and demand was made, he thereby elected, as he had the right to do, to stand upon his rights as to the entire demand, and the judgment dismissing the entire claim without prejudice should be affirmed.

It results that the judgment is reversed and remanded for further proceedings consistent with the opinion of a majority of this court.

GROSCHELL V. KNOLL.

(*Filed June* 13, 1888.)

Evidence--Books of original entries--"A book of original entries" within the meaning of subsection 7 of section 606 of the Civil Code, is a book in which the entries were made at or near the time of the transactions, and intended to furnish evidence of the transactions to which they relate, and if it is shown from the books or otherwise that the entries offered in evidence were made at or near the time of the transaction it is immaterial whether they were made from the memory of the salesman alone, or whether his memory was aided by memoranda kept on a slate or scrap of paper not intended as evidence of the transaction, but merely as a memoranda to aid the memory, and to secure accuracy in the entry upon the books.

In this case it is held that a day-book in which entries were made each

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night from a slate containing memoranda of sales made during the day, the slate being cleaned off, was admissible in evidence as "a book of original entries."

Tisdale & Gray for appellant.

O'Hara & Bryan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Presiding Judge Ward.

This is an action by the surviving member of the firm of T. R. Krueskamp & Co. against appellee for goods sold and money loaned.

The only error complained of is the action of the court below in refusing to allow the plaintiff to read in evidence the account books kept by said firm, and the resulting error, if these books were competent evidence, of giving a peremptory instruction.

The evidence conduced to show that these books, day-book, journal and ledger, were solely in the handwriting of T. R. Krueskamp; that he died before this suit was instituted; that the books had been regularly kept and were free from changes or alterations, and it was averred that they contained the items named in the account sued upon, and there was an offer to submit them to the court for its inspection and to the jury for examination. There was also evidence tending to show that up to 1878 there was an assistant in the store, but after that date there was no assistant except a porter; that it was the custom of the house for the person selling the goods to make an entry thereof on a slate, and at night these entries would be put upon the day-book by T. R. Krueskamp and the slate cleaned off; that if Krueskamp sold the goods in person he would sometimes make the entry directly in the day-book without making an entry on the slate.

Was this evidence sufficient to show that the day-book was "a book of original entries" within the meaning of subsection 7 of section 606 of the Code? It is claimed that the books do not contain the original entries, but that the original entries were made upon the slate. An original entry, within the meaning of the phrase, is one made at or near the time of the transaction in the books kept for and intended to furnish evidence of the transactions therein contained. It must be shown, from the books or otherwise, that the entries offered in evidence were made at or near the time of the transactions. If this be shown it seems to be immaterial whether the entries were made from the memory of the salesman alone or whether his memory was aided by memoranda kept on a slate or scraps of paper, not intended as evidence of the transactions, but merely as memoranda to aid the memory and to secure accuracy in the entry upon the books. The rule is well stated in Pattin v. Ryan, 4 Rawles, 410.

"The principle of Ingraham v. Bockius is that a minute, not to be itself the evidence of the sale, but to be used in the preparation of such evidence is not an original entry within the meaning of the term as it is used in the books. If such be its effect the material on which it is written or the size and shape of it must be indifferent. Here it was made on a card which was superseded by a book into which it was transcribed and which was destined to be the final means of perpetuating it, for the destruction of the card when the transaction was made shows that its office was but a temporary one. It would be most unreasonable to preclude the shopkeeper from making the regular, permanent entry in his day-book because he

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had taken the precaution to put down the transaction on a fugitive scrap of paper in order to secure a greater degree of accuracy when the regular entry of it should come to be made. Such a rule would be subversive of everything like fair dealing." To the same effect see Ingraham v. Bockius, 9 Serg. and Rawles, 285, reported 11 Am. Dec. 730, with notes.

Entries made on a slate by the foreman and at night transcribed in the book by the manufacturer are original entries, and competent. Sickles v. Mather, 20 Wendell, 72; s. c. 32 Am. Dec., 521.

Entries made on a slate, but not transferred until four or five days after the entry, are not admissible as original entries. Forsythe v. Norcross, 5 Watts, 432; s. c. 30 Am. Dec., 334; Pittsburg v. Locke, 66 Am. Dec., 711, and note; Greenleaf's Evidence, vol. 1, sections 117 and 118 and notes.

The judgment is reversed and the cause remanded, with directions to grant to appellant a new trial and for further proceedings consistent herewith.

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SUPERIOR COURT ABSTRACTS.

VICROY v. TOLLE.

Filed September 12, 1888. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Settlement of mutual accounts—Where one of two parties procures from the other a settlement of mutual accounts by holding out the idea that it embraces items which it does not in fact embrace, he is bound by the settlement as if those items had been embraced, and can not have the settlement disregarded and a new settlement made.

Whittaker & Robertson and E. W. Hines for appellant; Wall & Worthington for appellee.

WELLS v. BEST.

Filed September 12, 1888. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Principal and agent—B. authorized W. to buy, as his agent, a crop of tobacco owned by M., for which B. had offered M. a certain price. W. did not buy the tobacco answering that description, but bought another crop of tobacco owned by M., for which B. had refused to make an offer. *Held*—That W. can not look to B., his principal, for indemnity for the loss resulting from the mistake, however innocent it may have been on his part.

Cochran & Son, E. L. Worthington, G. W. Adair and T. C. Campbell for appellant; Whittaker & Robertson for appellee.

HOUSE, &c. v. GREATHOUSE, &c.

Filed September 12, 1888. Appeal from Hancock Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Right of infants to vacate judgment*—Infants have the right, at any time within the time prescribed in section 381 of the Civil Code, to apply to a court of equity to vacate any judgment or final order by which injustice has been done them without alleging any of the grounds for which new trials may be granted to adults. It is enough that they were infants when the judgment was rendered; that it is unjust according to the facts presented by them, and that they apply for relief within the prescribed time. And while a demurrer might have been sustained to the petition in this case as to one of the plaintiff's, who is a married woman, for the reason that it does not appear whether she was a married woman at the time of the judgment, or whether she was an adult at that time, or whether she had arrived at age within twelve months before the institution of this action, that fact did not authorize the dismissal of the petition as to the other plaintiffs, who showed their right to the relief asked.

2. *Continuance—Loss of deposition*—As the affidavit of the plaintiff's attorney showed that a deposition which had been lost from the papers without the fault of plaintiff's, sustained many of the material allegations of the petition, it was error to try, over the objection of plaintiffs, in the absence of that deposition.

W. P. D. Bush for appellants; G. W. Williams & Sons for appellees.

CONNER, &c. v. CONNER'S ASSIGNEE.

Filed September 12, 1888. Appeal from Hancock Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Final order*—In an action for a distribution of the estate of a debtor who has made an assignment for creditors an order striking out that part

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of the answer of the assignor and his wife, in which they set up claim to a certain amount of the personal property upon the ground that it is exempt from the assignor's debts, and not embraced by the deed of assignment, was not a final order. The court may yet, upon a final hearing, pass upon the right of appellant to that property.

2. *Assignments for creditors—Pleading*—Although the petition does not state the amount of the debts, or the amount of the personal assets in the hands of the assignee, as it should have done, it does state that the personalty and realty combined will pay only a small part of the indebtedness, and, therefore, it was not error to order a sale of the realty. The denial that "the personalty and realty will pay only a small part of the indebtedness" was not good.

3. *Same—Dower*—The court was not compelled to order the sale of the land as unincumbered by the wife's contingent right to dower upon the mere suggestion of the husband and wife in their joint answer that they desired that she should be allowed the value of her dower right in the proceeds arising from the sale of the land. Notwithstanding the answer, the wife might have refused to abide by the sale of her inchoate right of dower or to accept the value placed upon it.

E. S. Watts and W. S. Roberts for appellants; R. Z. Bush and Miller & Morrison for appellee.

Timberlake v. Trapp.

Filed September 12, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. *Pleading—Limitation*—Appellant seeks to recover of appellee the price of gravel and sand sold and delivered to him, and for which he had agreed and promised to pay her more than five years prior to the institution of the action. Evidently in anticipation of the plea of limitation, plaintiff alleged subsequent promises to pay made within five years. Defendant relied upon the Statute of limitation, and denied any subsequent promises. Plaintiff, after filing a reply, offered an amended petition, averring that "she is now in possession of the contract under which the sand and gravel mentioned in the petition were sold, which she files as part of the petition." *Held*—That as there is no allegation, either in the original or amended petition, that the contract was in writing, and it is nowhere averred that those who purport to be parties to the writing ever signed it, the court properly refused to allow the amended petition to be filed, and for the same reason there was no error in refusing to allow the writing to be read as evidence to the jury.

2. *Witnesses*—The defendant set up an agreement, made at the time of the sale of the gravel and sand, to the effect that the price should be credited on a demand which defendant and one H., who were partners, had against plaintiff. Upon this issue H. was allowed to testify as to consultations between him and plaintiff's agent, who was dead when the testimony was offered. *Held*—That as H. could not have been affected by the result, his testimony was competent.

Crawford & Irvine for appellant; John S. Ducker for appellee.

Hanning v. Taylor's Executors, &c.

Filed September 12, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. *Action on foreign judgment—Right to amend*—This was an action on an alleged judgment of a justice of the peace in Indiana. The whole case was tried by the court without a jury, its conclusion being that the Indiana record was not properly authenticated and could not be considered; but nevertheless it rendered judgment for the plaintiffs for the amount of the account on which the alleged judgment was based. As soon as the court indicated its opinion that the account was in issue the defendant asked leave to amend his answer and plead limitation, which was refused. The only reference to the account was a short participial reference in stating the grounds of the suit in which the judgment sued on was rendered. *Held*—

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That if the judgment was valid there could not have been any cause of action on the account; but even if there might have been none was stated. But assuming that the account was in issue, the defendant should have been allowed to amend his answer, as a case was certainly presented which excused the failure to plead the statute in the original answer.

2. *Appeals*—This being an ordinary action, and the lower court having refused relief on the judgment, this court can not go further than to act on the defendant's appeal.

G. W. Williams & Son for appellant; George W. Jolly for appellees.

WILLIAMS v. HAY & SWEENEY.

Filed September 12, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. *Construction of contract a question for court*—In this action to recover damages for the alleged failure of the defendant to feed and care for cattle, as provided in a written contract between the parties, the court should have construed the contract and not have left it to the jury to determine how the cattle ought to have been fed and cared for. They should have been told what the defendant should have done, leaving them to determine whether he had or had not done it.

2. *An instruction as to the measure of damages* which allowed the plaintiffs to recover all the value that would have been created by performance, when they would have received only half of it if there had been a performance, was erroneous.

G. W. Jolly for appellant; W. N. Sweeney & Son for appellees.

RUGGLE, RECEIVER v. MULLINS, &c.

Filed September 12, 1888. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Bowden, reversing.

Settlement with sheriff—Burden of proof—Evidence—A sheriff and his sureties executed to a receiver appointed by the county court their notes for the balance found due the county by the sheriff upon a settlement made with a committee appointed by the county court to make the settlement, it being agreed, however, that the sheriff should have the right to set-off against the note any credits to which he was entitled, and which had not been allowed him in the settlement. In making this settlement the committee considered a report made by a former receiver as to the state of the sheriff's accounts. In this action against the sheriff and his sureties on the notes executed by them. *Held*—

1st. As it is conceded that the settlement was not supposed to give the sheriff all the credits to which he was entitled, the burden was on the plaintiff to prove that credit had been given for sums admitted to have been properly paid.

2d. Upon an issue as to whether credit had been given for a particular item the report of the former receiver, which was made the basis of the settlement, was competent evidence, and without regard to its official character, or whether or not it was a settlement with the sheriff or merely the statement of the former receiver of his own accounts as receiver. His statements made in that report were before the committee, and it must be assumed that they were taken and acted on as correct in the absence of evidence that they were overlooked or rejected.

John H. Barker for appellant; L. T. Applegate for appellees.

HAYS v. WILLIAMS, &c.

Filed September 19, 1888. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. *Interest*—As a general rule interest is not recoverable on running or unliquidated accounts unless there is an agreement, either express or implied, to pay it.

In this action by a sheriff against his deputy's sureties to recover the amount of taxes which the deputy had collected and failed to pay over, and

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which the plaintiff had paid for the deputy to the auditor, the plaintiff is not entitled to interest, the parties having mutual and subsisting demands, the one against the other, and a settlement being necessary to determine the amount the one might owe the other.

2. *Sheriff and deputy—Liability of deputy and sureties*—The deputy collected taxes under a statute which, after the amount thus collected had been accounted for by him to his principal, was decided by the Court of Appeals to be unconstitutional. The lower court, upon the idea that the sheriff had no right to retain the amount which the deputy had thus collected without authority and paid over to him, credited the deputy's sureties with the amount, or, in effect, made the sheriff refund it to them. *Held*—That this was error. The deputy, in paying the amount of these taxes to his principal, was but repaying what the latter had paid out for him, the sheriff having accounted to the auditor therefor. It is no answer to say that the deputy could be made to return the money to those from whom he collected, for, if that be true, which is not necessary to decide, the sheriff, who had placed the tax books in his deputy's hands, was as much responsible for the deputy's acts as the deputy himself.

3. *Same—Burden of proof*—The sheriff having admitted that his deputy was entitled to certain credits, it devolved upon him to show that they had been allowed.

4. *Same—Estoppel*—The defendants, having received a certain credit in an action on another bond of their principal, are estopped to claim the same credit in this action upon the ground that it was pleaded in the other action by mistake.

5. *Same*—Under the agreement the deputy was under the same responsibility to the sheriff for the collection of taxes that the sheriff was to the State and county. And without determining whether the defendants could claim credit for insolvents, etc., other than such as the deputy reported to the court of claims under the statute, and for which he obtained credit, the defendant should have shown by the evidence that he could not by reasonable diligence have collected the taxes for which credit is now sought, on account of the alleged insolvency of the persons against whom the taxes were assessed. It is not sufficient to show the subsequent insolvency of the taxpayers.

J. P. Hobson and J. P. Helm for appellant; Montgomery & Poston for appellees.

ARNOLD v. GARTH.

Filed September 19, 1888. Appeal from Todd Circuit Court. Opinion of the court by Judge Barbour affirming.

1. *Pleading—Slander* Although the petition and amended petition in this action of slander set up several utterances of the slander, they state only one cause of action, as it is not alleged that the words were spoken at several distinct times.

2. *Same—Instruction not prejudicial*—The defendant admitted the speaking of the words, which charged theft, but claimed that the occasion of the speaking was conditionally privileged, in that they were spoken without malice to the mother and friends of the plaintiff in response to inquiries made by them, and in connection with a statement of the circumstances which led the defendant to believe that the plaintiff had taken her money. The court, on plaintiff's motion, instructed the jury that although the words were spoken under the circumstances set out in the answer, yet the burden was on the defendant to show they were not spoken maliciously. *Held*—That if it be conceded that this instruction was erroneous, it was not prejudicial, for the reason that the court, on defendant's motion, instructed the jury that the burden was on defendant to show that the words were spoken under the circumstances and with the motive mentioned in the answer; and further, that if they believed, from a preponderance of the evidence, that the words were spoken without malice, they should find for the defendant, this instruction embracing the same idea as that given on plaintiff's motion.

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3. *Same—Evidence*—It was competent to prove the speaking of other words than those admitted in the answer for the purpose of showing that the words admitted were spoken maliciously, the jury being instructed that they were competent only for that purpose, and, although the words thus spoken were spoken to one who was interested in having her child exonerated from suspicion, they can not be regarded as privileged communications.

4. *Same*—The court properly refused to allow the defendant to prove that the plaintiff was, several years prior to the alleged slander, subject to hallucinations, etc.

H. G. Petrie, Browder & Edwards and E. W. Hines for appellant; A. Duvall and Ben T. Perkins, jr., for appellee.

LEXINGTON CITY RAILWAY v. KAYSE.

Filed September 19, 1888. Appeal from Fayette Circuit Court. Opinion of the court by Judge Barbour, reversing.

Wilful neglect—Who may sue—An action, under section 3 of chapter 57 of General Statutes, to recover for the loss of life of a person, occasioned by the wilful neglect of another, can be maintained only by the widow or child of the deceased, or by his personal representative for their use and benefit. Therefore, as the petition by the father and mother in this case contained no allegations that would authorize them to recover for the loss of the services of their infant child, or for expenses incurred during his illness, a demurrer thereto should have been sustained.

Beck & Thornton for appellant; T. N. Allen for appellee.

K. C. R. R. Co. v. CLARK.

Filed September 19, 1888. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. *Railroads—Killing of stock*—To entitle one to recover of a railroad company the damages mentioned in section 6 of chapter 57 of the General Statutes, it is not necessary that he should allege that the company did not have its road inclosed, etc., as provided in section 9, but if he does so, it does not render his petition bad on general demurrer.

2. *Prejudicial errors*—Whether certain evidence was or was not competent is not necessary to determine, as the special findings upon other points upon which the evidence complained of could have had no influence are sufficient to sustain the judgment.

3. *Rebutting presumption of negligence*—To entitle the defendant to the benefit of the rule laid down in K. C. R. R. Co. v. Talbott, 78 Ky., 621, it must introduce as witnesses not only such persons as are in the employment of the company at the time of the trial, who may have known of the accident and its cause, but all persons who were in the employment of the company at the time of the accident, and who, from that employment, may have known of the accident and its cause, provided it is in its power to introduce them.

In this case the fact that some of the engineers and firemen on the trains that passed the point of the accident about the time it occurred were not in defendant's employment at the time of the trial, and were beyond the limits of the State, does not show that it was beyond the power of defendant to have procured their evidence.

4. *Appraisement of stock*—The plaintiff was not entitled to the 25 per cent. damages provided for in section 7 of chapter 57, General Statutes, both the notice for the appointment of appraisers and the order appointing them being defective. The notice was defective in that it did not state at what place the application for the appointment would be made, nor the hours within which it would be made, and did not state that the party giving the notice had any interest in the animal killed. The order of appointment was defective in that it required the appraisers forthwith to view and appraise, whereas it should have fixed a time for the appraisement which would have given the company an opportunity to be heard.

W. H. Wadsworth & Son for appellant; Sallee & Sallee for appellee.

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CATLETT v. BRUMLEY, &c.

Filed September 19, 1888. Appeal from Anderson Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Slander—Variance—In an action of slander the exact words charged need not be proved: it is sufficient if the words proved are substantially the same. And it is for the court to determine whether the words proved are substantially the words charged.

In this case the words charged were "Sarah Brumley (plaintiff) is a thief" The words proved were: "You (meaning plaintiff) are a roguish, thieving devil." *Held*—That the words are not substantially the same, as the words proved may mean only that the plaintiff has the dispositions, habits or inclinations of a thief, while the words charged impute the crime of larceny.

Ed. M. Wallace for appellant; P. B. Thompson and Geo. C. Cohen for appellees.

HEDGE'S EXECUTOR v. VALLANDINGHAM.

Filed September 19, 1888. Appeal from Grant Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. *Practice*—If the deposition of appellant, taken in another case, and read as an admission against him in this, was read during the absence of appellant or his attorney, that fact could only be made to appear by bill of exceptions, and there is nothing in the bill in this case to show that such was the fact.

2. *Same*—As the bill of exceptions shows that the court announced that certain evidence was incompetent and could not be considered, it may be assumed that it was not; or if it was considered, that its consideration was made known and not objected to, as there does not appear to have been any objection to the evidence when it was introduced.

3. *Same*—Where there is no separation of law and fact in an ordinary action tried by the court, nor any objection or exception to the rulings of the court on questions of law, the revisory power of this court is confined to the pleadings, the admission of evidence objected and excepted to, and the sufficiency of the evidence to support the judgment under the issue of fact. And in determining whether the evidence is sufficient to support the judgment the judgment must be treated as the verdict of a jury.

H. Clay White for appellant; Collins & Fenley for appellee.

BAKER, &c. v. FARMERS TOBACCO WAREHOUSE COMPANY.

Filed September 19, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Judge Bowden, reversing.

A guarantor or surety may stand on the very terms of his contract, and may insist that it shall not be varied in any particular; nor can the creditor accept an offer of suretyship on terms different from those proposed; an inquiry should not be made in such cases whether the variance is prejudicial.

Appellants executed and delivered to Hanks & Co. the following writing: "We agree to and with the Farmers Tobacco Warehouse Company that Hanks & Co. will well and faithfully carry out and fulfill their contract with said warehouse company, in the advance of supplies and money to farmers on growing crops; and that said Hanks & Co. will pay over and return to said warehouse all amounts so advanced on the present growing crops." Hanks & Co. thereafter made a contract with the warehouse company for the ensuing year, and delivered to them this writing, upon which the company sues appellants. The contract made by Hanks & Co. with the company was to the effect that the company would lend them what money they might desire to advance to farmers, they to first get the farmer's note, payable to the company, bearing interest at 8 per cent., they to give the company their receipt and obligation to pay each note the farmer did not pay. *Held*—That appellants are not liable. Appellants undertook, first, that H. & Co. would use money they got in making advances on tobacco; and, second, that they would repay all they received and properly advanced; but they did not undertake that they would pay whatever usury or whatever forfeit-

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ures the farmers might be committed to. Moreover, appellants proposed to assure the repayment of money lent to H. & Co., to whom the borrowers were to become debtors, whereas, under the contract actually made with H. & Co., the borrowers were not to be debtors to them, and they had no power to secure any of the debts that might become doubtful.

John Roberts, R. W. Masterson and T. J. McElrath for appellants; Gibson & Gibson for appellee.

SWITZER v. COHORN.

Filed September 19, 1888. Appeal from Franklin Circuit Court. Opinion of the court by Judge Bowden, affirming.

Pleading—Misjoinder—Election—The plaintiff's grievance was that the defendant had converted to his own use certain tobacco in which he had an interest. That interest was stated in the original petition as a mortgage lien securing the payment of $175. By an amended petition, filed without objection, the plaintiff claimed that he was the owner of the tobacco, and asked its alleged value, $340. A motion to strike the amended petition from the files was overruled. *Held*—

1st. Even conceding that there was a misjoinder of causes of action, the motion was properly overruled, as the court was thereby asked to elect for the plaintiff, which the plaintiff had the right to do for himself.

2d. The completed petition set out only one cause of action—the wrongful conversion of property in which the plaintiff had an interest—that interest being stated differently in the petition and amendment. There is no bill of exceptions, and it may be that at the trial only the last version was considered.

Ira Julian for appellant; O. D. McManama for appellee.

KENTUCKY CENTRAL R. R. CO. v. THEELKELD.

Filed September 19, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Bowden, reversing.

Railroads—Spark-arresters—Construction of statute—An act of the Legislature of January 30, 1874, made it the duty of all companies or persons operating cars by steam on any railroad track "to place on or around the top of the chimneys" of the locomotives "a screen, fender or damper, or such other preventive as will prevent, as far as possible, sparks of fire from escaping from such cars into fields," etc., and made every such company or person failing to provide such preventive liable for injury caused by escaping sparks. In this action, under that statute, to recover damages for the burning of grass, the evidence was that the locomotives from which the sparks escaped were provided with spark-arresters known as the Smith stack, and that this device was as efficient as any then known and in general use. It is not, however, placed literally "in or around the top of the chimney," but in the chimney and several feet from the top. The court instructed the jury, in effect, that the defendant was liable if the device used was not placed "on or around the top" of the chimney. *Held*—That the statute should not be so construed. It was intended to prevent the emission of sparks. It left the means whereby this might be best done to the genius of inventors and to the experience of practiced men.

Hallem & Myers for appellant; D. A. Glenn for appellee.

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KENTUCKY COURT OF APPEALS.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH, &c. v. MASONIC TEMPLE CO.

(Filed June 9, 1888.)

Immunity from taxation is a personal privilege which can be granted by the legislature only in consideration of public service to be rendered by the beneficiary, or to religious bodies, charitable institutions or schools. It is not an estate or interest running with the particular property exempted; nor can it be transferred by sale or succession without statutory authority, and to entitle a purchaser or successor to the benefit of it the intention of the legislature to continue the privilege must be clear and express, as relinquishment of the taxing power of a State is never to be presumed.

An act of the legislature exempting from taxation property belonging to "The Masonic Fraternity of Louisville," known as the "Masonic Temple," does not exempt the same property from taxation in the hands of the appellee, the "Masonic Temple Co.," although the latter corporation was organized under an act of the legislature providing for the reorganization of "The Masonic Fraternity of Louisville," and was empowered by that act to purchase the property and the "corporate rights" of that corporation, the act providing "when the corporation is organized and becomes the purchaser of the Masonic Temple it shall be the successor of the corporation, the 'Masonic Fraternity of Louisville.'" The "corporate rights" which the new corporation was empowered to purchase from the old do not include immunity from taxation; but, whether so or not, the new corporation, by the terms of the deed executed to it by the old corporation, acquired title to nothing except the property and the claims due to the old corporation. Moreover, neither by the act under which the appellee was organized, nor by the deed under which it acquired title to the property, is any obligation imposed upon appellee to establish and maintain a school for the education of poor and orphan children, which was the inducement and condition of the exemption originally granted to the Masonic Fraternity of Louisville as expressed in the act providing for the exemption.

Helm & Bruce for appellant.

Wm. Lindsay and Goodloe & Roberts for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

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The auditor's agent having, as provided by statute, filed in the Jefferson County Court information that appellee, "The Masonic Temple Co.," on the 10th day of January of each of the years 1862 to 1883, inclusive, owned property, taxable under the laws of the State, and failed to give in a list thereof, which consisted of a lot of land bounded by Jefferson, Fourth and Green streets, in the city of Louisville, and improvements thereon, and the county court, having found the information true, assessed the value at $85,000, and the aggregate taxes due at $8,593.50, and placed the same in the hands of the sheriff for collection, this action was brought to enjoin any levy on or sale of the property of the corporation to pay the taxes so assessed.

As appears from his opinion, made part of the record, the ground upon which the judgment of the chancellor was rendered perpetuating the injunction, and an affirmance of that judgment is contended for in argument, is that the lot in question has, by statute, been exempted from taxation.

By an act of the legislature, approved February 27, 1849, certain persons therein named, on behalf of the officers and members of their respective masonic institutions in the city of Louisville, and such others as might thereafter be created and apply for participation in the benefits of the act, were created a corporation under the name of "The Masonic Fraternity of the City of Louisville."

The corporation was empowered to own and dispose of, at pleasure, real and personal property not exceeding $250,000 in value, and its business was to be placed under the control of one member of each of the institutions composing it, to be styled "The Masonic Board of Finance."

It seems that some time after its organization the corporation purchased the lot of land described, and commenced the erection of a Masonic Temple or hall upon it, which was not, however, completed when an amendment was passed January 9, 1854. By that act it was provided that, for the purpose of benevolence and charity and the completion of their temple, "The Masonic Fraternity of Louisville" might issue bonds and purchase ground upon which to erect an asylum for indigent masons, their wives and orphans. It was also provided that those who had or should take stock in the Masonic Temple might constitute a savings institution with corporate powers and privileges, but that dividends upon the stock therein, in excess of 10 per cent. should be given in aid of the buildings and charities contemplated by the act.

Further provision was made for organizing the Masonic Savings Institution by an act passed March 9, 1854, in which the excess of dividends were required to be paid to the stockholders in the Masonic Temple.

The act under which the exemption from taxation is claimed is entitled "An act for the benefit of the Masonic Fraternity of Louisville," was approved March 10, 1856, and is as follows: "That the lot of ground * * * with the improvements thereon belonging to the Masonic Fraternity of Louisville be * * * exempt form taxation for State, county and municipal purposes: Provided, however, That this exemption is made with a view to enable said fraternity, as soon as a sufficient fund shall have been accumulated, to establish and maintain a school for the education of poor and orphan children at the expense of said fraternity, and the legislature reserves the power to repeal or amend this act." Appellee did not then exist, but was organized as a corporation under an act approved February 2, 1860, the first section of which is as follows: "That it shall be lawful to reorganize

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the corporation of the Masonic Fraternity of Louisville as herein provided in order to raise the necessary funds to pay the debts not secured by mortgage or deed of trust, and punctual payment of interest on its debts." Certain persons named in the act were appointed commissioners to open books of subscription and raise stock, and a list of subscribers of stock having, as provided, been filed in the county court, they then became a corporation under the style mentioned. And, March 31, 1860, a tripartite deed was executed between "The Masonic Fraternity of Louisville" of the first, Isaac Cromie, trustee, of the second, and "The Masonic Temple Co." of the third part. By the terms of that deed the absolute title to the lot in question, together with all claims owing to "The Masonic Fraternity of Louisville," was conveyed to the Masonic Temple Co. for the recited consideration of $1 paid and the covenant of the latter company to pay the debts incurred in erecting the temple, to save Cromie harmless from personal liability by reason of the deed of trust made to, and accepted by, him for the benefit of the creditors of the first-named company, and to release the masonic institutions before mentioned from payment of their resources and revenues as required by regulations between them and the board of finance. It is not necessary to decide the question of the validity of the act of March 10, 1856, exempting from taxation the lot upon which the Masonic Temple was erected. But we will simply inquire whether that exemption has inured to appellee, claiming to be the successor and entitled to the franchise of the former corporation.

Sections 8 and 16 of the act of 1860 are principally relied on in support of appellee's claim to the exemption of the property from taxation.

Section 8 provides that "the president and directors shall have the power and authority to purchase the Masonic Temple and the corporate rights of the existing corporation, subject to the mortgages on the same, or rent out the rooms in said temple and any of its franchises, and apply the rents and profits to the payment of interest on the mortgage debts and on the principal stock until the mortgage debts shall be discharged, and the rents and profits shall be sufficient not only to pay the preferred stockholders not exceeding 10 per cent. per annum interest, and all the stockholders the same dividend, after which there shall be no preferred stock."

Section 16 is as follows: "That, when this corporation is organized and becomes the purchaser of the Masonic Temple, it shall be the successor of the corporation, the Masonic Fraternity of Louisville."

Immunity from taxation is, from its nature, a personal privilege, which can be granted by the legislature only in consideration of public service to be rendered by the beneficiary, or to religious bodies, charitable institutions or schools. It is not an estate or interest running with the particular property exempted, nor can it be transferred by sale or succession without statutory authority; and, to entitle a purchaser or successor to the benefit of it, the intention of the legislature to continue the privilege must be clear and express, for relinquishment of the taxing power of a State is never to be presumed. Such has been the ruling of the Supreme Court of the United States and of this court; and any other would be against public policy and common justice, as well as subversive of the sovereign authority of the State. (Morgan v. Louisiana, 93 U. S., 221; Wilson v. Gaines, 103 U. S., 417; L. & N. R. R. Co. v. Palmer, 109 U. S., 224; Bradley v. McAtee, 7 Bush, 667; E. & H. R. R. Co. v. Commonwealth, 9 Bush, 439.)

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It, therefore, follows that the corporate rights which appellee was, by section 8, empowered to purchase from the Masonic Fraternity of Louisville must be regarded such rights or privileges merely as were essential to the existence of that corporation or accomplishment of the object of its creation, and not as including immunity from taxation, which is a privilege the legislature may grant to one company and not intend, nor have the power, to grant to another. It, however, makes no difference what meaning may be given to the words, for, by the terms of the deed, appellee acquired title to the property and to nothing else except the claims mentioned. Nor do we think the exceptional privilege claimed by appellee can be justified by section 16 without giving to the word "successor" therein used a meaning forbidden by the rule of construction just mentioned. It is a fair and legitimate inference that the legislature intended to give to appellee, as a corporation, the right and privilege to purchase, own and control the Masonic Temple building, but the intention to exempt it from taxation, after being thus acquired, is not expressed, nor can be reasonably inferred from the language used. On the contrary, looking at the provisions of the act of 1860 alone, without reference to the subsequent conduct of appellee, it is evident the purpose of those who procured the passage of it, and the organization under it, was the purchase of the property as an investment for their own benefit. And obviously, in order to make it as profitable to themselves as possible, by getting the property at less than its actual cost without regard to the interest of the institutions composing the Masonic Fraternity of Louisville, it was provided in the act that stockholders in that company could become such in the one about to be formed only by surrendering two shares for one and paying $10 besides, and that all the shares in the old might be purchased up by stockholders in the new company.

Power was conferred to pay off the debts incurred in erecting the building by issuing and disposing of preferred stock by sale or exchange, and all was made personal estate and assignable.

Power was also given to organize the Savings Institution provided for in the acts of 1854, or to rent the right to organize the same to others. And finally, so much of the charter of the Masonic Fraternity of Louisville, and the amendments thereto, as conflicted, were repealed.

We perceive nothing in the charter of appellee distinguishing it from those ordinarily granted to corporations organized for purely business purposes.

It is true there is a provision that the Grand Lodge of Kentucky may become a stockholder, and another that at least one-half the directors shall be affiliated Masons. But neither, it seems to us, constitutes a reason for the exemption claimed.

There is, neither by the act of 1860 nor by the deed under which it acquired title to the property, any obligation imposed upon appellee to establish and maintain a school for the education of poor and orphan children, which was the inducement and condition of the exemption granted by the act of 1856, but it is, and has been from the beginning, free to appropriate the surplus rents and profits to the sole use of its stockholders.

It exacts rents from the Masonic bodies that occupy rooms in the building, a portion of which is used as a theatre and other portions for stores.

And although, during the twenty eight years that have elapsed since it was organized and became the owner of the property, large profits have accrued and been divided among the stockholders, no step has been taken nor

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intention shown to comply with the condition upon which the privilege was granted to the former company, that it now claims the benefit of. In our opinion appellee occupies, in this case, the same position that would any other corporation having money invested in real property for the exclusive use and benefit of its stockholders.

The judgment is reversed and cause remanded, with directions to dissolve the injunction and dismiss the petition.

POWELL v. COMMONWEALTH.

(Filed September 20, 1888—Not to be reported.)

Criminal law—Forgery—An indictment against appellant for forgery alleges that the offense was committed by the accused in signing the name of H. across the back of a check purporting to have been drawn by M. in favor of H.: that said signing was without the authority of H., and for the purpose of defrauding him. The only evidence that any such man as H. ever existed is that found in the testimony of the accused, who says the check was given him in payment of money due him by H. There is testimony tending to show that the name of M. was a forgery, but the indictment charges that it was the name of H. that was signed without authority. Held—That there is an entire absence of proof to sustain the charge in the indictment, and that the judgment of conviction must be reversed.

W. T. Ellis and E. W. Hines for appellant.

P. W. Hardin for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

The appellant was indicted for forgery in the Daviess Circuit Court and convicted. The offense, as is alleged, was committed by the accused in signing the name of one John Hildebrand across the back of a check purporting to have been drawn by one T. J. Monarch, in favor of John Hildebrand, on the Citizens' Bank of Owensboro, without the authority of Hildebrand, and for the purpose of defrauding, etc. There must be some mistake in the bill of evidence as to the name of the party whose signature had been forged by the accused. We find no evidence that any such man as John Hildebrand ever existed but that found in the testimony of the accused.

It is not shown that the signature of Hildebrand is not genuine, and in fact no one ever saw Hildebrand (and of course could not know his handwriting) but the appellant, who swears that the check was given him in payment of money due him by Hildebrand and won at a game of cards. There is some proof conducing to show that the name of Monarch was a forgery, but the indictment charges that it was Hildebrand's name that was written across the check without authority.

There is an entire absence of proof to sustain the charge contained in the indictment, and the judgment of conviction must, therefore, be reversed, and is now remanded, with directions to grant a new trial, and for proceedings consistent with this opinion.

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CHITTENDEN v. COMMONWEALTH.

(Filed September 20, 1888—Not to be reported.)

1. Criminal law—Evidence—Appellant was indicted jointly with F., his father-in-law, for murder, it being alleged that F. fired the fatal shot, and that appellant was present, aiding by his presence and by throwing a stone and striking him with a hoe. F., having, prior to the trial of appellant, been convicted of manslaughter and then pardoned, was a witness for appellant, and having stated, upon cross-examination, over appellant's objection, the fact of his conviction upon an investigation of the same transaction, appellant offered to show that neither he nor F. was introduced as a witness on that trial, which the court refused to allow him to do. Held—That the evidence was competent as tending to show that there was not, upon the trial of F., as full an investigation of the transaction.

2. Dying declarations—While the proper course is to permit one making a dying declaration to state fully and freely all he desires, leaving it to the trial court to reject such portions of the statement as may not be competent testimony, yet as the dying man in this case was prevented merely from detailing the circumstances of a previous difficulty, which would have been excluded as testimony, it was proper to admit what he did state as his dying declaration.

3. Same—A dying declaration is admissible as evidence, as well for the accused as for the prosecution. It was, therefore, error in this case to exclude a part of the statement of the deceased to the effect that not long before the killing he left the place of the killing and went to a neighboring farm and "got a hoe and a briar hook and came on back," as it furnished ground for argument, in the light of other testimony, that he returned for the purpose of a difficulty.

4. Aiders and abettors—An instruction making the conviction of appellant turn upon the sole ground whether F. intentionally brought on the difficulty with the intention of shooting the deceased, was erroneous, as was also an instruction authorizing a conviction upon the ground that the mere presence of the appellant at the difficulty was such aid to F. as to render the appellant guilty.

5. Homicide—Defense of another—Appellant, under the evidence, was entitled to an instruction authorizing an acquittal in the event the jury should find that he acted in good faith in the necessary, or apparently necessary, defense of F., his father in-law, and that F. would have been excusable in doing the same thing for himself. While one may kill in defense of another, he can not do so unless the person in whose defense he acts could have lawfully done the same thing for himself.

John K. Hendrick and J. W. Bush for appellant.

P. W. Hardin for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Holt.

The appellant, J. J. Chittenden, was jointly indicted as a principal with his father-in law, Jerry Ferrell, for the killing of Matthew B. Rogers. The indictment states what part each took in the killing in this language:

"That the said gun at the time of said killing was in the hands of, and fired by, Jerry Ferrell, the said John Chittenden being present and aiding in said killing by his presence and by throwing a stone at him, the said Matthew B. Rogers, and by striking him with a hoe and briar hook or scythe."

Prior to the trial of the appellant Ferrell was convicted of manslaughter,

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sent to the penitentiary for ten years, and then pardoned. The appellant now, upon various grounds, asks the reversal of a conviction for manslaughter under which he has been sentenced to the penitentiary for two years.

As the case must, for several reasons, go back for another trial, we shall refrain from an extended discussion of what appears to be the facts connected with the killing.

Jerry Ferrell was a witness for the appellant; and after having stated, upon inquiry from the prosecution and over the objection of the appellant, that he had, upon an investigation of the same transaction, been convicted to the penitentiary for ten years, the appellant was denied the right of showing by him that upon his trial neither he nor the appellant were introduced as witnesses. This was error. It was competent to prove this fact, the jury of course to judge of its worth, as tending to show that there was not then as full an investigation of the transaction, and the appellant was entitled to the benefit of it.

A writing purporting to be the dying declaration of the deceased was offered in evidence. The court properly had the jury withdrawn, and in their absence heard testimony as to the competency of the paper. It clearly appeared that the statement was made by the deceased when in extremis, and that upon this score there could be no valid objection to it as evidence. It was, however, shown that when he began to make the statement he commenced speaking of a former difficulty between him and the accused, but which had occurred upon the same day. The person who was taking down the statement thereupon stopped him, and told him not to speak of any former difficulty, but to confine himself to the one in which he was shot, and he thereupon did so, and gave his version of it. After doing so it was read over to him, and he pronounced it correct.

It is now urged that he was prevented from stating all that he desired to, and that, therefore, the writing should be rejected in toto as evidence.

Undoubtedly the proper course is to permit one making such a declaration to state fully and freely all he desires. It is usually heard by those who are at least friendly to the deceased, and if reduced to writing it is apt to be done by one partial to the dying man.

There is no cross-examination; and injustice would often be done if the declarant were not allowed to state in his own way, and fully, all that he desires, leaving it to the trial court to reject such portions of the statement as may not be competent testimony. The draftsman of it should not be allowed to decide what is and what is not competent.

In this instance, however, the dying man was about to detail the circumstances of a previous difficulty. This clearly would have been incompetent as evidence. The rule is well settled, and safety to the meting out of justice requires that it should remain so; that a statement relating to former or distinct transactions is inadmissible. The declaration must be confined to the circumstances of the death.

Therefore, it has been held that the dying declaration of a party that the accused had previously attempted to kill him is not admissible. (Wharton's Crim. Law, sections 670-675.)

Here the injured man was prevented from stating merely what would have been excluded as testimony upon the trial.

Moreover, the accused obtained the benefit of the previous difficulty because it was fully detailed by witnesses, whose statements as to it were un-

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contradicted. The statements contained in the written paper were fully proven by witnesses to have been those made by the accused, and it was proper, therefore, to permit it to be read in evidence. The court, however, improperly rejected this portion of it over the objection of the accused: "I went up to Mr. William Farley's to commence cutting out fence corners, and got a hoe and a briar hook and came on back."

A dying declaration is admissible as evidence as well for the accused as the prosecution. The portion of the statement excluded—showing, as it did, the purpose for which Rogers, not long before the killing, had gone to Farley's, and that he then returned to the place of killing—would, in our opinion, have furnished, to some extent, how far we will not pretend to say, ground for arguing that he had returned for the purpose of a difficulty.

Some of the instructions are also objectionable. The fifth one improperly made the conviction of the appellant turn upon the sole ground whether Ferrell intentionally brought on the difficulty with the intention of shooting Rogers, while the eighth one improperly authorized a conviction upon the ground that the mere presence of the appellant at the difficulty was such aid to Ferrell as to render the appellant guilty. He was the son-in-law of Ferrell. If there was no confederation between them to attack or injure Rogers, and the meeting with him was accidental, and the appellant had reasonable grounds to believe, and did believe, that Rogers was then and there, and not in his necessary self-defense, about to kill Ferrell or inflict on him great bodily harm, and further believed, and had apparent reason to believe, that it was necessary to do what he did do to prevent such injury, and was actuated by no other motive, and used no greater force than was apparently necessary to avert such impending danger, then he is excusable. Of course he would have no right to do so unless Ferrell would have been excusable in doing the same thing for himself. Another would have no right to do for him what, under existing circumstances, he could not lawfully do for himself. (Stanley, &c v. Commonwealth, 9 Ky. Law Rep., 655.)

The evidence upon the former trial authorized an instruction embodying this view, and, for the errors indicated, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

ROSENBERRY & NATHAN v. THOMPSON, &c.

(Filed May 5, 1888—Not to be reported.)

1. Fraudulent mortgage—As both the mortgagor and mortgagee in a mortgage, which is attacked by creditors for fraud, testify that the money was loaned, and there is an entire absence of testimony showing a want of consideration for the mortgaged note, the mortgage must be held valid.

2. Replenishment of mortgaged stock of goods—Where the mortgaged property consists of a stock of goods, and the mortgagee permits the sale of the goods and the replenishment of the stock, the burden is on him to show the goods embraced by the mortgage lien.

As it appears in this case that the mortgaged stock of goods was replenished from time to time after the execution of the mortgage, it was wrong for the mortgagee's assignee for the benefit of creditors to pay over to the mortgagee the proceeds of the entire stock of goods. There should be an inquiry as to what part of the proceeds was realized from the sale of goods purchased subsequent to the mortgage, and that sum appropriated to the payment of creditors generally.

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Arthur Cary, H. L. Stone, H. Marshall and Laf Joseph for appellants.

W. H. Holt and Jas. Harlan for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Pryor.

It plainly appears from the evidence that Thompson, the assignee of Dinkinspiel, has acted in the best of faith with reference to the assigned estate, and equally clear that Oppenheimer loaned the money which the mortgage was given to secure. The relation of the parties towards each other might be a circumstance, in connection with other facts, to establish fraud, but here there is an absence of any testimony showing a want of consideration for the note, but, on the contrary, the uncontradicted statement of both the mortgagor and mortgagee that the money was loaned; and, therefore, the note being unpaid, the mortgage must be held valid as against creditors.

The error in this case consists in the payment, by the assignee, of the entire amount realized from the sale of the goods to the mortgage creditor. It is evident that many of the goods sold were purchased by the mortgagee after the mortgage was executed, and, as these goods were not embraced by the mortgage, the mortgagee could not have appropriated them to his own use; and if not, the assignee is in the wrong when he attempted to divest the money in that way. That the stock of goods was replenished from time to time, and money expended by the mortgagor for that purpose, after the date of the mortgage, is conceded, and, therefore, the payment of the whole amount realized to Oppenheimer was improper. If the goods have been so mingled as to prevent the ascertainment of those on hand when the mortgage was given the mortgagee, permitting the sale of the property mortgaged and the replenishing of the stock by the debtor, must suffer the loss, if any; in other words, the burden is on him, under such a state of case, to show the goods embraced by the mortgage lien.

There is enough in this case, however, to show that many of the goods were sold by the assignee that were in the store when the lien was created, and certainly not more than one-third of the proceeds should be held as from goods not embraced by its terms. This case must be reversed, with directions to ascertain what amount was included in the note from the sale of goods that were purchased subsequent to the mortgage, and to appropriate that sum to the payment of the creditors generally; and, if no other proof is taken, at least one-third of the amount of the note should go in that way.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

Judge Holt not sitting.

STROHMIER v. LEAHY, &c.

(Filed September 15, 1888—Not to be reported.)

Right to use of alley—O. became the owner of two houses built by another upon adjoining lots. There was an alley or private passway between the houses for the use and convenience of both houses, which was jointly used up to the institution of this action. Above the alley, on the second floor—that covered the alley—there were two small closets, the one belonging to

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one house and the other to the other house. In 1868 O. conveyed to the appellee one of the lots, known as the northern lot, the conveyance expressly providing that it was "to include the alley." O., as the owner of the lot known as the southern lot, continued to use the alley until his death, in 1877, after which appellant became the purchaser of the southern lot. Appellant tore down the house on her lot for the purpose of building a larger house, and in erecting the new house claimed the right to place the joists in the wall of appellee's building; whereupon appellee instituted this action, seeking to enjoin her from doing so, denying appellant's right to the use of the alley or the space above it. Appellant insists that she has the right to use the alley and the space above by reason of her title and the long-continued use by both parties, and also insists that O. was not in fact the owner of the lot conveyed to L., but held it for the husband of L., to defraud creditors. Held—That as O. was the owner and possessor of both lots prior to his conveyance, the easement was extinguished; but if not, when he conveyed absolutely to another what is now claimed to be an easement that he had in his own estate, he divested himself of all title, and there is no reason to suppose that his right to use the alley was to continue longer than his grantee desired that he should use it. Nor will either O. or his vendees be heard to say that O. held the land for a secret purpose, so as to defeat the title of his grantee.

Patrick Joyes for appellant.

Brown, Humphrey & Davie for appellees.

Appeal from Louisville Law and Equity Court.

Opinon of the court by Judge Pryor.

In the year 1821 John Miller, owning two lots adjoining, in the city of Louisville, erected a building on each and occupied, by himself or tenants, for many years. Miller sold both lots and the title passed to different purchasers, who held them down to 1864 or 1865. At that time one James O'Brien purchased both lots, one from Leahy and the one known as the southern tenement from Curry.

In the year 1868 he conveyed what is designated in this case, and by the conveyances previously made, the northern lot, to the appellee, Mrs. Leahy, the wife of the grantee, Leahy, of whom O'Brien purchased. O'Brien was in the possession of, and owned, what is called the southern lot when he conveyed the northern lot to Mrs. Leahy.

When the buildings were erected on these lots by Miller there was an alley or private passway left between them, about three feet nine inches wide, extending back a depth of thirty feet. This alley was for the use and convenience of both houses, and, as is manifest from the facts, belonged equally to both lots, and was jointly owned up to the institution of this action. Above the alley, on the second floor that covered the alley, there were two small rooms or closets, one room used by the occupants of the one, and one by the occupants of the other, and a partition between the two, so as there was no ingress from the one to the other, with a door leading from the northern building into the closet belonging to that building, and a like door from the southern building to its closet.

This peculiar structure of the building, giving to each building the one-half of the space above the alley, is quite conclusive that the alley was intended to be the common property of these lot owners. O'Brien, the owner of the southern lot, died in the year 1877, and his property, or that lot, having been sold by the chancellor, the present appellant became, and is now, the owner.

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The appellant tore down the building on her lot with a view of rebuilding a house of larger dimensions. When she commenced this new building the workmen began to lay the joists across the alley on the second story and into the wall of Mrs. Leahy's building, insisting that she had the right to occupy the space above the alley by reason of her title, and from the long and continued use of the alley below and the space above, by both parties, as already stated. This act of the appellant, in claiming the right to place the joists of her building in the wall of appellee's building, and to occupy a space above the alley, resulted in an injunction by the appellee that was sustained by the chancellor below. We would have but little difficulty in determining that this alley, and the space above, was the common property of the owners of the two lots but for the conveyance by O'Brien, in 1868, to Mrs. Leahy. If each lot owner, prior to that time, held this space of ground in common, or either was entitled to it as an easement, the conveyance to Mrs. Leahy, the appellee, by O'Brien in 1868, who then owned both lots, divested him of title and destroyed the easement, if any existed, giving to Mrs. Leahy the right to deny the use of the alley to O'Brien when she saw proper.

The facts clearly show that O'Brien, when he made the conveyance in 1868, was entitled to the use of the alley and his portion of the space above, and as he must have been apprised of his rights, for he had been using the property and the passway for years, there must have been some reason for his conveying to Mrs. Leahy the whole of the alley, and making the one-half of the northern wall of his southern home the boundary between the two lots. If nothing had been said in O'Brien's conveyance about the alley its constant use by O'Brien and the owners of both lots, even after his conveyance to the appellee, might afford evidence of the purpose to leave the alley as an easement to both buildings; but when the grantor, O'Brien, has made an unconditional grant of the alley, there can be but little room for supposing that the right to use it was to continue longer than his grantee desired he should use it. The conveyance from O'Brien to the appellee, in defining the boundary of the lot conveyed to the appellee, proceeds, "thence south at right angles twenty-two feet six inches, more or less, so as to include the alley and one-half of the north wall of the southern tenement," etc.

The grantor could not have intended to make the wall of the building he was conveying to the appellee the boundary, for he conveys to her the entire alley, leaving no room for dispute as to the boundary between the two lots. It is argued, however, that O'Brien was not in fact the owner of the lot conveyed to the wife of Leahy, and that he held it for Leahy, the husband, to defraud creditors, or for some secret purpose. The manner of the holding is immaterial. O'Brien was invested with title, and passed it to the appellee, and neither O'Brien nor his vendees will be heard to say that he held it for the purposes claimed, so as to defeat the grant made to Mrs. Leahy. Nor will the one by O'Brien, or those claiming under him after the grant, by the consent of Mrs. Leahy, confer upon them the right of use that is irrevocable, or authorize the construction by the appellant of her new building on the alley or the space above it. The attempt to prove consent will not confer title, when it is plain that the appellee was denying the right of appellant to appropriate her property to the use of the former from the time the joists were attempted to be placed in appellee's wall.

O'Brien was the owner, prior to his conveyance, of both lots, and being the owner and possessor, this extinguished the easement. But if not, when he

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conveys absolutely to another what is now claimed to be an easement that he had in his own estate, he divested himself of all title. The purchaser from him acquired no greater rights than O'Brien had. No new easement was created at any time after the grant. It was the duty of O'Brien to have reserved his right in the grant to the appellee, and this he failed to do. The case of Mitchell v. Seipel, 53 Maryland, 251, a well-considered case, sustains this view of the question. (Warren v. Blake, 54 Maine, 276; Carbrey v. Willis, 7 Allen, Mass., 364.) We have given but little attention to the boundary of these lots prior to the deed made by O'Brien, because the absolute conveyance of the alley, it seems to us, must determine this case for the appellee.

Judgment affirmed.

ALLEN, &c. v. KENNEDY, &c.

(Filed June 16, 1888—Not to be reported.)

1. Executors—Liability of sureties—Where an executor is directed by the will to pay a special legacy, the sureties in his bond are liable to make good his default; but where he is directed by the will to sell all the estate of the testator, and out of the proceeds pay first the testator's debts and then certain specified legacies as the several legatees shall arrive at age, the money to be loaned out until then, the dates fixed for the payment of the several legacies being from ten to twenty years in the future, the executor as to the sums loaned becomes a trustee, and the sureties in his bond as executor are no longer liable.

2. Same—Estoppel—The effort of sureties in an executor's bond to prevent him from wasting the assets did not enlarge their liability or estop them from making the question as to their liability when sought to be made responsible.

3. Same—Res judicata—The sureties in an executor's bond brought suit, attacking a transfer by the executor to his individual creditor of a note belonging to the estate, alleging their liability on his bond. Special legatees under the will filed a cross petition, seeking to make the sureties liable on the bond, and judgment was rendered against the sureties as prayed. Upon appeal the judgment was affirmed, the court holding that it was too late for the sureties to claim that the default for which they were sought to be made liable was a default as trustee and not as executor, they having, by their petition, admitted their liability. A rehearing was afterwards granted, and the judgment reversed upon the ground that no breach of the bond had been alleged in the cross petition. Held—That upon the return of the case to the lower court the sureties had the right to raise the question as to their liability, no issue having been made on the former hearing.

Stuart & Atchison and Sweeney & Son for appellants.

Williams & Powers for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Pryor.

The will of N. B. Allen was admitted to probate in the year 1867. James Weir, of Texas, was appointed his executor, who executed a bond, with W. L. Courtney and S. D. Kennedy as his sureties. As executor Weir collected the claims due the testator, paid all of his debts, sold the land on long credits, taking the notes payable to himself as executor, and within two years after the qualification had fully administered the estate. By the pro-

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visions of the testator's will he made special devises to his nieces and nephews, who were at the time infants, to be paid them on their arrival at the age of twenty-one, and the money to be loaed out until that period. He makes Weir, "his worthy father-in-law," executor, and directs him also to pay to his mother, during her natural life, an annuity of $100, payable out of the portion devised to his executor, Weir, to whom is given the entire residue of testator's estate.

The executor, being a resident of Texas, returned to that State after administering the estate of the testator, and having pledged some of the notes due him as executor to the Planters' Bank to secure his individual indebtedness, the sureties, believing they were liable for the payment of the special legacies to testator's nieces and nephews, filed this petition in equity, alleging their liability and assailing the transfer to the bank of the notes payable to the executor from the sales of the estate of the testator. The appellants, the nieces and nephews, filed answers and cross petitions, seeking to make the sureties liable on the bond of the executor for the special devises made to them. On the hearing below the sureties were made liable, and on an appeal to this court the judgment was affirmed, but a rehearing afterwards granted, and the judgment reversed. The opinion affirming the judgment said, in express terms, it was too late to make the question here; that the holding by Weir was as trustee and not as executor, as their liability was admitted, and on that ground they were seeking the aid of a court of equity. No issue of that character was made by the pleadings but the plain averment that these sureties were liable on the executor's bond. The rehearing was granted after affirming the judgment, on the ground that no breach of the bond or covenant had been alleged in the cross petition. In the opinion reversing the case this court said: "The question as to whether the assets of the estate were held at the time of the bringing of the suit can not be determined in the present condition of the pleadings, as no issue as to liability of any kind is presented." On the return of the case the legatees filed answers and cross petitions, presenting a cause of action, and the sureties presented the defense that Weir held this fund for the legatees as trustee, and not as executor, and, therefore, no liability existed on their part by reason of the bond of the executor. This issue was tried and decided for the sureties, and the legatees have appealed.

It is insisted by their counsel that the opinion affirming the original judgment, as well as the admission of their liability by the sureties in the original pleading, has concluded the sureties from making any such defense. It is sufficient to say that the legatees had no cause of action against these sureties in the original proceeding, and, therefore, when they attempted, on the return of the case, to assert their claim in a proper manner, the sureties had the right to make or present any defense they had to the recovery. It was the first and only time they had been called on to respond to the claim of the appellants, and the opinion reversing the case intimated plainly the reason why the question was not disposed of on the first hearing. If the cross petition of Crawley and wife had presented a cause of action, then, with no question raised as to the liability of the sureties, but with the admission that they were liable, the judgment below would have been affirmed. The effort of the sureties to prevent a wasting of the assets by the trustee, or the executor, did not enlarge their liability or estop them from making the question when sought to be held responsible.

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They doubtless thought they were liable, and proceeded against the bank on that idea, but there is no principle to the law of estoppel that would preclude them from making a defense, if meritorious, when sued by the legatees, unless their action had worked an injury in some way to the appellants. Instead of injuring the appellants they have stopped the bank from appropriating the funds of the estate to the payment of Weir's own debts. So the practical question in this case is, how did Weir hold these funds, as executor or trustee? He had paid the debts and all the special legacies required to be paid within a certain period; that is, within two years from his qualification. He had converted the estate into cash, or sold it, taking notes payable to himself as executor. He was not required to pay this money over to the legatees, but required to loan it out until they arrived at twenty-one years of age, and to pay to his mother out of the fund passing to him, as the residuary legatee, $100 per annum. The testator had implicit confidence in the father-in-law he was, at the time, making his executor; speaks of him as a worthy man, and intrusts him with the duty of loaning out and managing this fund, out of which the legacies are to be paid until the legatees arrive at age. The will was probated in the Daviess County Court, in the year 1867. The first legacy was not due until June, 1878; the second March, 1880; the third April, 1880; the fourth January, 1883; the fifth June, 1885, and the sixth February, 1887. These legacies were payable from ten to nineteen years after the probate of the will of the residuary legatee of the entire estate. The money coming to his hands was a fund, first, to pay debts and certain legacies that were due and payable at once or in a short period, and the balance was to be held by him and loaned out for the benefit of these appellants, and what was left belonged absolutely to Weir, save the charge made upon it for the benefit of his mother.

The sureties had no power over this fund. Everything had been paid that should have been paid, and the balance left in the hands of Weir, to be loaned out by him for these appellants. He confided in Weir, his father-in-law, and required him to keep this fund at interest until the children arrived at age. The loaning out of this money, and holding it from ten to twenty years, was no part of the executor's duty as such. He became trustee for these appellants, and as such can be held responsible. (Neely v. Merritt, 9 Bush, 346.)

In Warfield v. Brand's Adm'r, 13 Bush, 98, this court, in speaking of the powers and duties of executors, said: "And we think we ought, in furtherance of that inteniton, to treat all those powers and duties conferred and imposed by the will, the faithful performance of which are secured by the executorial bond, and which appertain to the settlement of the estate, and the ascertainment of the net amount and its distribution, according to the usual course of administration, among those entitled to it, as legal executorial powers and duties, and all others as trusts." There is no doubt but, under a devise by which the executor is directed to pay a particular sum of money to the devisee, or a special legacy, that the sureties on the bond are liable to make good the default of the executor; but when a devise is made by which the executor is to sell all the estate of the testator, pay first his debts, and then pay certain specified legacies, and to loan out a part of the proceeds of sale for ten or twenty years for certain other purposes, that he then, as to that sum, becomes a trustee, and his office as executor ceases, and particularly when he is invested with the absolute title, first, as executor or trustee, and then as the residuary devisee.

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In Lasley's Ex'or v. Lasley, 1 Duvall, 117, the testator bequeathed to his grandson "$500 for the purpose of educating said grandchild, and to be paid out and furnished in such a way, and at such time, as my executor may deem proper." It was held that the executors should be presumed to hold as trustee after two years from the date of qualification.

In this case Weir, as executor, trustee and devisee, held and owned the whole estate, a part of the proceeds of which was to be loaned out for the period of from ten to nineteen years for the payment of certain legacies. This made Weir trustee as to the loan, and his sureties are not liable for this money.

Judgment affirmed.

LAWRENCE v. COMMONWEALTH.

(Filed September 13, 1888—Not to be reported.)

Criminal law—Prejudicial errors—As the appellant's own testimony, upon his trial for willfully and maliciously shooting and wounding his wife, showed that the shooting was premeditated, he was not prejudiced by the refusal of the court to grant a continuance to enable him to prove vague and indefinite threats upon the part of his wife against him. Nor would the testimony of the absent witnesses, that the wife had been unfaithful to her marriage vows, have availed him as a defense.

W. M. Beckner for appellant.

P. W. Hardin for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellant was indicted, tried and convicted for the offense of willfully and maliciously shooting at and wounding his wife, Millie Lawrence, who was, at the time, living apart from him.

The evidence of eye witnesses, which he does not, in his own testimony, contradict, shows that he not only announced his purpose to shoot her, but placed himself in a hallway which he knew she would very soon pass, and when she approached he took hold of her with one hand and fired two shots at her, one of them wounding her in the neck, very near to the artery.

She made no threat or demonstration of violence against him at the time, nor does the record reveal any legal excuse or provocation whatever for the act.

The refusal of the lower court to grant a continuance on account of the absence of witnesses is the only ground relied on for reversal. But their testimony, even if it had been before the jury, as stated in his affidavit, would have afforded no excuse for his deliberate and preconceived attempt to kill her. For, however unfaithful to her marriage vows she may have been, he was not excusable. Nor would proof of the rather vague and indefinite threats on her part against him, which he, in his affidavit, stated the absent witnesses would prove, have availed in the least degree as a defense. For the shooting was not only premeditated, but, according to his own testimony, was done because she had refused his solicitation, that day made, to return and live with him, and under circumstances when he was in no danger whatever from her.

Judgment affirmed.

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COMMONWEALTH v. EDISON.

(Filed September 13, 1888—Not to be reported.)

One may be convicted of perjury for falsely and corruptly testifying that one was drunk, when in fact he was not. Whether a man be drunk or not is not necessarily merely a matter of opinion, but, even if it were, a witness may commit perjury by falsely and corruptly stating to be what is not his opinion of a matter about which the law authorizes witnesses to give their opinion, and the court and jury to act upon that opinion.

Finley Shuck for appellant.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellee was indicted for perjury, charged to have been committed on the trial before the police judge of the town of Harrodsburg, of one Mack Burton, for the offense of drunken and disorderly conduct.

It is stated in the indictment that appellee testified, as a witness on that trial, Burton was not, at the time mentioned, drunk, and did not act or appear to be so, when he was, and known by appellee to be drunk.

Several witnesses in this case testified that Burton was, on the occasion referred to, very drunk, and showed it plainly by staggering, boisterous conduct, and the whisky odor of his breath; one of them, the jailer, stating he was, after being arrested and brought to jail, blind drunk, and had to be led to a cell.

It further appears, from the evidence in this case, that appellee testified before the police judge, in substance, that on the day of Burton's arrest for the offense mentioned he (appellee) was with him at several places and for a sufficient length of time, before and up to the time of his arrest, to be fully aware of his condition, and that he was not drunk. Upon the conclusion of evidence by the prosecution the court instructed the jury peremptorily to find the accused not guilty, and the verdict and judgment of the court having been accordingly rendered, the Commonwealth appeals.

We are unable to perceive any reason for the instruction given to the jury, unless, as stated in the brief of counsel for the appellant, the lower court acted upon the idea that whether a man be drunk or not is a matter of opinion, in the expression of which a witness could not commit perjury.

Perjury, as defined by Lord Coke, and also by Blackstone, is a crime committed when a lawful oath is administered by any one having lawful authority, in any judicial proceeding, by one who sweareth absolutely and falsely in a matter material to the issue in question.

Whether a man be drunk or not is, in the first place, not necessarily merely a matter of opinion of the person who smells the fumes of liquor from his breath, hears his silly, blasphemous, vulgar conversation, and sees him staggering and falling upon the street. On the contrary, when a witness undertakes to testify intelligibly on the subject, what he says is generally to be regarded as a statement of fact, for the intentional falsity of which he is to be held criminally responsible. For if a jury is authorized to decide as to the guilt or innocence of a person charged with drunken and disorderly conduct, upon the testimony of witnesses of the fact, it would seem they should be held liable when such testimony is willfully false.

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In the second place, a witness may commit perjury by falsely and corruptly stating to be what is not his opinion of a matter about which the law authorizes witnesses to give their opinion, and the jury and court to act upon them.

We think the lower court erred in giving the instruction referred to, as there was sufficient evidence for the jury to convict, and the clerk of this court is directed to so certify.

COMMONWEALTH v. ELLIS.

(Filed September 13, 1888—Not to be reported.)

1. Construction of statute—Criminal law—Taxation—The reason of the law must be kept in view in construing it. If the reason for its application fails it should not be applied.

Where the owner of land, who does not reside in the county where it lies, goes to the assessor in person and lists it, instead of filing a written description of the land with the county clerk, as required by section 11 of article 1, chapter 92 of the General Statutes, he is not subject to the penalty provided by that section for a failure to comply with its requirements, as the only object of that requirement is to enable the assessor to list the land in the absence of the owner.

2. Same—Construing the statute by the object in view, the description should be furnished to the clerk long enough before the time when the assessor is required to return his lists to enable him to make use of it for the purpose intended.

J. C. Hodge for appellant.

John K. Hendrick for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Holt.

Section 11, article 1, chapter 92 of the General Statutes, provides: "Owners or claimants of land, who do not reside in the county in which it lies, shall furnish the county clerk thereof with a written description of each tract, verified by affidavit, and the failure to do so shall subject such owner or claimant to a penalty of not less than $20 nor more than $100 for each tract, and $1 for each $100 of the value of the land, recoverable by action in the county or circuit court of the county where the land lies. * * *

"Proceedings may be had under this section, from time to time, not exceeding twice in any one year, until the same shall be complied with; but a false or fraudulent descriptive list shall not bar or prevent a recovery. The clerk shall carefully copy such descriptive lists when required, and if required, on payment of 50 cents, furnish the person filing the same a receipt therefor, in which the same shall be described so as to identify it. He shall also keep an alphabetical list of the names of such land owners, and the date of the filing of such descriptive lists, posted in his office.

"The assessor shall call upon the clerk of the county court, from time to time, for descriptive lists, and examine them, and make use of the information contained in them in making out his list and book of taxable property.

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The county attorney shall prosecute under this section, and if he does so, shall have one-half of the penalty, but not to exceed $25 in any one case."

This action was brought on January 4, 1887, in the name of the Commonwealth, against the appellee, W. C. Ellis, a resident of McCracken county, Kentucky, to recover the statutory penalty for his failure to furnish the county clerk of Livingston county, Ky., with the required description of the appellee's land in the latter county. It appears that he did so on January 26, 1887; but unless this was in proper time, it furnishes no defense.

The law took effect September 14, 1886. It is silent, save by way of implication, as to the time within which the list must be furnished. The evident purpose of the statute was to aid the assessor in listing the property, and to prevent its escaping taxation. Under the law all taxable estate is to be "valued as of the 15th day of September in the year listed;" and the assessor must complete and return his tax books to the county clerk by the 15th day of December.

Construing the statute by the object in view, the description should be furnished to the clerk long enough before the time when the assessor is required to return his lists to enable him to make use of them for the purpose intended. This was not done by the appellee. It appears, however, that he, in November, 1886, went in person to the assessor of Livingston county, and listed these lands with him. After doing so, is he to be punished for a failure to do something which was but a step leading up to the listing of the property? The reason of the law must be kept in view in construing it. If the reason for its application fails, it should not be applied. The mischief intended to be remedied must be looked to, and the courts should then so construe the law as to prevent it. Beyond question this statute is a very proper one. The assessor can not go out of his county to assess property. Some means must be employed to enable him to list the estate of nonresidents, located in his county. Without a statute similar to this one it would often escape taxation, thus unjustly increasing the burden of other taxpayers. This was the mischief aimed at by the statute. It was intended by it to furnish the assessor with knowledge of the property, and to enable him to list it.

If, however, the owner, in person, and within the proper time, lists it with the assessor, he should not be punished for failing to do an act which would merely have enabled the assessor, in his absence, to list it. Such a construction or application of the statute would be unreasonable, and reason is the life of the law. The owner should not be open to punishment when he has done all that the law intended to accomplish.

Judgment affirmed.

CARR, &c. v. WATKINS, &c.

(Filed September 13, 1888—Not to be reported.)

Liens—Claims maturing pendente lite—Summons—Judicial sales—The appellees' action is based upon three notes secured by a lien on land. When the petition was filed but one of the notes was due, but all three were stated, fully described in, and filed with the petition. An amended petition was afterwards filed setting up the maturity of the second note, and a judgment rendered for the amount of these two, and a sale of the land ordered to satisfy that judgment. Subsequently a second amended petition was filed,

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etting up the maturity of the third note, and thereupon, after notice to the defendants, the former order of sale was set aside and a judgment rendered upon the third note, with an order for the sale of the land to satisfy that judgment and also the former judgment. No summons was issued upon either of the amended petitions. The defendants appeal from both judgments. Held—

1. No summons upon the amended petitions was necessary. All the claims having been stated in the original petition, the amended petitions were "suggestions of record," within the meaning of section 135 of the Code, that the notes that had not matured when the petition was filed had become due pendente lite.

2. Even if an order of sale is such a judgment as can not be modified or annulled after the expiration of the term, save as provided in section 518 of the Code, section 135, which should be liberally construed, must be regarded as furnishing an exception to that section; and although one of several lien notes set up in the petition matures after an order of sale has been entered, and the term has passed, it will be regarded as having matured pendente lite within the meaning of section 135. Therefore, the court, in this case, had the right to set aside the first order of sale and enter the second order.

3. In any event the substantial rights of appellants were not prejudiced by the action of the court in setting aside the first order and entering the second, and, therefore, they can not complain.

4. The court having, at the instance of appellants, set aside a judgment rendered prior to either of the judgments appealed from, the fact that in setting aside the judgment the court, as a part of the same entry, rendered the first of the two judgments appealed from, without giving appellants time to file an answer, was not prejudicial, as it was never intimated during the protracted litigation that appellants had any defense.

Wm. Lindsay for appellants.

Ira Julian for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Holt.

The appellees' action is based upon three notes secured by lien upon land. When it was brought but one of them was due, but all three were stated, fully described in, and filed with, the petition.

Prior to the rendition of the first judgment, in June, 1885, and which was for the amount of the two notes that had then matured, and the enforcement of the lien given to secure them, the appellees had, by an amended petition, set up the maturity of the second note.

In October, 1885, this judgment, and the sale that had been made thereunder, were set aside at the instance of the appellants; and at the same time, and as a part of the same entry upon the record, a second judgment was rendered upon the two notes and for the enforcement of the lien.

Complaint is made that, after setting aside the judgment of June, 1885, no time was given the appellants to plead in defense of the action before the rendering of the second judgment. They had not even offered to do so, however, at the appearance term of the action, and no such offer was made when the second judgment was rendered, or intimation given, so far as this record discloses, that they desired to do so, or had any defense whatever to the action. Indeed, it is quite suggestive that, during the somewhat protracted litigation in the court below, no answer was ever, at any time, presented, or intimation afforded that ground for one existed.

In February, 1886, and again at the instance of the appellants, a sale that

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had been made under the October, 1885, judgment was set aside and an order of resale, over the objection of the appellants, entered, but no steps were ever taken to enforce it. The appellees filed a second amended petition on July 3, 1886, setting up the maturity of the third note, and subsequently notified the appellants, but without stating any grounds in the notice, that they would, at a certain time, move the court to set aside the order of resale entered in February, 1886, and render a judgment upon the third note, upon the amended pleading that had been filed, and for an order to sell the land to satisfy it and the judgment of October, 1885, upon the other two notes. The motion was granted by the court and judgment rendered accordingly.

It is urged that the judgment of October, 1885, was final, and that hence the court had no power at a subsequent term to render a judgment upon the third note; also, that the judgment of February, 1886, ordering a resale of the property, was in force, final in its character and, therefore, beyond the control of the court, and a bar to the making of another order of sale in the judgment of October, 1886.

The only judgments appealed from are those of October, 1885, and October, 1886. It is unnecessary, therefore, to consider any of the other orders or judgments save so far as they may affect the two in question.

No summons was sued out upon either of the two amended petitions. But this was unnecessary. The Civil Code, section 135, provides:

"A party may be allowed, on motion, to file a supplemental pleading, alleging material facts occurring after the filing of the former pleading, but if a plaintiff, having a lien for a debt due and a debt not due, upon property which he seeks to subject, state both claims in his petition, he may, upon a suggestion of record that one of them has become due pendente lite, have judgment for a sale of the property therefor."

The petition in this case "states" all of the appellees' claims. The filing of the amended petitions were "suggestions of record" of their maturity. In addition, notice was given to the appellants of the filing of the amendments, and that judgment would be asked upon the last note.

After the filing of the first amended petition the appellants appeared in court and asked that the judgment, which had in part been rendered upon it, be set aside, and this having been done, a second judgment for the two notes was rendered. There can, therefore, be no question as to this judgment, to wit, that of October, 1885.

It is said, however, that the court had no power to render the judgment of October, 1886, upon the third note because the judgment of October, 1885, was final and there was then no pendente lite. It is urged that the former judgments could only be annulled or modified upon the grounds, and in the manner, pointed out by section 518 of the Civil Code, and that the proper mode to obtain such relief is by a supplemental petition and supplemental judgment.

If the judgment of October, 1886, for the amount of the third note, was proper, then it necessarily follows that an order of sale should have been entered embracing it, because the former order of sale related only to the two notes first due, and for which judgment had been rendered in October, 1885. A liberal construction should be given to the Code provision above quoted. Its object was to prevent a debtor from being harrassed by, and subjected to the cost of, numerous suits, and to save the creditor the trouble and expense incident thereto. When the judgment of October, 1886, was

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rendered there had been no enforcement of the previous orders and judgment. The suit was awaiting further action. If not then strictly pendente lite, it should be regarded so within the meaning and purpose of section 135 of the Code. This being so, the judgment upon the third note was proper, because it was authorized by said section, and while generally, after the expiration of the term at which they are rendered, a judgment or final order can not be modified or annulled save as provided in section 518 of the Code, yet, conceding that an order of sale is of such a character as to be embraced by that section, section 135 must be regarded as furnishing an exception to it, and authorizing a second order of sale.

In no other way can the two sections be harmonized and the evident purpose of the law be executed. But one can, of course, be made. In any event, therefore, the substantial rights of a debtor can not well be prejudiced, and the Civil Code provides, section 134:

"The court must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

So far as the order as to the sale is concerned the appellants are complaining of a matter not affecting their substantial rights. It merely sets aside the former order of sale at the cost of the appellees and orders one to be made for an entire debt, the justice of which is not disputed.

Judgments affirmed.

TRABUE v. TERRY, &c.

(Filed September 13, 1888—Not to be reported.)

Construction of devise—"Dying without issue"—Trust—Where a devise is direct and immediate to the child of a testator, with a devise over in the event of his "dying without children or issue," those words will be held ordinarily to mean the death of the devisee during the lifetime of the testator, or before distribution.

A testator, after directing an equal division of his undistributed estate among his children and grandchildren, provided that each child's portion should be held by him in trust for his children, and that the portion for the three infant children of G., a son of the testator, who was dead, should be held by their trustee for their benefit, the testator having, prior to the execution of his will, made advancements to them through the intervention of a trustee. The testator then provided, as to the three infant children of G., "should any of them die, leaving no children of their body, the survivor or survivors to be the proper heir or heirs; or should they all die, leaving no children of their own bodies, then my other grandchildren to inherit the unexpended balance devised to them." In this action by appellant, one of the children of G., who has arrived at age, for a construction of the will, Held—That the devise over to the other grandchildren was to take effect only in the event of the children of G. dying without issue during the lifetime of the testator and it was the testator's intention that the trust should terminate when the disability of infancy should be removed. Appellant is, therefore, entitled to the estate devised to him.

Geo. T. Duff and Isaac T. Woodson for appellant.

Porter & McQuown for appellees.

Appeal from Barren Circuit Court.

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Opinion of the court by Judge Pryor.

George W. Trabue, Sr., being the owner of a large estate, prior to his death made advancements to his children and grandchildren. His son, George Trabue, Jr., died before the father, leaving three infant children, to whom he also made advancements through the intervention of a trustee, the latter holding the property for their benefit. After making these advancements he executed his last will and testament, by which he required the recipients of his bounty to account for the advancements made them, and then directed an equal division of his undistributed estate between the children and grandchildren. By the seventh clause of his will he provides: "I wish all my personal property, real estate, debts or other assets remaining undisposed of to be equally divided between all my children, viz., Benjamin's portion to him as trustee for his children; Helen's portion to her husband as trustee for her children; Elizabeth Vanculin's portion to her husband as trustee for her and her children, and George's three children's portion to their trustee or trustees for their benefit.

"Should any of them die, George's children, leaving no children of their body, the survivor or survivors to be the proper heir or heirs, or should they all die, leaving no children of their own bodies, then my other grandchildren to inherit the unexpended balance devised to them, after defraying all expenses of said three children, Buford, Nellie and Nettie."

One of the children of George, Nettie, died under age, and there is no controversy as to the manner in which her interest passed. Buford Trabue, the son of George Trabue, Jr., filed this petition, seeking a construction of the will of his grandfather, with a view of ascertaining when, if ever, he would become entitled to his share under the seventh clause of testator's will.

The testator seems to have made provision for his grandchildren, placing what would be their parent's share in the hands of the parent, as trustee, for their benefit. As to the children of the son and daughters of the testator who were then living, he made no provision as to survivorship because at the death of either their parents would take as heirs-at-law; but as to George's children, George being dead, he provided that if one died his interest should survive, and if all then died without children, then the interest of the three should go to his other grandchildren. The only event upon which his other grandchildren could take from George's children was the dying of all three without leaving children. Did the testator, by this clause of the will, intend a dying at any period of time without children, or did he mean, if the three died before the testator, without children, their whole estate should then pass to his other grandchildren? He had made a direct devise, absolute and unconditional, to all his other grandchildren, and a similar devise to George's children except the provision that if all three died childless it should pass as already stated.

It was necessary that he should appoint a trustee to hold for the children of George the advancements made, as they were then all infants, and unable to manage the estate, and when the testator executed his will, the children being all under the same disability, he saw the necessity of making the devise to the trustee, that the property might be held and controlled, as the advancements were then held, by some one for their benefit.

The testator never contemplated that the trustee should hold the advancements or the devised estate as long as any of the children of George lived,

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or that the death of the three children at any time, however remote, without children, should determine the right of his other grandchildren to take. Buford Trabue is now of age, but is told by the judgment below that he can never become entitled to the control of his estate, as his death, without issue, must determine the rights of the other devisees.

While the trustee is not limited as to the duration of his control, we think it evident that, as to the property advanced before the execution of the will, he could have been compelled to surrender to the beneficiary his estate when of full age and competent to manage it; and, if so, we see no reason why the same construction as to intention should not apply to the devised estate. Besides, the rule is that where the devise is direct and immediate to the children of a testator, the words "dying without children or issue" will be held ordinarily to mean the death of the devisee, without issue, during the lifetime of the testator, or before distribution. (Birney v. Richardson, 5 Dana, 424.) The testator intended that his grandchildren should all be invested with a like title, and there is no reason for holding that the children of the living sons and daughters should take an absolute estate and confine the children of his son George to the use of the income, with the right of the trustee to hold the body of the devise until the death of the beneficiary. Such a construction would perpetuate the estate in the hands of the trustee, and deny to the devisee the right to take charge of the estate devised at any period during his life. It was the intention of this devisor that the trust should terminate when the disability of infancy was removed, as the helpless condition of the infants made it necessary for some one to be appointed by the testator to take charge of, and control, the devised property.

In our opinion the appellant is entitled to the estate devised to him, and that passed from his deceased sister under the provisions of the testator's will. And the judgment is, therefore, reversed and cause remanded, with directions to enter such a judgment.

LAWRENCE v. SIMMONS, DICKERSON & CO.

(Filed September 13, 1888—Not to be reported.)

While a lottery franchise can not be assigned and divided so as to give each assignee the power to conduct a separate lottery, yet, the legislature having authorized the sale of the franchise, there is no reason for denying the purchaser the right to permit others to enjoy the profits with him. And while the chancellor will not appoint a receiver at the instance of one who has acquired an interest in the franchise and asks for a settlement of the accounts and a judgment for his part of the profits, since it would be so detrimental to the public morals, yet he can at least "stay the wheel" until a settlement is made.

It was not incumbent on the plaintiff in such a case to allege that the defendants were operating a lottery in accordance with the grant; that will be presumed.

Simrall & Bodley and F. W. Morancy for appellant.

D. W. Sanders and O'Neal, Jackson & Phelps for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

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If the facts alleged in the petition filed by the appellant are true, and they must be so regarded on the demurrer, we perceive no reason why he is not entitled to relief. The lottery franchise was sold or transferred, under, and by virtue of, a legislative enactment by the city of Frankfort, to E. S. Stewart, who became the sole owner, and Stewart afterwards transferred two one-hundredths' interest to Reamer, who transferred the same, through Stewart, to Lawrence, the appellant. It is further alleged that after this sale to Reamer the lottery privilege and franchise was assigned to Edward Hensley, in trust for the benefit of Stewart, Solomon, Reamer and others; that after this transfer in trust all the parties in interest, except Reamer, sold and assigned all their title and interest to Simmons & Dickinson, the defendants, who had notice of Reamer's interest; that the defendants have been operating the lottery for their own benefit, and refuse to permit plaintiff to participate in the profits or to have any voice in transacting the business. They refuse to state their accounts or to have any settlement whatever with the plaintiff, denying him any access to the books and keeping him in ignorance as to the condition of the accounts. The insolvency of the defendants is also alleged, and a prayer for the appointment of a receiver and a settlement of the accounts, with a judgment for plaintiff's part of the profits.

The validity of the franchise, or the right of the defendants to further operate the lottery is not involved on the appeal, but the simple question presented it: Will the appellant, under his transfer, be permitted to participate in the profits? This court, in the case of Meredith v. Barron, 2 Ky. Law Rep., 208, held that the franchise could not be assigned and divided so as to give each assignee the power to conduct a separate lottery, although of different classes or schemes, but it did not hold that the original owners of the grant were powerless to prevent others, for a valuable consideration, to enjoy a part of the profits. If the legislature had the right to grant the franchise and then authorized its sale, we see no reason for denying the purchaser the right to permit others to enjoy the profits with him. It is true the plaintiff claims the right to an interest in the franchise which, when construed properly, means an interest in what is made, and not an assertion of the right to run a lottery of his own. He comes into a court of equity to have an account of property, alleging a state of facts requiring the interposition of the chancellor to settle the joint account between them. The appellant also asks for the appointment of a receiver to take charge of the franchise. This relief the chancellor must necessarily deny, for, conceding the validity of the grant, no chancellor could be induced to lend the aid of a court of conscience in granting such relief, however meritorious between the parties, when the consequences would be so detrimental to the public morals, and the business made more pernicious than when conducted by those who are ready and willing to fatten upon the ignorance or the misfortunes of their fellow men. What relief then can the chancellor give in such a case? He can at least stay the hand that turns the heel until a settlement is made, and while it is proper, perhaps, to leave the chancellor below to adopt the remedy, it is certain that the appellant must have some relief upon the facts stated.

It is contended by counsel for the appellee that it was incumbent on the appellant to allege a state of facts showing that the defendants were operating a lottery in accordance with the grant, and having failed to do so the demurrer was properly sustained.

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It is distinctly alleged that the defendants, in pursuance of certain acts of the legislature that are referred to, acquired the right to run the lottery, and that the transfers and sales were made by the original grantee, the city of Frankfort, under legislative authority, and the court will not assume that the defendants, or any of the beneficiaries, had failed to comply with the provisions or conditions of the grant, but, on the contrary, will presume, as between these parties, that the appellees are exercising the privileges, and none other, given by the legislature, in the absence of any averment showing that they had abused the privileges conferred by the grant. In our opinion, therefore, the demurrer should have been overruled, and the judgment below is reversed and the cause remanded for proceedings consistent with this opinion.

VINCENT, GOBLE & PRITCHARD v. McALPIN & CO.

(Filed September 13, 1888.)

Assignments by operation of law—Rights of bona fide purchasers—This case, distinguished from Fuqua v. Ferrell, 3 Ky. Law Rep., 571. (See original opinion, ante, page 182, which should not have been published until after the petition for rehearing had been acted on, but, by mistake, was published before.)

W. C. Ireland and K. F. Pritchard for appellants.

Wm. Lindsay, Moore & Brown and Alex. Lackey for appellees.

Appeal from Boyd Circuit Court.

To a petition for rehearing Judge Pryor delivered the following response of the court:

When the opinion in this case was delivered, the case of Fuqua v. Ferrell, 80 Ky., 69 [3 Ky. Law Rep., 571], was not considered, and we now fail to see any analogy between the two cases. There a mortgage was executed to secure the debt by an insolvent debtor, and, operating as an assignment, the estate then passed to creditors, and any subsequent transfer by the debtor could not divest the creditors of title unless made to a bona fide purchaser. In Southworth v. Casey, 78 Ky., 395, it was so expressly held, and the bona fide purchaser obtained the property between the time of the act operating as a transfer of the debtor's property and the institution of the suit by creditors, was protected in his title.

In Fuqua v. Ferrell this court was discussing the effect of the payment by the debtor of a part of the mortgage debt after the execution of the mortgage. The payment was also an act of insolvency, and in alluding to such payments or the acquisition of property after an act of insolvency, the rights of an innocent purchaser, as was said in that case, would be protected, unless the purchase was made after the institution of the suit by creditors. There is no conflict in the cases. Both follow the statute. In the case before us the parties who are the appellants here were bona fide purchasers from the time the contracts were made until the timber was delivered, and when executed by the delivery there is no reason in law or equity, or any provision of the statute, that would compel the appellants to surrender their acquisitions for the benefit of the common creditors.

Petition overruled.

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KENTUCKY SUPERIOR COURT.

DEPOSIT BANK OF GEORGETOWN v. SECOND NATIONAL BANK OF LEXINGTON.

DEPOSIT BANK OF GEORGETOWN v. FAYETTE NATIONAL BANK OF LEXINGTON.

(Filed April 4, 1888.)

1. Banks—Payment of forged check—If a bank pays a forged check drawn upon it to an innocent holder who has paid value for the check, the bank can not afterwards recover the money of him. The drawee is bound to know the drawer's signature, and, having admitted its genuineness by paying the check, is estopped to afterward deny it to the detriment of an innocent third party.

2. Same—Even if the rule were otherwise, the bank could not recover in this case on account of its delay (four months) in making the discovery of the forgery. In such a case it is not necessary for the holder to show that he has been injured by the delay. The law presumes damage.

3. Same—A check drawn payable to a fictitious payee is, in the hands of a bona fide holder who acquired it in ignorance of the fact, in effect a check payable to bearer, and may be so treated by the holder. Therefore, where the bank, the drawee of such a check which has been forged, pays it to the innocent holder, it can not recover the money of the latter upon the ground that he had no title by reason of the fact that the indorsement of the payee's name on the check was a forgery.

Breckinridge & Shelby for appellant.

Beck & Thornton for Second National Bank.

J. D. Hunt for Fayette National Bank.

Appeals from Fayette Circuit Court.

Opinion of the court by Judge Barbour.

As the same questions are presented in each of these cases we will consider them together. The actions were brought by the appellant to recover of each of the appellees the several sums paid them upon a number of forged checks, payable to Williamson & Wolfe, and purporting to have been drawn on the appellant by Thomas J. Burgess, who was one of its customers and depositors.

In the case of the appellee, the Second National Bank of Lexington, there were two checks—the first, for $396, dated December 10, 1883, was, on that day, cashed by J. R. Wolfe, who presented it with the indorsement of Williamson & Wolfe, and was, upon presentation, paid by the appellant to the appellee the next day. The second, for $172, dated January 10, 1884, was cashed to an indorsee of the payee, and was, on the 15th of January, upon presentation, paid to the appellee by the appellant. In the case of the appellee, the Fayette National Bank, there were sixteen checks, ranging in amount from $195 to $32. These were all cashed by the appellee for the payees or their indorsees. The first check was dated November 26, and was paid to the appellee by the appellant December 5, 1883. The last was dated

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April 26, and was paid to the appellee by the appellant April 29, 1884. The appellant did not discover that the checks were forgeries until the 7th day of May, 1884. On the 9th of that month it notified the appellees of its discovery and demanded repayment of them.

The case was tried without the intervention of a jury, and the facts, as found by the court in addition to those stated, are, in brief, these: The checks were forged by J. R. Wolfe, and were paid by the appellant under a clear mistake, the forgeries being such as to deceive the appellant's officers. The payee, Williamson & Wolfe, was a fictitious firm, unless J. R. Wolfe should be considered as constituting the firm. The appellees cashed the checks in good faith in the usual course of business, exercising due precautions. There was nothing in the transactions with Wolfe to excite the suspicions of the appellees, and nothing in their conduct to induce the appellant to make the mistake. Nor was there any fault upon the part of the appellant in failing to discover the mistake and forgeries at an earlier date. There being no fault upon the part of either party, other than that which the law implies from the relation of the parties to the checks and the transactions, the question presented to us is, upon whom shall the loss fall?

There is no adjudication by the courts of this State upon the question. There are, however, numerous decisions by other courts which are directly in point. After an examination of the cases cited by counsel we are of opinion that, upon principle and upon the decided weight of authority, that the correct rule is that if a bank pays a forged check to an innocent holder who has paid value for it, that it can not recover the money of him. The reason of the rule is that the drawee is bound to know the drawer's signature, and having admitted its genuineness by paying the check, is estopped to afterwards deny it to the detriment of an innocent third party. "Ordinarily, money paid under a mistake of fact may be recovered back, however negligent the party paying. But that rule has not been generally deemed applicable in such a case as this, for, as is said, the fact in this case is one which the drawee has no right to mistake. The law refuses to hear him say he has mistaken it. The money is paid through the failure to fulfill his acknowledged duty, inasmuch as he has failed to detect this very non-existence of the merely supposed fact of signature by a certain person." (Morse on Banking, 296.) This doctrine (as said in the notes to Laborde v. Consolidated Asso., 39 Am. Dec., 521) is but a practical application of the maxim that where one of two innocent parties must suffer he who has been the occasion of the loss must bear it. The rule, as stated, is sustained by Price v. Neal, 3 Burrows, 1534; Levy v. Bank of U. S., 4 Dall., 234; Bank of U. S. v. Bank of Ga., 10 Wheat., 333; First Nat. Bank v. Richie, 71 Ill., 439. Notwithstanding these high authorities and numerous other cases to the same point, Mr. Daniel, in his work on Negotiable Instruments (section 1655a), questions the correctness of the rule and says: "Where the bank discovers the forgery immediately and demands restitution, offering to return the check before the holder has lost anything, by regarding the matter as all right, we can not help thinking that it should be entitled to recover back the amount." In support of Mr. Daniel's opinion it is argued that though a bank is to be taken as knowing the signature of its customers or depositors, yet if it fails in such knowledge and innocently pays a forged check it does not necessarily follow that he who received the money shall keep it; that the rule is one of mercantile policy whereby the courts imply knowl-

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edge when the implication is necessary for the protection of the rights of the innocent person. To this much of the argument, which is but a statement of the reason of the rule, we see no objection. But it is further, and we think inconsistently, argued that where the bank and the party to whom the check is paid are both deceived without actual fault upon the part of either, there being no collateral hardship on either side, that the bank, having paid the money under a clear mistake of fact, should be allowed to demand its return. The adoption of the latter part of this proposition would effectively destroy the rule. As between the bank and the party to whom it has been paid its depositor's check, there is no necessity or occasion for the application of the rule that the bank must know its depositor's signature, except where both the bank and the party to whom the money is paid are equally innocent of any wrong. If the fault is with either, the loss is upon him in fault. If the party collecting the check is guilty of negligence, if he did not receive it in the usual course of business, or if he received it under circumstances which should have excited his suspicion, another principle is interposed to prevent him from holding the money he has received. While on the other hand, if the bank pays the check when it could by the exercise of proper care, have discovered that it was a forgery, there would be no occasion for the interposition of the rule. It can not be said that the bank, unless it has been misled by his conduct, paid the check upon its faith in the party who presented it. It paid, as the law presumes, upon the faith of its knowledge of the drawer's signature. With the single exception of the case of McKleroy v. Southern Bank of Ky., 14 La. Am., 458, all the cases cited by Daniel as supporting his view, so far as we have been able to examine, are cases where the party took the paper under circumstances which should have excited his suspicions, or cases where the forgery was not that of the drawer, but of an indorser—very different cases. The drawer has no better means of knowing the signature of the indorser than the holder of the paper has. In such a case it is not incumbent upon the drawer to know the signatures of the indorsers, but such knowledge is incumbent upon the holder of the paper, as he must be presumed to know his title, and in presenting the paper he guarantees the genuineness of the signatures of the prior indorsers.

But, even if we were inclined to adopt Mr. Daniel's view, the appellant could not recover on account of its delay in making the discovery of the forgery. In such case it is not necessary for the appellees to show that they have been injured—the delay itself imports damage—the law presumes it. It is an arbitrary rule of mercantile policy, analagous to that rule requiring the notice of the dishonor of a bill to be given to the indorsers within a prescribed time.

But it is insisted that the appellant is entitled to recover in these cases for the reason that the appellees had no title to the checks. This argument is based upon the fact that the names of Williamson & Wolfe, the pretended payees, were fictitious names, and that, therefore, the indorsement of their names on the checks were forgeries. The finding of fact by the court is that the payees of the checks, Williamson & Wolfe, were fictitious persons, or rather a fictitious firm, unless J. R. Wolfe constituted the firm.

We think it is clear that J. R. Wolfe adopted the names for the purpose of perpetrating the forgeries. It is conceded that the drawee of the check does not undertake to the holder that the indorsements are genuine. On the contrary, the holder, in receiving payment, guarantees the genuineness of all indorsements necessary to his title. The bank is entitled to this guar-

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anty as a protection against its beineg required to pay the check again. But where the holder's title to the payee, such as it is, is unquestioned, the fact that an indorsers' name is fictitious can not affect the bank. In these cases the payee's names, and consequently their indorsement on the checks, were fictitious. In such case the holder had the right to treat the checks as if they were payable to bearer, and there can be no question as to the appellee's title. "A check drawn payable to a fictitious payee is, in the hands of a bona fide holder who acquired it in ignorance of the fact, in effect a check payable to bearer and may be so treated by the holder." (Daniel on Neg. Inst., section 137.)

The judgment in each case is affirmed.

WIMBERLY v. METCALF.

(Filed June 13, 1888.)

1. Slander—The charge that a man has two wives, unaccompanied by any explanation, will be understood to impute to him the crime of bigamy, and will support an action for slander.

2. Same—When one charges another with the commission of a crime, without fixing its locality, the inference arises that it was committed in the State where the charge is made, unless, from the nature of the charge or its attending circumstances, that inference is clearly excluded.

In this action of slander the words charged to have been spoken were: "He (the plaintiff) has two wives—one here and one in Missouri or Arkansas." Held—That it does not appear that the defendant meant to charge that either marriage, much less the second, was not performed in this State, and, therefore, the words are actionable without alleging that the crime of bigamy is a felony under the laws of Missouri and Arkansas, even if such an allegation would be necessary in any event.

3. Same—In the absence of all allegation or proof courts should assume that flagrant violations of the fundamental principles of moral obligation, which involve moral turpitude, such as bigamy, are punishable in all christian countries to a degree commensurate with the gravity of the offense.

4. Same—But even if the court is wrong in the latter two propositions, words charging an offense of moral turpitude, punishable by the law of the State where they are uttered, are actionable per se, for the reason that words which accuse a man of any crime condemned and subjected to infamous punishment by the law of the community where they are spoken expose him, in that community, to obloquy and contempt.

D. B. Stanfield, W. W. Robertson and J. E. Robbins for appellant.

W. W. Tice and W. M. Smith for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Barbour.

In this action for slander the appellee alleged that the appellant spoke and published of him these false and slanderous words: "I can not vote for Metcalf (the plaintiff); he has two wives—one here and one in Missouri or Arkansas."

Special damage is not alleged, and the contention of the appellant is that the words do not necessarily charge appellee with the crime of bigamy; that they are susceptible of a double meaning. True, as argued, a mistress or divorced woman is sometimes characterized as a "wife," but this is not the

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common meaning, and the charge that the man has two wives, unaccompanied by any explanation, will be understood to impute to the plaintiff the crime of bigamy. As said in the former opinion delivered in this case by Judge Bowden for the majority of the court, polygamy, though subject to canonical censure, was not an offense at common law. It was first made a felony by the statute of 1 James I, chapter 11. This statute was adopted in Virginia, and subsequently in this State; and as the court could not judicially know the statute laws of Missouri or Arkansas, the difficulty we had in sustaining the judgment for the appellee was whether, as the crime of bigamy (as is a well-recognized principle of law) is committed against the law of the county where the second marriage takes place, and the words alleged to have been spoken did not import that the plaintiff married the second wife in Kentucky, the petition was not fatally defective in failing to aver that polygamy was a felony by the laws of Missouri and Arkansas. If the only words spoken had been that "I can not vote for Metcalfe; he has two wives," there could be no doubt but what the words would have been construed to charge the commission of the offense in this State. But it is contended that these words were qualified and explained by the further words, "one here and one in Missouri or Arkansas." We, however, after a careful reconsideration of the question, are now of a different opinion. By the use of these latter words it does not appear that the defendant meant to charge that either marriage, much less the second, was not performed in this State.

We understand the rule to be that when one charges another with the commission of a crime without fixing its locality the inference arises that it was committed in the State where the charge is made, unless, from the nature of the charge or its attending circumstances, that inference is clearly excluded. And again it seems to us that, in the absence of all allegation or proof, courts should assume certain general principles of law as existing in all christian countries, as the flagrant violations of the fundamental principles of moral obligation, which involve moral turptitude, such as bigamy, are punishable to a degree commensurate with the gravity of the offense. But if we are mistaken upon these propositions we think that, upon every principle of reason and policy, the correct rule is to hold that words charging the offense of moral turpitude, punishable by the laws of the State where they are uttered, are actionable per se. We are aware that Townshend, in his work on Slander, section 159, lays down the general rule that "when the offense is charged to have been committed in a foreign State it will be actionable if it appears that the offense charged is one, by the law of that State, punishable by indictment, and involving moral turpitude. When the offense charged is one punishable by indictment at common law it will be presumed to be indictable everywhere; but if the offense charged be one created or punishable by statute, * * * to make the charge actionable the statute relating to the offense must be pleaded and proved like any other fact."

We have examined all the cases cited by the learned author which are at our command, and, with one exception, they are all cases where actions were brought in one State for words uttered in another State. If the rule is limited to such cases we find no fault with it. "The reason is a plain one; the defendant committed no legal wrong where the words were spoken." The excepted case, which sustains the text in its broadest application, is that of Bundy v. Hart, 46 Mo., 460, where it was held that a charge that plaintiff had to leave Indiana for burning a barn was not actionable

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ithout a colloquium of the law of Indiana. But in Klumph v. Dunn, 66 Penn. St., 141, 5 Am. Rep., 355, the rule was held to be different, and it seems to us that the Pennsylvania case the better accords with sound reasoning and the theory of the law of slander. In that case the slanderous words were spoken in Pennsylvania, and charged the plaintiff with the commission of adultery while in the State of Georgia. There was no avermentt or proof as to the law of Georgia, and no special damage was alleged. Judge Sharswood, in a well-considered opinion, says: "It has often been held that where the words impute a common law offense to have been committed in another State, it need not be proved that such offense is indictable therein. The presumption is that the common law of a sister State is similar to our own, and in one case it is intimated, though not decided, that if the offense charged derives its quality as a crime from the statute alone the rule would be otherwise. But after a careful search I find no case which directly holds that words charging an offense of moral turpitude, and indictable by the statute laws of the country where uttered, are not actionable per se, because they state the offense to have been committed in another country. Some cases seem to rely upon the liability of the defendant to extradition under the Constitution of the United States, or treaties with foreign States. But that surely is not the true ratio decidendi. Nothing seems to be better settled than that liability to prosecution or punishment is not the criterion." After saying that actionable words are confined to imputations of offenses of moral turpitude, punishable in the temporal courts, the opinion continues: "But to what law are the courts to refer to ascertain whether the offense charged is of this character? Upon every principle of reason and policy the answer seems to be the law of the country where the words are spoken. That law is the exponent of the moral sense of that community—of the estimation in which they hold offenses against the moral law, and words which accuse a man of any crime condemned and subjected to infamous punishment by that law expose him in that community to obloquy and contempt. The moral character of the act can not be affected by the place where it is committed. What matters it to those who hear the words that the crime is charged to have been committed in a State where such actions are not subject to punishment? Even if they are to be presumed to know that the act was not a crime punishable by the law of the country where it is alleged to have been committed, would it any the less injure the moral character and standing of the party charged?" After a careful reconsideration of the case we are of opinion that the petition sets out a good cause of action, and perceive no error in any of the rulings of the court complained of to the prejudice of the appellant.

A rehearing is granted and the former opinion is withdrawn and the judgment is now affirmed, with damages.

CARTER'S ADM'R, &c. v. CARTER.

(Filed June 13, 1888.)

Contest of will—Costs—The unsuccessful contestant of a will is not entitled to have his costs and reasonable attorneys' fees incurred in the contest paid out of the testator's estate, although he may have had reasonable grounds for contesting the will. No amount of evidence tending to show

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that the contest was made in good faith can entitle him to have such costs paid out of the estate.

W. B. Harrison for appellants.

Avritt & Russell for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Barbour.

The only question presented in this record is whether the unsuccessful contestant of a will, who had reasonable grounds for questioning the decedent's testamentary capacity, should be allowed his costs and reasonable attorneys' fees incurred in the contest. In this case the testatrix's will, which devised all the property to the appellants, her four nieces, was probated in the county court. From the judgment probating the will the appellee, the testatrix's sister, prosecuted an appeal to the circuit court where, after several mistrials, the will was sustained by the verdict of a jury, and the contestant was adjudged to pay the costs. At a subsequent day in the term, on appellee's motion, the judgment, in so far as it required her to pay any costs, was set aside; and the court, holding that there were probable grounds upon which to base a contest of the will, adjudged that the costs and reasonable attorneys' fees, incurred by her in the contest, should be paid out of the estate of the testator, and referred the matter to a commissioner to ascertain and report the amount of costs and attorneys' fees. Upon the report of the commissioner the court rendered a judgment, directing the personal representative to pay, out of the money of the estate in his hands, $188, as the legal costs of the contestant, and $325, her attorneys' fees.

The question never seems to have been raised in this State before, though there are several cases from other States, and numerous English cases, which hold that where the circumstances are such as give the opponents of the will reasonable ground for questioning the decedent's testamentary capacity that they are, though unsuccessful in their assaults upon the will, entitled to their costs, including reasonable attorneys' fees, to be paid out of the estate.

Even if we were not of the opinion that our statutes regulate the question of costs in such cases as this we would hesitate to follow the rule laid down in the cases referred to—a rule which, it seems to us, might result, not only in the encouragement of litigation, but in the necessity for discussing the policy of such a rule is dispensed many cases in the absolute destruction of the devised estate. But the necessity for discussing the policy of such a rule is dispensed with, as we think the statute determines the question. Chapter 26, General Statutes, provides in section 12, that "the party succeeding in any civil action, on the merits or otherwise, shall recover costs, unless differently provided in this chapter;" and in section 15, that "the party prosecuting an appeal to a court inferior to the Court of Appeals shall recover his costs on the same if he succeed, in whole or in part, in reversing the decision of the inferior court. If the decision of the inferior court be affirmed, the appellee shall recover his costs." There are other sections of the chapter which give the courts judicial discretion in regard to costs in certain cases, but the case of the contest of a will is not embraced by them.

But it is insisted that a contest over the probating of a will is not an action within the meaning of the word, as used in the chapter on costs.

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This position, however, is not tenable, for section 27, chapter 21 of the General Statutes, provides, "that the term 'action,' when used in this revision, shall be construed to include all proceedings in any court of this Commonwealth." It will be observed that this provision was not embraced in the Revised Statutes.

The case of Phillips v. Phillips, 81 Ky., 333, is relied upon by counsel as sustaining their contention. The court, in that case, allowed the nominated executor his costs and attorneys' fees, incurred in an unsuccessful attempt to probate the will, the court saying: "It being his duty to offer the will for probate, and in good faith to exhaust all legal or equitable remedies to that end, and the statute making no provision for cost, it is reasonable to conclude, as we here adjudge, and as appears to be the general rule, he should be compensated out of the estate for the discharge of this duty." There the whole question turned upon the duty which the law imposed upon the executor. But there is no rule of law which makes it the duty of any one to contest a will, and it would seem that the very principle upon which a nominated executor is allowed his costs where he attempts (though unsuccessfully), in good faith and upon reasonable grounds, to probate the will, would, if he were successful, deny to the defeated contestant his claim for costs. The appellee is in the position of unsuccessful litigants in cases generally. She must pay, not only her own costs, but the legal costs of her adversaries, no matter how meritorious her contest may seem to her to have been. The rule of the civil law that "victus victoriæ expensis condemnatus est" is the rule in this State, subject to some exceptions, none of which include this case.

No bill of exceptions is necessary to enable us to review the judgment—it is upon its face erroneous.

No amount of evidence, no matter how strong, tending to show that the contest was made in good faith and upon probable cause, could sustain it.

The judgment is reversed and the cause remanded, with directions to set aside the order of April 8, 1887, which adjudged that the costs of both parties should be paid out of the devised estate, and referred the case to the commissioner; and also the order of September 1, 1887, which directed the administrator to pay the appellee's costs and attorney's fees.

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SUPERIOR COURT ABSTRACTS.

CONNER v. CLARKE.

Filed September 26, 1888. Appeal from Bracken Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Attachments for rent—It is not necessary that an affidavit to obtain an attachment for rent should conform to the requirements of the Code as to affidavits for attachments generally. If the affidavit sets out the amount of the rent and when due, and that it is owing to the affiant, and that he has reasonable grounds to believe, and does believe, unless an attachment is issued he will lose the rent, it is sufficient under section 5, article 2 of chapter 66, General Statutes. It is not necessary that the affiant should state in the affidavit the facts which show the reasonable grounds for his belief that he will lose his rent. If, however, the grounds of the attachment are controverted he must prove the facts which show that he has reasonable grounds, etc.

The grounds of the attachment were not controverted in this case.

2. Same—Bond—The bond required to obtain an attachment for rent must conform to the provisions of the General Statutes, and not to the provisions of the Code.

3. That the bond has no date does not invalidate it. It will be presumed that the officer did his duty, and that it was executed before the attachment was issued. Nor does the fact that the officer failed to attest the bond when it was executed before him invalidate it. As it is not pretended that it was not executed at the proper time, the court did not err in allowing the officer to attest it, nunc pro tunc.

4. Parol testimony to vary writing—As the writing upon which the attachment is based is an unconditional agreement to pay the rent at a stated time, parol evidence is inadmissible to vary or alter its terms.

H. P. Willis for appellant; E. W. Hines for appellee.

STEINBORN v. WARING.

Filed September 26, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Practice—Reversible error—This court can not review the action of the lower court in setting aside a verdict in favor of appellant, as there is no bill of exceptions embracing the evidence heard on that trial, the grounds upon which the verdict was set aside being such that this court can not say, in the absence of such a bill, that the court erred in setting aside the verdict.

2. New trial—After the motion for a new trial has been overruled, especially after the lapse of three days from the return of the verdict, it is too late to file additional grounds.

3. Evidence—The court properly refused to allow the plaintiff to be reinterrogated about matters as to which he had repeatedly testified in his original examination.

J. F. & C. H. Fisk for appellant; T. F. Hallam for appellee.

ADAMS EXPRESS CO. v. TINGLE.

Filed September 26, 1888. Appeal from Carroll Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Carriers—Liability of express company—A carrier's liability as such terminates upon the expiration of a reasonable time after the arrival of the goods at their destination. Subsequent to that time, however, the carrier

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retaining the goods in its possession must exercise ordinary care to preserve them from loss.

The appellant undertook to carry a package of money consigned to appellee. The package arrived at its destination late Monday afternoon, of which fact the appellee, who lived about a mile from the station, was informed on the same day. The agent says he saw the package in the drawer where valuables were kept, Tuesday evening, between 5 and 6 o'clock; that next morning when he went to the office, about 7 or 8 o'clock, he discovered that the storeroom in which the office was kept had been entered at night, and details facts showing that the store had been broken into, but he did not look after the money in question until noon, when he, for the first time, discovered that it was gone. Upon this evidence it is insisted that the court should have instructed the jury, as matter of law, that the defendant had exercised ordinary care for the safety of the money. Held—That it was a sufficient answer to this to say that the defendant assumed the burden, and, therefore, necessarily undertook to show that it had exercised ordinary care in the keeping of the package, and that the burden being upon it, the court can not say that its own evidence was conclusive of the question.

2. Parties to actions—Although others than the plaintiff had an interest in the money, the action was properly brought in his name, he being the sole consignee.

T. F. Hallam for appellant; Joseph Blackwell for appellee.

ROBINSON v. CLOYD.

Filed September 26, 1888. Appeal from Taylor Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

New trial—Practice—The affidavit made by appellant's attorney, that he was sick and not able to be in court after the verdict until the day on which the grounds for a new trial were filed, and the motion entered, which was more than three days after the verdict, was not sufficient to show that the appellant was prevented by unavoidable accident from sooner making the motion, as the affiant does not state that there was no other attorney associated with him in the case of trial, the pleading of appellant showing there were two attorneys in it. Therefore, the bill of exceptions can not be considered, and in the absence of a valid bill of exceptions nothing can be considered except the pleadings.

J. D. Belden for appellant; Charles Patterson for appellee.

STEINHARTER v. COVINGTON CITY NATIONAL BANK.

Filed September 26, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Assignment—Accommodation paper—The plaintiff, by its petiton, alleged that defendant, by his promissory note, agreed to pay C. $1,600; that C., after defendant signed and delivered the note to him, wrote his name across the back thereof and gave it into the possession of defendant, who thereafter delivered the note to plaintiff for the purpose of securing the payment of a note contemporaneously executed by defendant to plaintiff for $2,150; that no part of the last named note has been paid except $433. Wherefore judgment is asked for $1,600 and interest. Plaintiff insists that it has the right to maintain an action upon the $1,600 note in order to preserve the recourse against C. Held—If the alleged object and purpose of the suit would have authorized the suit upon the note taken as collateral security, rather than a suit upon the original undertaking or note, the petition should have stated facts sufficient to have shown a contingent liability against C. as assignor.

2. Same—C. was in no way liable upon the $1,600 note. (Callahan v. First National Bank of Louisville, 78 Ky., 604.)

3. Same—While it would not be safe, perhaps, to say that a person could not give his own promissory note as collateral security for his own note, it is safe to say that the collateral paper would not, as long as it remained in the hands of the payee of the principal paper, be efficacious for any purpose;

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its efficacy, so long as the parties remained the same, would be merged in the principal note.

4. Same—If the petition had alleged that the note of the defendant for $1,600 was indorsed by C., and placed in the hands of defendant to enable him to raise money thereon, and that he had done so, these facts would have shown a contingent liability upon the contract of assignment, the consideration for which would have been the money raised upon the assigned note, not exceeding the amount thereof. From which it would result that the discharge of the original or principal note would take away the right of recovery on the collateral paper; and upon the same principle any payment upon the principal note reducing its amount below the amount of the collateral paper would bar any recovery on the collateral paper except for the amount due on the principal note, that amount being the extent of the assignor's liability.

J. F. & C. H. Fisk for appellant; Wm. Goebel for appellee.

ROBERTS' ADM'R v. EALES, &c.

Filed September 26, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Right of heir to sue—The personal property of an intestate does not pass to, or vest in, the heir at law, but the personal representative appointed as provided by law; hence the heir at law has no right of action for the recovery of debts or choses in action due to the intestate, unless there is an administrator and he refuses on demand to sue, and then he must be made a defendant.

2. Administrator of infant's estate—The legal title to the personal estate of one who dies in infancy passes as that of an adult. And whatever powers the guardian may exercise as to the estate of his ward after the death of the ward in infancy, the necessity for the appointment of an administrator still exists, as it is clear that the legal title to the infant's estate never vests in the guardian.

3. Pleading—Special demurrer—The provision of the Code which requires a want of legal capacity to sue to be taken advantage of by special demurrer does not apply where the plaintiff attempts to sue in his own right and the facts stated by him fail to show any right of action in him, but where one attempts to sue in right of another, as committee, curator, etc., without alleging such facts as are required by law to authorize him to act in that capacity.

O'Hara & Bryan for appellant; J. F. & C. H. Fisk for appellees.

SMITH v. CLAYTON.

Filed September 26, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Bowden, reversing.

No judgment can be rendered against a garnishee merely because he fails to answer as garnishee when so summoned. And even if he has been regularly summoned as a party defendant a judgment against him can not be maintained unless the petition states a cause of action against him in favor of the principal debtor. Nor can a creditor, without a judgment and return of nulla bona, make the garnishee a party until he has failed to make a satisfactory disclosure.

J. F. & C. H. Fisk and Charles S. Furber for appellant; M. J. Dudley for appellee.

HANSFORD, &c. v. DUNGAN.

Filed October 3, 1888. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. An exhibit can not be read to supply the omission of a material averment from a pleading. Therefore, in this action on an indemnifying bond, the bond itself can not be read to cure the defect in the petition in failing to allege what the undertaking was.

2. Indemnifying bond—Pleading—An execution having been levied on property which the defendant in the execution claimed to be exempt, the

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execution plaintiffs executed a bond whereby they undertook to pay all costs and damages that might be assessed against the sheriff, provided the execution defendant "should bring suit for the recovery of said property." The property having been sold, the appellee, the execution defendant, brought this action to recover damages, on the ground that the property was exempt. Held—That the bond sued on is not the bond provided for by section 641 of the Code, and that the appellee can not maintain an action on the bond to recover damages; and as one can not sue on a bond and recover on a different cause of action, the peremptory instruction asked by defendants should have been given. The court does not mean to imply an opinion as to whether appellee has or has not a cause of action.

O. H. Waddle and Curd & Denton for appellants; James T. May for appellee.

BROWN v. SMALL.

Filed October 3, 1888. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Liens—Joinder of actions—Where two notes against different persons are secured by liens on the same tract of land, it is not necessary or proper that the holder should bring separate actions to enforce his liens; both may be enforced in the same action.

2. Parties to actions—A testator bequeathed money to his wife for life, remainder to appellee, their son. The widow subsequently married the appellant, and after the marriage lent to him a part of the trust fund, for which he executed his note to H. for the use of his wife. The wife having died, appellee, the remainderman, brought this suit against appellant upon this note, which H. had assigned to him. Held—That the right of action was in appellee as remainderman, and not in the administrator of his mother, and, therefore, the action was properly brought by him.

3. Interest—It was error to charge appellant with interest accruing during the life of his wife. He is the distributee of his wife, and as such is entitled to that interest.

4. Appellant is entitled to credit by sums paid by him to or for appellee after appellee arrived at age, as such sums must have been paid in anticipation of appellee's remainder interest.

As the sums paid by appellant to the mother during her life, and to appellee during his minority, would not much, if any, more than pay the interest on the trust fund, appellant is not entitled to credit therefor.

T. R. Gordon for appellant; Wm. Lindsay and H. G. Botts for appellee.

POLLY'S EX'OR v. CITY OF COVINGTON.

Filed October 3, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Schedule—Partial transcript—In cases for the settlement of estates, as well as all others, there should be a schedule filed if a partial transcript is to be relied upon. And even if a schedule made by the judge of the court to whom an assignment of errors has been presented could be regarded in any case as sufficient, the schedule filed in this case will not avail the appellant, as it was not made at his instance, and the errors assigned did not relate to the question now presented.

Where many distinct and separate matters are involved in one suit, as is generally the case in suits for the settlement of estates, a complete transcript as to any one case may be made up now, as formerly, by bill of exceptions and evidence.

But waiving the failure to file a schedule in this case, the court considers the errors complained of and affirms the judgment.

2. Demands against decedent's estates—The provisions of the statute as to the verification and demand of claims against the estates of decedents do not relate to claims against an estate incurred after the death of the intestate or testator, but to claims existing against the decedent at the time of his death.

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As the claim for taxes, the allowance of which is complained of in this case, occurred after the death of the testator, and during this litigation between the executor and devisees as to how the estate should be settled and distributed, the provisions of the statute as to verification do not apply.

3. Judicial sales—Claim for taxes—It was proper for the court, upon claim being made therefor, to have its master report as to these taxes, that the title to the property which it was asked to sell might be freed from the tax claim, and the apprehensions of bidders removed.

4. The judgment of the lower court is presumptively correct, and this court has no power to reverse a judgment on a question purely evidential, or a mixed question of law and fact, and about which evidence might have been heard on the trial, unless the judgment shows that no evidence was introduced, or unless the evidence which was introduced on the trial is made a part of the record by bill of exceptions.

In the absence of a bill of exceptions and evidence in this case the judgment of the lower court overruling exceptions to the commissioner's report of taxes, and allowing the claim for taxes, is presumed to be correct, although the affidavit of the claimant and the tax accounts filed are not sufficient to show that the property had been assessed, or that a tax had been levied.

Collins & Fenley for appellant; W. K. Benton for appellee.

KENDALL, &c. v. LEWIS.

Filed October 3, 1888. Appeal from Morgan Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Note construed—Pleading—Appellee instituted suit upon the following writing: "Whereas, James M. Lewis has loaned me $100, which is to draw 10 per cent. from date until paid, which is to be due and payable the 1st day of November, 1887, and now, to further secure him, I hereby give him lien upon county claim that will be due me at October Court of Claims, 1887." The paper was declared upon as a promissory note, whereby the makers agreed to pay plaintiff the sum named on the 1st day of November, 1887. Appellants, sureties, answered, averring that it was not true that they, by the writing sued on, agreed and promised to pay the plaintiff the named sum, or any other. Held—That a demurrer to the answer was properly sustained. The writing was an acknowledgment by the principal that he had received from appellee $100, upon which he was to pay interest until the principal sum was paid, and that the principal sum was due and payable November 1, 1887, from which the law implies a promise to pay principal and interest on that day, and the undertaking of the sureties is the same as that of the principal. The answer was simply a traverse of the legal conclusion resulting from the admitted facts.

John T. Hazelrigg for appellants; Salyer & O'Rear for appellee.

EVERETT v. TURNER.

Filed October 3, 1888. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Bowden, affirming.

Pleading—After fifteen years of litigation, and after a preparation and hearing on the merits, it is too late to indulge in a critical reading of the pleadings.

H. L. Stone for appellant; Thomas Turner for appellee.

ALSOP v. ADAMS.

Filed October 3, 1888. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

Questions treated as settled on second appeal—Damages—Evidence—Appellee and appellant owned adjoining farms, upon each of which was swamp lands which they desired to improve by a system of ditches. To this end, in the year 1877, they entered into a written agreement, whereby each undertook to dig certain ditches connecting with each other, and to keep them cleaned out. Appellee, claiming that appellant had failed to comply with his contract, instituted an action in 1884 for the recovery of damages alleged

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to have been sustained by him in consequence thereof for the four preceding years. Upon the trial of this action appellee obtained a verdict and judgment, which was subsequently reversed. In the meantime appellee had instituted another action for damages alleged to have been sustained by him during the year 1884, growing out of appellant's continuing breach of contract. Upon the return of the first case the two actions were consolidated, and upon the trial appellee again obtained a verdict and judgment. Held—

1. Every question presented on the former appeal must be taken to have been disposed of by the decision on that appeal, unless it was expressly left open for future litigation. Therefore, the presumption must be indulged that instructions now complained of, which were also given on the former trial, were approved by this court on the former appeal, as the correctness of the rulings of the court in giving them was presented on that appeal, and they were not condemned.

2. Evidence as to the value of the land in the condition in which defendant kept his ditch, and its value if the ditch had been as it was to have been under the contract, was competent as affecting the value of the use, and, for the same purpose, evidence as to the difference in the character of crops that could have been raised upon the land under the different conditions was competent.

3. Though not surveyors or civil engineers, the neighbors and farmers who are acquainted with the lands and the surrounding country, and the system of ditches, and who had personally inspected the ditches in question, were competent to speak as to the capacity of the defendant's ditch as compared with those above and below it, the weight of their evidence being for the jury.

4. The court properly refused to allow a witness who had made a survey of the ditches on the 31st of July, 1885, to testify as to their then condition, as the defendant did not show that the ditch was then in the same condition that it was in 1884, or prior thereto. The avowal that the witness would state that no change had occurred along the line of the ditches is too indefinite, as the witness did not pretend to have any knowledge of the ditches prior to his survey.

E. E. McKay and Carry & Spindle for appellant; James S. Pirtle and B. F. Camp for appellee.

WORTHINGTON v. COVINGTON ROLLER SKATING RINK CO., &c.

Filed October 3, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Distress warrant—The magistrate has no authority to issue a distress warrant where the statement of the landlord shows that the rent has been due more than six months, and if he does so the warrant is void; and, as the warrant is an entirety, if it is void as to any part of the rent it is void as to the whole.

In this case, as the affidavit of the landlord upon which the distress warrant issued showed that a part of the rent had been due more than six months, the warrant was void, and the landlord acquired no right by virtue of his purchase under the warrant.

2. Landlord's lien—This is a proceeding to settle the affairs of an insolvent company. The original action was instituted by parties asserting a mechanic's lien on certain buildings of the company. Appellant, the lessor of the land on which the buildings are situated, and other creditors of the company, are made parties. Appellant, by his answer, alleged that he had purchased all the property of the company under a distress warrant which he had sued out for his rent, but asked that, if his purchase should not be allowed to stand, that he be given a superior lien for the rent due him. The other creditors came in, and, alleging the insolvency of the company, asked for a settlement of its indebtedness and for a sale of the property. Held—That, although appellant's distress warrant was void, he should be allowed to set up his lien for rent in this action, and should be allowed a prior lien for rent which fell due 120 days before the filing of the original action assert-

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ing a mechanic's lien. In such a case it would involve needless expense to require the landlord to sue out a distress warrant or attachment for rent.

3. Same—Appellant, having taken possession and control of the premises, should be deemed to have asserted his right, reserved in his lease, to re-enter in the event any rent should become due and remain unpaid for ten days, although he claims to have entered by virtue of his purchase under the warrant, and he should not be allowed rents after he re-entered. It was also proper to refuse to allow his claim for premiums paid for insurance, as the insurance was for the beefit of himself, and not for the benefit of the other creditors. Nor was he entitled to be allowed for expenditures made in repairing the building, as they will be of comparatively little value if the building has to be removed, as will be the case if any one else than appellant purchases it.

4. A cross appeal is only allowed to an appellee against the appellant, and not against a co appellee, and as other creditors whose liens were rejected have no complaint against appellant, their cross appeals must be dismissed.

Hallam & Myers for appellants, J. F. & C. H. Fisk and Collins & Fenley for appellees.

VOGLER, WAGNER & CO. v. SMITH, &c.

Filed October 3, 1888. Appeal from Kenton Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Assignment by operation of law—The evidence sustains the chancellor in his judgment that the defendant had, in contemplation of insolvency, attempted to prefer appellants to the exclusion of her other creditors.

2. Mortgages—When it clearly appears from an instrument that it was intended to have the force and effect of a mortgage, it will be enforced as such; the form is immaterial.

3. Same—When a mortgage upon a stock of goods gives a lien upon additions which may be made thereto, it is valid as to such after acquired property as between the parties, but is not valid as to other creditors.

In this case, by an arrangement between the debtors and appellants, creditors, who are contesting the mortgagee's right to a lien upon the property acquired subsequent to the mortgage, an agent was placed in charge of the store and sold goods in the interim between the service of an order of attachment upon the goods and their sale by order of the county judge. Held—That as these goods were sold at the instance of appellants, they should clearly identify them as a part of the additions to the mortgaged stock before they can claim any benefit arising from such sales, they having constructive notice of the mortgage.

4. Liens—Prejudicial errors—As the landlord had a lien upon all the goods, his rent should be paid out of the goods upon which the mortgagee had no lien; and out of the balance of the proceeds of the after-acquired property, after deducting the landlord's lien, must be paid the costs of the mortgagee in this action, all of which grew out of appellant's resistance to his effort to have the estate of the debtor settled for the benefit of her creditors. And as the court is satisfied, from an examination of the record, that such costs will exceed the balance named, the judgment will not be disturbed, although the chancellor erroneously held that the mortgagee had a lien upon the after-acquired property, the result being the same.

James M. Tisdale for appellants; W. K. Benton for appellees.

ROBERTS & CO. V. NICKLIES.

STUCKY v. NICKLIES.

Filed October 3, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, granting rehearing and reversing.

Assignment for creditors—Where the assignor's intent in making an assingment for the benefit of his creditors is to hinder and delay his creditors, the assignment is void, irrespective of its effect, and an attaching creditor is entitled to a preference. The creditor having died since the institution of these suits, the effect of the reversal is to place his estate in the hands of his administrator, instead of his assignee. (Bank of Commerce v. Payne & Viley,

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&c., ante., page 43, decided by the Court of Appeals since the former opinion was delivered.)

Abbott & Rutledge for appellants; Bacon & Stites for appellees.

SILVA v. FIRST NATIONAL BANK OF NEW ORLEANS.

Filed June 13, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Removal of causes to United States Court—The mere filing of a petition for the removal from the State court to the United States Circuit Court of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand a removal. It is only when this is made to appear on the record, and the requisite security has been given, that the power of the State court in the case ends and that of the United States court begins.

2. Same—In determining whether or not the petitioner is entitled to a removal, the sole question, aside from the amount in controversy, is whether a law of the United States is to be construed and applied. If so, it is a controversy arising under that law, no matter how plain the question may be, nor how frequently it may have been decided by the court which is to try the question.

3. Same—An answer having been filed in this case prior to the filing by the defendant of the petition for removal, it is proper to consider its allegations in connection with the petition for transfer, in order to see what amount is in dispute, and by what law that dispute is to be determined.

As it appears in this case that the matter in dispute was less than $500, the lower court did right in refusing to relinquish its jurisdiction in proceeding with the trial of the case. The question depends upon the law as it was when the petition was filed and bond approved, which was prior to the act of 1887, changing to $2,000 the sum necessary to authorize the removal.

4. Same—In this action by a national bank upon a note executed to it by the defendant, in which the defendant alleges that he had paid usury, and seeks to recover under the United States law double the amount so paid, he can not compel the plaintiff to accept a sum he tenders, which he admits is usury, in order to increase the sum in dispute, that he may be entitled to a removal of the cause from the State Court. The plaintiff can not be compelled to take the amount tendered because it has promised or agreed to do so.

5. National banks—Usury—Conflict of laws—National banks are not affected or controlled by State laws upon the subject of usury. While they are not allowed to charge a greater rate of interest than may be charged under State laws by individuals or State banks of issue, yet if they do charge more they are not amenable to the penalties denounced by the State laws, but to those denounced by the act of Congress establishing them.

6. Usury—Under section 5,198 of the Revised Statutes of the United States, interest paid upon a note does not go to the discharge of the legal interest due at the time of payment, and then to the satisfaction of the principal, but it is a payment of interest or usury as the case may be. Nor can the payments so made, or double the usury, be set off against the debt sued upon, but these sums, if recovered at all, must be recovered by an independent action.

C. J. Helm for appellant; J. S. Ducker for appellee

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KENTUCKY COURT OF APPEALS.

TANKERSLY v. COMMONWEALTH.

(Filed September 15, 1888—Not to be reported.)

Appellate jurisdiction in misdemeanor cases.

Alcorn & Craft for appellant.

P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Pryor.

This court has no jurisdiction of the appeal. The fine is only $25 and the imprisonment for ten days. (Section 347, Criminal Code.)

Appeal dismissed.

DOWNING, &c. v. SLADE, &c.

(Filed September 15, 1888—Not to be reported.)

1. Improvement of wife's estate with husband's money—An insolvent debtor will not be allowed to appropriate his own means to the improvement of his wife's estate to the injury of his creditors, and where he attempts to do so his prior creditors will be allowed to subject the estate to the extent that it has been enhanced in value by reason of the improvements. The mere fact of the investment is not of itself sufficient to make it fraudulent as to subsequent creditors.

The building (a merchant tailor's shop) erected by the husband on the wife's land in this case was not necessary for the support and comfort of the wife in a legal sense, or, if so, it was an expenditure of too much money for the benefit of the wife at the expense of creditors, it being alleged that the wife's estate was enhanced in value $2,000.

2. Same—Return of "no property"—It was not necessary that the creditors should have a return of "no property" to entitle them to maintain this action to subject the proceeds of the wife's property, as they resorted to an attachment under which the debtors to the wife for the property sold were garnished.

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L. M. Martin and J. Irvine Blanton for appellants.

Forman & Cason for appellees.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Pryor.

The facts alleged in the petition entitled the appellants to relief. The parties, husband and wife, are nonresidents, or were when this action was instituted. The husband, as is alleged, being indebted to the appellants, used his own means in the erection of a new building on premises belonging to his wife that enhanced its value $2,000. He was and is insolvent. The question presented by the demurrer is, can the husband, by or without the consent of his wife, appropriate his own means in improving her estate to the injury of his own creditors? The husband has in this case, if the allegations made are true, by these improvements enhanced the value of the wife's lot of ground, which seems to be all the property she owned, that enabled her to sell it for greatly more than its original value. The building was a merchant tailor's shop, that was neither necessary nor required for the support and comfort of the wife in a legal sense, or, if so, it was an expenditure of too much money for the benefit of the wife at the expense of creditors.

That he was indebted to the appellants when he made the expenditure is alleged, and the effect this act of the husband may have on the rights of creditors, whose debts were thereafter created, is not now determined. There was no reason for a return of no property found, as the plaintiffs resorted to their attachment, under which the debtors to the wife for the property sold were garnished. It seems that the husband and wife sold the property, and the purchase money, being due or to become due from the vendee, it will be proper for the chancellor to subject to the payment of the husband's debt existing when the investment of his money, if any, was made the enhanced value of the estate caused by this expenditure. The mere fact of the investment is not of itself sufficient to make it fraudulent as to subsequent creditors. This opinion will not affect any legal or equitable defense that may be interposed by the parties, as it is based alone on the facts admitted by the demurrer.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

TAYLOR v. FARMERS BANK OF KENTUCKY, &c.

(Filed September 15, 1888.)

Principal and surety—Subrogation—Where a security is given by a principal to his surety it operates eo instanti as a security to the creditor for the payment of his debt; but where a security is given by a stranger to indemnify the surety, and not for the payment of the debt, a trust does not attach to it for the creditor, and he can not be subrogated to the rights of the surety. Nor is it material that the security was given by the wife of the principal, she being a stranger to the debt.

A. Duvall and Nelson & Washington for appellant.

W. H. Mackoy for appellees.

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Appeal from Campbell Circuit Court.

Opinion of the court by Judge Holt.

This is a question of subrogation.

October 10, 1877, William Timberlake drew a bill of exchange for $7,140.03 upon Henry C. Timberlake, payable to the order of John W. Menzies. It was endorsed by the latter, after having been accepted by Henry C. Timberlake, and then delivered to the latter and negotiated by him for his benefit.

March 18, 1878, the Farmers Bank of Kentucky sued the three parties above named upon the bill, and subsequently recovered a judgment.

Execution upon it was returned nulla bona, save about $1,000, made out of the estate of William Timberlake, the Timberlakes and Menzies being insolvent.

The latter was an accommodation endorser, and has never paid anything upon the judgment.

March 21, 1878, the appellee, Susan A. Timberlake, her husband, Henry C. Timberlake, joining with her as a legal necessity to the step, mortgaged to John W. Menzies a tract of land belonging to her.

The condition of the mortgage is as follows: "This conveyance is made to secure, indemnify and save harmless the said Menzies against any loss he may sustain by reason of his endorsement of a draft, dated October 10, 1877, drawn by William Timberlake on the said Henry C. Timberlake for his accommodation, at four months, for $7,140.03, and endorsed by said Menzies, and negotiated by said Henry C. Timberlake for his own benefit, and upon which the Farmers Bank of Kentucky has brought suit in the Kenton Circuit Court, and if said Menzies is not required to pay any part of said claim this conveyance will stand for naught, otherwise it will remain in full force. * * * The said Menzies is not to permit any loss to fall upon him which he can lawfully prevent, as this conveyance is for his benefit, and not made for the purpose of securing any part of said claim which he may avoid by any and all lawful efforts."

December 7, 1882, the bank, by a written transfer, assigned the judgment to the appellants, together with "all the rights and equities of every kind or nature" connected with it.

Henry C. Timberlake died insolvent in 1880; and on December 12, 1882, the appellants brought this action, asking to be substituted to all the rights of Menzies under the mortgage of indemnity to him, and that the land of Mrs. Timberlake be subjected to the payment of their judgment.

The matters above recited are to be taken as true, as they are set out in the petition, and it was dismissed upon demurrer.

It is urged that there was no consideration to support the mortgage. It was executed after the bill of exchange, and indeed after suit had been brought upon it. If Menzies had paid anything, and were seeking to enforce the mortgage, suspicion arises from this record that if issue were made and proof taken upon a plea of no consideration it would be in his way.

The writing, however, imports a sufficient consideration.

True, this presumption ceases when the party relying upon the writing undertakes to show the consideration by his pleading. (Steadman v. Guthrie, &c., 4 Met., 147.)

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Here, however, the appellants did not do this; but merely state the purpose of the mortgage. The real question in the case is now reached: Had the bank a right to be substituted to Menzies' place under the mortgage? If so, then the appellants, as its assignees, have the same right.

The doctrine of subrogation comes to us from the civil law. It is not the creature of contract, but of natural equity, although it has been said that it may be modified by contract. It is applied between parties where the circumstances require it, that essential justice may be afforded; but not where it will work injustice to others.

The rule is well settled that where a security is given by a principal to his surety it operates eo instanti as a security to the creditor for the payment of his debt. This right of the latter can not be defeated, even by the release or conveyance of the surety or mortgagee, unless the liability be contingent, save to a bona fide purchaser without notice; and if contingent, the surety can not defeat it after his liability becomes fixed. The reason of this rule is that the security given by the principal debtor to his surety is regarded in equity as a trust fund for the payment of the debt. All the property of the principal debtor is liable for his debt; and it does not lie in his mouth, therefore, to say that it is not in trust for the creditor when pledged to the surety as indemnity. The creditor may, through the medium of the surety, resort to the property thus placed in trust for the payment of the debt, and is invested by equity wi h all the rights of the surety. In such a case the security is for the debt as well as the ultimate protection of the surety. It at once is clothed with a trust character; and the creditor immediately acquires a right and interest in it that can not be defeated by the act of the surety. So, too, upon like principles of justice or natural equity, where a principal indemnifies one of several sureties, he becomes a trustee for the others, and each is entitled to share the indemnity. The estate of the principal is liable for the debt, and his obligations to them are equal. He becomes a trustee for the creditor.

A different state of case is presented, however, where the contract of indemnity is by a stranger to the debt, and for the personal benefit of the surety merely, in opposition to the idea of a trust for the payment of the debt. In such a case the indemnity is not out of the estate of the principal. It was said, in the case of Osborn, &c. v. Noble, 46 Miss., 449: "We think the principle has been stated and enforced, that if, the security be purely personal, as to indemnify and save harmless the surety, and not for the better protection of the debt, or intended as a fund for its payment, a trust does not attach to it for the creditor."

Here Mrs. Timberlake was in no way liable for the debt. The fact that she was the wife of Henry C. Timberlake makes no difference. The indemnity was not out of his estate. The wife was under no obligation to pay the debt, and must be regarded, as indeed she was, as a stranger to it. It was no fraud upon the creditor to merely indemnify the surety. As the property belonged to her, if the mortgage created no lien to secure the payment of the debt, then no trust was created in favor of the creditor, since it is certain that the bill of exchange was not accepted upon the faith of the indemnity. It was not furnished to the surety until long after the creation of the debt, and indeed not until suit was brought upon it. Her contract must be regarded as one merely to save the surety harmless—as undertaking merely to indemnify him against the payment of the debt, and pledging the mortgaged property to him for whatever he may be compelled to pay, and.

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not as security for the payment of the debt. It is true that the mortgage recites the said Menzies is not to permit any loss to fall upon him which he can lawfully prevent, as this conveyance is for his benefit, and not made for the purpose of securing any part of said claim which he may avoid by any and all lawful efforts;" but when the entire instrument is considered it is evident that the purpose was merely to indemnify Menzies.

This being so, no right of subrogation exists in behalf of the appellants. Their claim is not supported by that equity which would attach to it if the debt had been accepted upon the faith of an indemnity created by the mortgage for its payment.

These views are supported and ably enforced by the opinions in the cases of Leggett v. McClelland, 39 Ohio St., 624, and Macklin, &c. v. Northern Bank of Ky., 83 Ky., 314; and the judgment below is affirmed.

HANCOCK STOCK AND FENCE LAW CO. v. ADAMS.

(Filed September 20, 1888.)

Constitutional law—Taking of private property for private use—The legislature has no power to take the property of one citizen to advance the private interests of another. Private property may be taken by way of taxation to improve a public highway, or for a purpose promoting the public health; but not to improve a particular tract of land, thus merely promoting the private interest of the owner or owners.

By an act of the legislature certain persons, therein named, were appointed trustees to erect and keep in repair a fence around a large boundary of land, the owners of which resorted to the plan of enclosing their lands for crop purposes by one common fence, their fences having been swept away by a recent flood. The trustees were authorized to levy and collect a tax from the property owners within the boundary, and penalties were provided for injuries to the fencing. By an amended act the appellant was created a corporation, and the boundary extended so as to include a part of the land of appellee, without whose knowledge or consent the act was procured. In this action by appellant to enjoin appellee from interfering with the fence on his land. Held—That the act of the legislature, as to appellee, is unconstitutional, he having never in any way consented to or ratified it.

Miller & Morrison, D. R. Murray and C. Adair for appellant.

W. S. Roberts for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Holt.

By an act of the legislature, approved March 6, 1884, certain persons, therein named, were appointed trustees to erect and keep in repair a fence around a large boundary of land therein described, lying upon the Ohio river in Hancock county. The reason for the passage of the law was that a then recent flood in the river had swept away the fencing, and the owners had neither the material nor the time to restore it for the crop season then at hand. They, therefore, resorted to the plan of enclosing their lands, for crop purposes, in one common boundary by one fence.

In order to build and maintain it the trustees were authorized to levy and have collected both a head and property tax from the property owners

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within the boundary. Penalties were also provided by the law for injuries to the fencing, and for allowing cattle to run at large within it. No part of the land of the appellee, Robert C. Adams, was embraced by the act.

In the spring of 1885 a portion of the fence was washed away, and the weight of the testimony shows that the appellee, as an accommodation merely, agreed with the trustee who was in charge of the fence in that locality that it might be rebuilt so that it would enclose a few acres of the appellee's land; but the fence, so far as it might be upon his land or enclosing it, was to be removed upon notice from the appellee; or, upon failure of the trustees to remove it, after being notified by the appellee to do so, he was to have the right to do so and also keep the fencing. There was no consideration moving to the appellee for this grant of privilege. It was done as a favor to his neighbors. The portion of his land thus enclosed was the river front to his farm. It took the land along it lying between the top of the river bank and the water, thereby preventing him from watering his stock there or otherwise using that portion of his farm. The bank of the river was subject to the right in the public of riparian privilege; but it was the appellee's land, and, subject to this right, he was the owner and entitled to the use of it.

In the fall of 1885, finding that this enclosure of his land was putting him to great trouble and expense, he gave the required notice for its removal; and it not having been removed, he, in January, 1886, took it down and stacked it up on his farm, consenting, however, as he has upon record in this suit, that the trustees may have it. January 29, 1886, some of the parties interested obtained an amended act of the legislature incorporating "The Hancock Fence and Stock Law Co.," eo nomine, and extending the boundary so as to embrace the land of the appellee that had been enclosed in the manner above stated.

He had no notice or knowledge in any way that such legislative action would be asked, and never in any way consented to or ratified it. Indeed there is testimony tending to show that he was kept in ignorance of it purposely by those who were asking it, and who would be benefited by it.

After obtaining it this action was brought by the company on April 19, 1886, against the appellee to recover damages for the removal of the fence, and to enjoin him from thereafter interfering with it.

The testimony shows that the fence, instead of being a benefit, is an injury to the appellee.

The corporation is a private one, and for private uses. It can not properly be said that it subserves any public purpose. For this reason, doubtless, no right of condemnation of property was attempted to be given to the company by the legislature. Such an act can only affect the rights of those consenting to it.

It is true a local burden may be imposed by the legislature, but it must be for a local public use; and while not indispensable to its constitutional validity, yet there is an eminent fitness in such a case, unless it be one of absolute necessity, or which admits of no delay, in providing that before it shall become imperative the legislative judgment as to its propriety shall be endorsed by the local community that is to bear it.

Thus local taxation for a local purpose of a public character may be imposed at the will of the legislature, and without the consent of any one to be affected by it.

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Private property, however, can not be taken even for public use without just compensation, nor can it be taken for a private use under the guise of taxation. The private property of the citizen is assured to him by constitutional shield, and he can only be deprived of it for governmental or public use, and then only upon just compensation being made to him. This guard to private right is as old as magna charta.

His property can not be subjected to a local burden for the private benefit of other individuals, and in which he has no interest. This would be spoliation, and is beyond the constitutional boundary of legislative action. It has no power to take the property of one citizen to advance the private interests of another. It may be taken by way of taxation to improve a public highway, or for a purpose promoting the public health; but not to improve a particular tract of land, thus merely promoting the private interest of the owner or owners. This is but taking from one citizen and giving to another.

True, in the case now before us, it is not proposed to exact a tax, as was the case in the Cypress Pond Draining Co. v. Hooper, &c., 2 Met., 350, and the Scuffletown Fence Co. v. McAllister, 12 Bush, 312, but it is an attempt to deprive the appellee of a vested right; to take from him the right to use his land as he pleases for the private benefit of other individuals; and we have no hesitation in holding that the act of the legislature as to him is inoperative and void.

Judgment affirmed.

GIBSON v. BLACK.

(Filed Spetember 20, 1888—Not to be reported.)

Departure in pleading—While the Civil Code provides that a party shall not in a reply depart from a cause of action stated by him in a previous pleading, it is expressly stated that the pleading of equitable matter in avoidance or estoppel in an equitable action shall not of itself constitute such departure.

Appellant instituted this action for an injunction against the erection, by appellee, of weighing scales on the public square of Barbourville in front of his (appellant's) lot, on which is a hotel building. He alleged in his petition that the right to have and use the site where appellee has commenced to fix the scales has been, for twenty-five years, enjoyed and used by him and those under whom he claims, and has been, and is, an appurtenance of the property. The defendant claimed by his answer the right to erect the scales at the place mentioned in virtue of an order of the board of trustees of the town granting the privilege. The plaintiff, by his reply, alleged that, by the terms of the order of the board of trustees relied on, it was made a condition that, in selecting a site for the scales, he should not "get so close to other private property as to interfere with the use of the same," and that the erection and use of the scales by defendant in such close proximity to his hotel property would injure the use and business of it. The court, upon motion, struck from the reply this allegation, and rejected all testimony taken in support of it. Held—That this was error. The plaintiff had the right to avoid the claim of defendant by showing a plain violation of the condition upon which the privilege was granted.

John H. Wilson for appellant.

Wm. Lindsay for appellee.

Appeal from Knox Circuit Court.

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Opinion of the court by Chief Justice Lewis.

Appellant instituted this action for an injunction against the erection by appellee of weighing scales on the public square of the town of Barbourville in front of his (appellant's) lot, on which is a hotel building. In his petition he says the right to have and use the site where appellee has commenced to fix the scales, which the evidence shows was granted about twenty-five years ago to a former owner of the hotel lot, has been, for that length of time, enjoyed and used by him and those under whom he claims, and has been, and is, an appurtenance of the property.

In his answer appellee claims the right to erect the scales at the place mentioned in virtue of an order of the board of trustees of the town granting the privilege to one Golden, who transferred it to appellee. It is further alleged that, for the consideration of $10, Golden had purchased from one A. Y. Culton the old scales and all his right to the site whereon they were located, and it is intended to erect the new scales, and that such purchase was made with the consent of appellant. A writing is filed as an exhibit evidencing the purchase, but A. Y. Culton made the sale not as principal, but as the agent of his wife, a sister of appellant.

She is not, however, shown to have had any other claim to the scales than the permission given by her brothher to use at sufferance, and make whatever she could out of the old scales. In his reply appellant stated that, by the terms of the order of the board of trustees granting the privilege to Golden, it was made a condition that, in selecting a site for the scales, he should not "get so close to other private property as to interfere with the use of the same;" and that the erection and use of said scales by appellee in such close proximity to his hotel property would injure the use and business of it.

Upon motion the court struck from the reply the allegation, and also rejected all the testimony taken in support of it.

Section 101, Civil Code, provides a party shall not in a reply depart from a cause of action stated by him in a previous pleading. But it is expressly stated that the pleading of equitable matter in avoidance or estoppel in an equitable action shall not, of itself, constitute such departure.

In opposition to the right claimed by appellant to the original site as appurtenant to the lot on which the hotel is situated appellee set up and relied on the order of the board of trustees as giving him the privilege claimed. It seems to us clear that appellant, under that state of case, had the right to avoid the claim of appellee by alleging and proving that the erection of the scales in front of his hotel would interfere with the use of the same, and, therefore, be a plain violation of the condition upon which the privilege was granted to appellee, and the lower court erred in sustaining the motion to strike from the reply such matter in avoidance of the claim of appellee.

There is evidence tending to show that appellant consented to the sale of the old scales by A. Y. Culton, as agent of his wife, to Golden. But we think the evidence fails to show he ever consented to transfer or give up the site where appellee now claims the right to erect the new scales. In fact there are circumstances developed which tend strongly to show that the order of the board of trustees, of which appellant was, at the time, a member, was obtained by Golden upon the implied understanding the new scales would be placed at another and different site.

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The evidence shows conclusively that the erection and use of the scales by another person than the owner in front of the hotel property of appellant would be very annoying and injurious to the proper use of the hotel. and consequently this record shows a state of case not only justifying the restraining order of the chancellor, but absolutely denying to appellee any right whatever under the order of the board of trustees to put the scales at that place against the protest of appellant. Appellee has a lot on the public square in front of which he might put his scales, and, independent of the condition contained in the order of the trustees, should not be permitted to impose upon some one else the inconvenience resulting from the use of the scales while himself enjoying the profit.

For the error of the lower court mentioned the judgment is reversed. But as the ruling of the lower court rendered it unnecessary for him to do so, and appellee did not take proof upon the issue set up in the reply, the cause is remanded, with directions to hear other evidence and determine whether the erection of the scales will interfere with the proper use of the hotel property or injure the business conducted there.

FARMER v. LYONS.

(Filed September 22, 1888.)

Trespass—Adverse possession—Where one has been in possession of land, although without title, claiming and using it as his own to a well-defined marked boundary continually for fifteen years before the commission of a trespass within his boundary, he may maintain an action therefor, whether the trespass was committed outside or within his enclosure.

D. H. mith for appellant.

I. W. Twyman for appellee.

Appeal from Larue Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is an action by appellant to recover of appellee for trespass by entering upon and cutting and carrying timber from a tract of land which, as alleged in the petition, he was the owner and in possession of.

Appellee, not denying he cut and carried off the timber, states in his answer that he and those under whom he claims had. at the time of the alleged trespass, been in the actual possession of the land described in the petition, claiming to a well-defined boundary, for more than fifteen years, and that he had, for more than eighteen months, so held and claimed it under a deed.

Upon the trial appellant testified as a witness he was the owner of the land, and had been in possession of it since 1861. And being asked if he claimed to a well-defined boundary would, as was averred, have answered that the boundary was marked; that he had lived upon the land, claiming to such boundary, exercised acts of ownership over it by cutting and using timber, and had part of it enclosed since 1861. But objection to the question was sustained, and not permitted answered. The court also refused to permit him to answer that he had the land surveyed in 1862, and had the field

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notes of such survey, or to state the value of the timber cut. And no further testimony being offered, the jury, under a peremptory instruction, returned a verdict for the defendant. As the act of cutting and carrying away the timber was not denied by the defendant, and the deed relied on in his answer is not alone sufficient to support a plea of liberum tenementum, the ruling of the lower court must have been made upon the assumption that a party without paper title can not maintain an action for trespass to land committed outside his enclosure, however long, notorious and definite may have been his possession and claim of ownership.

The case of Campbell v. Thomas, 9 B. M., 82, was an action of ejectment by the latter against the former. The defendant, and those under whom he claimed, in 1816 entered and settled upon a tract of land, without title, but claiming to the marked boundary, and so continued to hold until the action was commenced. The land was surveyed previous to the settlement and in the same year, but the survey was private and unofficial. The original settler under whom Campbell claimed made his entry and settlement with a view of obtaining from the Commonwealth a valid title to the land embraced by the survey and marked boundary, but never obtained it. In 1823 Thomas procured a patent for a tract of land which covered about twenty-four acres of that included in Campbell's survey. Thomas, in 1825, entered upon his patent boundary, but outside the interference, and continued to reside on the land, claiming to his patent boundary. No improvement was made by either party upon the interference, nor was any portion of it enclosed until shortly before the commencement of the action by Thomas in 1846.

The question involved and decided in that case was as to the extent of Campbell's possession in 1823 when Thomas obtained his patent, and in reference thereto, this court used the following language: "The land was vacant in 1816 when originally settled on by the person under whom the defendant claims. Having surveyed and laid off 170 acres and entered, and settled upon it with the intention of taking possession of the whole, he gained, according to the repeated adjudications of this court in similar cases, when the entry was made under color of title, a possession to the extent of his marked boundary." And in support of that decision, Thomas v. Harrow, &c., 4 Bibb, 564; Taylor v. Buckner, 2 Mar., 19; Roberts v. Sanders, 3 Mar., 30, and Brooks v. Clay, Ibid. 548, are cited.

It was there decided that while possession of vacant and unappropriated land is held in complete subordination to the title of the Commonwealth, it was taken in that instance under the encouragement given by legislation regulating the settlement and occupation of vacant lands, and consequently there was "no good reason why a possession taken under such circumstances should not, in ascertaining its extent, be governed by the rules which have been applied to other cases. When a possession had been taken without title such possession was held to extend to the ascertained limits of the claim." But, as said by the court, inasmuch as the settler did not comply with the requisition of the legislature, he acquired no pre-emptive right by his settlement, and the land was subject to appropriation by other parties at the time Thomas obtained his patent, and the title of the latter was not affected by the previous possession. It was, however, decided that, as Campbell claimed the land as his own, his possession, according to the doctrine uniformly held by this court, became adverse to Thomas so soon as he obtained his patent, and having permitted such adverse possession to

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continue for twenty (15) years without entry or suit to divest, it formed a complete bar to his possessory right. And as the entry of Thomas in 1825 was outside the interference, and not on Campbell's possession, it did not divest the occupant or invest the patentee with possession of the land in controversy.

It does not appear whether the land was or was not vacant and unappropriated at the time the person under whom appellant claims entered and had it surveyed and marked, nor do we think, according to the principle laid down in Campbell v. Thomas, it makes any difference. If it was vacant the person under whom appellant claims had the right to enter and hold to the extent of his survey and marked boundary, looking to the Commonwealth for a title upon the terms prescribed by statute. If it was not vacant the occupant might nevertheless have, by entering and marking a boundary, acquired possession to the extent of such boundary, good at the end of fifteen years, at least against one having no right to enter. And, moreover, as decided in Campbell v. Thomas, such possession, accompanied with a claim of ownership, would be adverse to some one having title derived from the Commonwealth, and at the end of that period form a complete bar to his possessory right to any part of the land within such marked boundary, for it was there held that, although the settler, Campbell, did not comply with the requisitions of the statute, and acquired in pre-emptive right by his settlement, and the title to the disputed land became rightfully invested by the Commonwealth in Thomas, still the entry by him under his patent did not, to any extent, divest Campbell of the possession already acquired when the patent was issued, although it included a part of the land covered by the patent and outside Campbell's enclosure.

It being thus decided, we think correctly, that a possession without title may exist which, if continued fifteen years, will bar a recovery in ejectment of any part of the land within a marked boundary by even one having title derived from the Commonwealth, we see no reason why such a possession should not be held effectual to support an action for trespass committed within the boundary, whether outside or within the enclosure.

In our opinion, if appellant had openly held possession of the land in dispute, claiming and using it as his own to a well-defined marked boundary continuously for fifteen years before the alleged trespass, he was entitled to recover, and as the evidence rejected by the court conduced to establish his right, and was relevant, it ought to have been permitted to go to the jury.

The judgment must be reversed and cause remanded for a new trial consistent with this opinion.

CHRISTMAS v. HAHN.

(Filed September 22, 1888—Not to be reported.)

1. Separate estate—The provision of the Revised Statutes prohibiting the alienation by a married woman of her separate estate did not apply where the wife herself had created the separate estate out of her general estate.

2. Same — A contract made by husband and wife before marriage, by which the wife was to hold the property she possessed before coverture as her separate estate after marriage, to be disposed of by her as she saw proper, was not cancelled by the subsequent marriage, and conferred upon the wife the power to dispose of such estate as if she were a feme sole.

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3. Same—The statute prohibiting a married woman resident within the State from conferring upon an agent the power to dispose of her estate applies alone to her general estate and not to her separate estate, that she is authorized, in express terms, to make disposition of as she may see proper. And she may confer such authority upon her husband as well as upon a stranger, and his deed will divest the title.

Wm. Lindsay and S. B. Toney for appellant.

H. M. Lane for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This action was instituted by the widow of Richard Christmas to recover the real estate sold by him under a power of attorney given the husband by the wife, the estate being her separate estate, with the power of disposal on the part of the wife. The provisions of the Revised Statutes or the construction of its provisions must control the decision of this case.

Prior to the marriage of Mary E. Phillips with Richard Christmas, which occurred on the 6th of October, 1852, they entered into a contract by which the property of the said Mary, including a large tract of land in Jefferson county, was to remain and constitute the sole and exclusive estate of the wife, free from the marital rights of the husband. In the year 1855, after the marriage, the parties, with a view of making the agreement more effectual, conveyed to James Y. Christmas the property, including the land in controversy, that he might reconvey the same to Richard Christmas in trust for the sole and exclusive use of his wife, Mary, as her separate estate with the express power on the part of the wife to dispose of the same, or any part of the property, at her discretion by deed, will or otherwise, as if she were a feme sole. The third party, James Y. Christmas, at or about the same time, reconveyed the property to the husband and wife—to the husband as trustee—creating the separate estate and giving to the wife full power to make such disposition of the property as she might deem proper.

The object of these two deeds was to carry into execution more certainly the antenuptial contract between the husband and wife, and the wife was, at all times, the beneficial owner of the estate, and in fact in equity the absolute owner. James Y. Christmas had no other interest or power over the estate than the right to convey it for the separate use of the wife, with power on her part to dispose of it as she pleased. The appellant, having owned the estate in her own right as her general estate, had the power, in conjunction with her husband, to create this separate estate for her exclusive benefit, with the right reserved on her part to control and dispose of it. Nor is this right of the wife affected by the provision of the Revised Statutes in force when the transactions took place. This court, in the cases of Bryan v. Bohannan, 1856, and Bell v. Rogers, January 24, 1877, MS. opinions, held that where the wife at the time owned the general estate and converted it into separate estate for her exclusive use, that such an estate was not controlled by the provisions of the Revised Statutes prohibiting the alienation by a married woman of property conveyed or devised to her for her separate use. (Chapter 47, section 17.) This court was not disposed to extend the statute so as to embrace a state of case where the wife herself had created the separate estate out of her general estate, for in equity, at

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least, she was, at all times, the absolute owner, and the statute only applies to cases where the owner of the property conveyed or devised it to the separate use of the feme. (Duvall v. Graves, 7 Bush, 467.)

It is well settled that in either an antenuptial or postnuptial contract between husband and wife, securing the estate vested in the wife to her separate use, the estate is not affected by the Revised Statutes. As to the alienation by the wife of her separate estate the rule is, that in equity she may act, in reference to her separate estate, as if she were a feme sole.

In the case of Crostwaight v. Hutchinson, 2 Bibb, 407, where a contract was made by the husband and wife before marriage by which the wife was to hold the property she possessed before coverture as her own, to be disposed of by last will or by deed, it was held that the contract was not cancelled by the subsequent marriage, and the wife had the power to dispose of her estate.

The feme covert in this case, living in France or residing there, executed a power of attorney to her husband, empowering him to sell this land then held as her separate estate, and the husband having sold the land under this power of attorney, the appellees, claiming under him, insist that they acquire a perfect title. Here the wife, being a party to these conveyances, was invested with the absolute power of disposition as to this separate estate, and her legal disability was not in the way of alienating the estate, either under a deed executed by her or under written authority given to another; and Mr. Story, in his work on Equity Jurisprudence, says: "Upon this subject the doctrine is now firmly established in equity that she may bestow her separate property, by appointment or otherwise, under her husband as well as upon a stranger." (Volume 2, section 1395.)

In the exercise of this power of disposition of her separate estate neither privy examination nor the concurrence of the husband was required, and the reconveyance by him under the authority conferred by the wife not being questioned, his deed divested her of all title. (Johnson v. Jones, 12 B. M., 326; Slaughter v. Glenn, 98 U. S., 242; Duvall v. Graves, 7 Bush, 467.)

It is argued, however, that as the wife was a resident of Kentucky, and living only temporarily out of the State, that, by virtue of the statute, she had no power to execute a letter of attorney to another to sell her land. We think the statute prohibiting a married woman, resident within the State, from conferring such an authority upon an agent applies alone to her general estate and not to her separate property, that she is authorized in express terms to make disposition of as she may see proper. This question was in effect decided in the case of Stuart v. Wilder, 17 B. M., 58, in which it is said that the provisions in the chapter on conveyances, authorizing married women to convey any real or personal estate they may own, must be construed as applying to their general estate as distinguished from that in which they have a separate estate. (Smith v. Wilson, 2 Metcalfe, 235.) The wife being invested with the power of disposal, the estate also being her separate estate and created by the wife and husband out of her general estate, she had the right to make her husband her attorney in fact to dispose of the real estate in dispute, and he having sold and conveyed, under the power of attorney, the title vested in the purchaser from him, and the petition of appellants was properly dismissed.

Judgment affirmed.

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MARCUM, &c. v. POWERS.

(Filed September 25, 1888—Not to be reported.)

1. Voluntary conveyances—A gift of property, real or personal, does not defeat the right of a creditor of the donor whose debt existed at the time of the gift to subject the property to the payment of his debt.

2. Venue—It was proper for the creditor to bring his action in the county in which lies the land he sought to subject.

3. Practice—As the defendant did not except to the action of the court in sustaining a demurrer to his answer, and did not ask leave to amend, it was proper for the court to render judgment for the plaintiff.

J. A. Brents for appellants.

Sam C. Hardin for appellee.

Appeal from Wayne Circuit Court.

Opinion of the court by Judge Bennett.

The debt on which the appellant, T. Marcum, was sued by the appellee, and on which judgment was rendered in the Clinton Circuit Court, upon which judgment execution was issued and returned by the sheriff "no property found," was created before the appellant conveyed the land in controversy to his daughter.

It is alleged in the appellee's petition that the conveyance of said land was without any valuable consideration—a mere gift. This allegation, not being denied by the appellant, must be treated as true. It is well settled that a gift of property, real or personal, does not defeat the right of a creditor of the giver whose debt existed at the time of the gift to subject the property to the payment of the debt.

The demurrer was sustained to the appellant's answer; he did not except nor ask leave to amend. It was not error, therefore, to render judgment for the appellee. The excuse offered by the appellant, at a subsequent term of the court, for not excepting and asking leave to amend, was not sufficient. Besides, the amendment tendered at said term did not cure the defect in the original answer.

The land which the appellee sought to subject to his debt lies in Wayne county. It was, therefore, proper for the appellee to bring his action in that county.

The judgment of the circuit court is affirmed.

ROYAL INSURANCE CO. v. SCHWING, SURVIVING PARTNER.

(Filed September 20, 1888.)

1. Pleading—It is not essential to a recovery for the breach of a contract that the plaintiff must first establish the breach and in addition show that nothing has transpired since the execution of the contract that would excuse the defendant from complying with its stipulations. Such matters properly come from the defendant and not from the plaintiff.

2. The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side.

In this action upon a policy of fire insurance the defendant admitted the insurance, the destruction of the building and its contents by fire, and the amount of loss sustained by plaintiff, but alleged that the building fell before the fire originated and that thereupon the insurance ceased, the policy providing that 'if the building, or any part thereof, falls, except as a result of fire, all insurance under this policy, on it or its contents, shall imme-

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diately cease and determine." Held—That the burden of proof was on the defendant, and that it was, therefore, entitled to the concluding argument to the jury.

3. The denial of the concluding argument to the party on whom is the burden of proof is an error prejudicial to his substantial rights, and, therefore, reversible, where the testimony is so conflicting as that a verdict by a jury properly instructed must control the final decision of the case.

Hargis & Eastin, R. W. Woolley and D. W. Sanders for appellant.

Wm. Lindsay, Goodloe & Roberts and Abbott & Rutledge for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

This action was instituted by the appellee, Schwing, as surviving partner of the firm of I. Balmforth & Co., against the Royal Insurance Co. to recover on a policy of insurance for the loss of certain produce and goods that were destroyed by fire on the 8th of January, 1886, in a building in the city of Louisville, on Main, between Eighth and Ninth streets, at the time occupied by the firm.

The appellant had issued its policy for $5,000 upon the produce and goods owned or held by the firm of Balmforth & Co. for the benefit of others, and much additional insurance had been taken in other companies by parties interested, the entire loss exceeding $100,000.

On the trial in the court below a verdict and judgment was rendered against the appellant for the amount of insurance ($5,000), from which the company appeals.

The grounds relied on for a reversal in this court are, first, the verdict was flagrantly against the testimony; second, the court erred in placing the burden of proof on the appellee and in giving the latter the right to conclude the argument to the jury. As to the first ground for a reversal it is only necessary to say that, after considering the testimony upon the issue made by the pleadings, it was proper the case should have gone to the jury. The testimony was conflicting, and in such a state of case it is the province of the jury, and not the trial judge, to determine the issue of fact.

The remaining ground for a reversal is one of more difficulty. The allegations contained in the petition on the policy are such as present a cause of action against the company, and the original answer, by traversing the statements of the petition, left the burden of proof with the plaintiff (the appellee). During the progress of the trial, and before the case went to the jury or any evidence was offered, the defendant amended its answer and claimed the burden of proof as well as the right to conclude the argument. The motion to that effect was overruled, and exceptions reserved. The fourth clause of the policy of insurance provides: "If the building, or any part thereof, fails, except as a result of fire, all insurance under this policy, on it or its contents, shall immediately cease and determine." The appellant, by the amended answer, admits the insurance; the destruction of the goods and produce insured in the building by fire, and the amount of loss sustained by the appellee, but pleaded that the building had fallen, and was a wreck before the contents caught on fire, or, in other words, that the building fell before the fire originated, the fall of the building causing the fire and not the fire the fall of the building, and, therefore, claims that, under the provisions of the fourth clause of the policy, the fall of the build-

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ing not resulting from fire, the liability of the company at once ended. If it was necessary to allege in the petition that the fall of the building was not the cause of the fire, or to aver that the fire caused the fall, then the petition in the case is clearly defective because there is an absence of any such averment, and if proper to make such an averment, it was incumbent on the plaintiff to prove not only that the building and its contents were destroyed by fire, but also to show that the fire caused the fall. The defendant, however, if the petition was defective, cured the defect by pleading the fact that the fire resulted from the fall of the building. Still this did not place the burden on the company if the plaintiff was required to aver and prove the nonexistence of a state of facts that would exonerate the company from liability when developed. In other words, the plaintiff or policy holder in such a case would be required to prove the destruction by fire of his property insured, the extent of the loss sustained, and then show, in addition, the nonexistence of any of the causes mentioned in the policy for defeating the recovery. The fourth clause of the policy merely provides a state of case by which the company is exonerated from all liability on a contract executed and conceded to be valid and binding on all the parties, and to compel the plaintiff to plead that no cause for avoiding the contract exists, is requiring it to make an issue that should be tendered by the defense. "What comes by way of proviso in a statute," says Lord Mansfield, "must be insisted on for the purposes of defense, but where exceptions are in the enacting part of the law the rule is different." Where a statute "providing that no one shall retail spirituous liquors, except for sacramental or other purposes mentioned, it is well settled that the statement of the indictment must negative the fact that the liquor was sold for those purposes." (Sedgwick on Statutory and Const. Law, page 50.)

The fourth section provides one of the causes only for which the policy is made to terminate. The life of A is insured, with a separate and distinct clause in the policy that it is to become null and void or to terminate in the event he should travel outside of his native State. In such a case it would be unnecessary to aver the nonexistence of a fact that, if true, would render the policy void. Such provisions are not conditions precedent, or such exceptions to the enforcement of the contract as would require the plaintiff to negative their existence. The matter pleaded in this case, if established, avoids the obligation of the company to pay the loss. That which avoids a contract otherwise valid must, as a general rule, be relied on by the defense, and it is not essential to a recovery that the plaintiff must first establish the breach of the covenant, and, in addition, show that nothing has transpired since the execution of the contract that would excuse the defendant from complying with its stipulations. Such matters come from the defendant and not from the plaintiff. When the defendant below admitted that it insured the plaintiff's goods in the building mentioned; that the building and the goods were destroyed by fire, and the loss amounted to $5,000, he admitted that the plaintiff was required to prove in order to sustain his cause of action; and the statement by the company that the policy had ended before the goods were burned, by reason of the fall of the building and its taking fire after the fall, was affirmative matter pleaded by way of defense, and the burden was on the company to make good its answer.

Section 525 of the Civil Code provides: "The party holding the affirmative of an issue must produce the evidence to prove it." Section 526 provides:

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"The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." Subsection 6 of section 317 provides: "In the argument the party having the burden of proof shall have the conclusion, and the adverse party the opening," etc.

We think it manifest that the defendant held the affirmative of the issue n this case, and, if no evidence had been introduced, from the admissions made by the defendant in its answer the jury should have been instructed to find for the plaintiff.

It is contended by counsel for the plaintiff that if the court erroneously required the plaintiff, not only to make out his cause of action, but go further and show that no defense could be well pleaded, that such an error was to the prejudice of the plaintiff and not the defense, and, therefore, there being no such error as affected the substantial rights of the party complaining, the judgment, by reason of section 134 and section 337 of the Code, ought not to be disturbed.

While we perceive the difficulty either party would labor under when required to prove the negative of a proposition, still, in this case, the plea affirms that the building fell, and after the fall took fire and destroyed the goods. Here is an affirmative allegation susceptible of proof, and the burden being on the party tendering the issue, he is entitled to conclude the argument. What effect the concluding argument may have had on the jury we can not determine, but the experience of every practitioner has taught him that, in cases where the testimony is conflicting, or where the facts are such as will enable counsel to appeal to the passion or prejudice of the juror, the right to conclude the argument is regarded as invaluable, and, besides, the Code, a positive statute, gives to the party holding the affirmative the conclusion, and a denial of that right, when assigned for error, must require a reversal.

Cases might occur where the evidence is so palpably for the one party or the other as would render it idle to grant a new trial upon such a ground, still this court ought not to deny the right where the testimony is so conflicting as that a verdict by a jury properly instructed must control the final decision of the case.

In our opinion the appellant is entitled to a new trial, and the cause is reversed and remanded for proceedings consistent with this opinion.

WIGGINTON v. EWELL.

(Filed September 25, 1888—Not to be reported.)

1. Vendor and vendee—Specific performance—In this action by the vendor to enforce a contract for the sale of land, in which the vendee objected to the title of the vendor because of contingent right of dower in his grantor's wife, it appearing that the grantor's wife is now dead, the objection to the title is removed, and there is no reason why the contract should not be enforced.

2. Same—Parol contract—The court erred in requiring the defendant to take and pay for land not embraced within the written contract, but within an alleged subsequent parol agreement denied by defendant. This parol contract can not be enforced, and should have been disregarded.

J. W. Jones and E. W. Hines for appellant.

R. L. Ewell for appellee.

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Appeal from Laurel Circuit Court.

Opinion of the court by Judge Pryor.

We find no difficulty in determining the nature of appellee's title and his ability to convey the land in question. Mrs. Jackson, as the testimony shows, is now dead, and this removes any contingent claim of dower. The contract in writing shows the land purchased, and the error in the court below consists in requiring the appellant to take and pay for land not embraced within the written contract, and, as his own testimony shows, was under a parol agreement that is denied by the appellant. This parol contract can not be enforced, and should have been disregarded. On the return of the case the appellant may designate the manner in which the two hundred acres shall be laid off, so as it is bounded in convenient shape and adjoins the one hundred and nine acres for which a boundary is given. This right is given him by the contract, and upon the return of the surveyor's report a deed will be made accordingly, and the lien of the appellees enforced. If no selection as to boundary is made by appellant a deed should be tendered for two hundred acres adjoining the one hundred and nine acres in convenient shape, and the lien still enforced.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

PARK v. RICHMOND & IRVINE TURNPIKE CO.

(Filed September 25, 1888—Not to be reported.)

1. Turnpikes—Parol contract for passage free of toll—Appellant seeks to enjoin appellee from charging him and his family toll upon its road, and bases his claim upon a parol contract, whereby he alleges he sold to appellee a piece of land in consideration of the privilege he now claims. The corporation has been in the undisturbed use and possession of his land under the parol contract for a period exceeding fifteen years, while appellant has continued to exercise his rights and privileges under it for the same period. Held—That it is now too late for appellee to tender back the land and rescind the contract upon the ground that it was by parol, or that there was no written order from the board of directors of the company authorizing the purchase.

2. Same—Notice—And one who has purchased all the stock in the company since the contract was made, and is now the sole stockholder, has no more right to surrender the land and repudiate the contract than the stockholders from whom he purchased; and while the testimony shows that he purchased with notice of, and subject to, appellant's claim, the question of notice is not material.

3. Same—Contract construed—Appellant acquired by his contract the right for himself and family to pass all appellee's gates free of toll, but others living with him and not depending upon him for a support are not entitled to the benefit of the contract; nor are his children who have married and left him, although living on the same farm, entitled to its privileges. Appellant has also the right to pass his stock and haul his produce free of charge, but only such stock as is required to stock his farm or as is fed upon it in the ordinary mode of farming, and not that purchasd in speculation merely.

J. B. White and H. C. Lilly for appellant.

C. F. & A. R. Burnam and Robert Fluty for appellee.

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Appeal from Estill Circuit Court.

Opinion of the court by Judge Pryor.

The testimony in this case is not only persuasive but conclusive that the contract was made with the appellant as alleged in his petition, and that he is entitled to pass the toll gates between Irvine and Richmond free of charge; that the contract applies to travel by his family and hauling for his own purposes. The corporation has been in the undisturbed use and possession of his land under the parol contract for a period exceeding fifteen years, while the appellant has continued to exercise his rights and privileges under it for the same period. It is now too late to surrender a title thus acquired by rescinding the contract and tendering back to the appellant the possession and use of what is now the property of the turnpike company. If the appellant had instituted his action against the company for the possession of this land, on the idea that the contract was by parol, or there was no written order from the board authorizing the purchase, it is manifest that no recovery could have been had by him. While there is proof conducing to show that some of the stockholders or parties in interest were not aware of the extent of the contract, the decided weight of the testimony shows that the corporation and those having the immediate supervision of the road knew all about it, and with the additional fact that the right of passage, free of toll, was exercised for so long a time, there can be no doubt as to the existence of such a contract, and the rights of the appellant under it. The contract was evidently made with D. B. Williams, and the appellee, when he purchased Williams' interest, knew the nature of Park's claim, and purchased subject to it. The question of notice, however, is not material in this case. The appellee purchased the stock in the corporation. He now owns the stock, and when he purchased he acquired all the property of the corporation, and this included the land obtained from the appellant for the use of the company. He had no more right to surrender the land and repudiate the contract than the company had. The corporation is still the owner and the appellant the sole stockholder, and both are now estopped to deny appellant's right. No other claim is asserted than the right of the appellant to the passage, free for his own family purposes. The fact that his family may have increased in numbers can make no difference. While he would have no right to claim that others living with him and not depending upon him for a support had the right to the benefit of the contract, his own family had, and with it the right to pass stock and haul his produce to and from his farm free of charge. If the land had increased in value it would have afforded the appellant no excuse for rescinding the contract. There is nothing in this record showing that the appellant has made an improper use of the contract, and no equitable reason for rescinding it. The contract is reasonable, and the exercise of rights under it for so long a time is conclusive as against testimony merely negative in its character, and that in nowise contradicts even the statements made by appellant as to the making of the contract. We think it is also evident that there were three several sales made of this ground—the last two made so as to enlarge the area of ground for the use of the road, and in this way the $20 receipt was executed. The appellant's version of the contract and its details is fully sustained, and the effect of appellee's statement, equally credible, is that he knew nothing of the contract or its terms. The judgment below is, there-

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fore, reversed, with directions to issue an order prohibiting the appellee, the turnpike company, from charging appellant and his family toll on gates one, two, three and four, or the gates between Irvine and Richmond, the same to apply to traveling with his wagons and vehicles when not hauling for others.

(On rehearing—October 25, 1888.)

We are asked in a petition by the appellee to make the opinion more definite. The appellant has the right to pass through all the gates with his stock and the produce of his farm. He has no right to pass free of toll stock that he may purchase on speculation merely, but such as would be required to stock his farm or feed upon it in the ordinary mode of farming he is entitled to pass free of charge. His children who have married and left him, although living on the same farm, are not entitled to the privileges acquired by the appellant under his contract.

CASSIDY, &c. v. PENDLETON, &c.

(Filed September 25, 1888—Not to be reported.)

1. The deed of a married woman executed while the Revised Statutes were in force is attacked upon the ground that it was procured by fraud, and also that it was acknowledged in one county before the clerk of another. The deed remained unassailed for nearly thirty years, and until after the death of the grantee. Held—That there is no evidence that the deed was procured by fraud, and as to the certificate of the clerk some verity must be given to his action, especially after such a lapse of time. And as he has officially stated that the female grantor acknowledged the deed before him in his county, and the testimony relied upon to contradict that statement is not of a satisfactory character, the deed must be upheld.

2. Clerk's certificate—Under the Revised Statutes a clerk's certificate of a married woman's acknowledgment to a deed was merely prima facie evidence that the deed was freely executed.

J. W. Compton for appellants.

E. Newman for appellees.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Holt.

The deed from Rebecca Cassidy and her husband to Abner Pendleton was made in 1856. It purports to convey the entire interest of the female grantor in the farm of her deceased father. It is claimed that it was intended to convey only her portion of it outside of the dower land allotted to her mother.

The deed is attacked upon the ground that it was made by mistake and procured by fraud in so far as it conveys any interest in the dower land, and also upon the ground that it was acknowledged in Barren county before the county clerk of Adair county, in which latter county the land is situated. Section 31, chapter 24 of the Revised Statutes, which were then in force, made the certificate of acknowledgment by a married woman to a deed merely prima facie evidence that it had been freely executed.

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In this instance, however, when we turn to the testimony, we find that it tends to show that the female grantor never even saw the deed, much less signed and acknowledged it. She is the only witness upon this point, and was sixty years old when she testified. Nearly thirty years had elapsed from the time of the transaction. She proves that she made a sale to Pendleton, but only of the portion of the land that had been allotted to her as an heir, not including her interest in the dower land. Her testimony shows that she knew a deed had been prepared, and that she started to a gentleman's house just in the edge of Adair county to acknowledge it, but says she met the clerk—the same person who was clerk, and who certifies that he took her acknowledgment in his own county—in the road at a certain place, and he merely asked her if it was her trade, and she replied affirmatively.

There is evidence tending to show that the place named by her is in Barren county, but quite near the Adair line; and the draftsman of the deed, who is now an old man, testifies in substance that it was his understanding that she only sold the seventeen and a half acres that had been allotted to her outside of the dower land, and that he thinks there must have been a mistake in framing the deed. It, however, recites: "Doth grant, bargain and sell unto Abner Pendleton, of the State of Kentucky and county of Adair, all of our interest in the land whereon Elijah Stevens lived at the time he, said Stephens, died, said land lying in the county of Adair and on the waters of east fork of Little Barren river. Said Daniel and Rebecca Cassidy sells and conveys all interest in said tract of land allowed to us, lying on the fork on the east fork of Little Barren river, and all its appurtenances, it being land that said Rebecca Cassidy derived as heir to Elijah Stephens. We do by these presents sell all our interest in said land, both divided and undivided, unto Abner Pendleton."

There is not the slightest evidence of fraud in its procurement. It was written by the brother of the male grantor, and he testifies that when he did it he knew the portion that had been allotted to his sister-in-law, outside the dower land which had not been divided, was seventeen and one-half acres; and yet the deed does not name the quantity conveyed. If, however, it was the intention to convey her entire interest it could not have given the quantity, and would have been written as we now find it, since it could not then have been known how much she would get out of the dower land. The husband united in the deed, and the record fails to show that he did not understand its terms. They were plain and unmistakable. It can hardly be supposed that he would not have objected to it if it was intended to convey merely the wife's interest outside of the dower land.

The proof as to the value of the land is meagre. Enough, however, appears to show that the consideration recited in the deed is, at most, not an unreasonably inadequate one for Mrs. Cassidy's entire interest in the land, subject, as her interest in the dower land then was, to a life estate. The deed remained unassailed for nearly thirty years. The grantee in it had died before it was attacked. His heirs are now asking that it be upheld.

Some verity, especially after such a lapse of time, must be given to the action of the clerk, who has officially stated in his certificate that the female grantor acknowledged it before him in his county. It should not be overturned upon suspicion, since surmise is not proof. In view of all of the other circumstances in the case, according to Mrs. Cassidy and her brother-in-law, entire honesty as witnesses, yet their testimony is not of a satisfactory character.

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Time, in its roll of nearly thirty years, has naturally clouded their memories, while the written memorial of the transactions in question remains unchanged.

The testimony fails to show satisfactorily that its statements are untrue, and the judgments appealed from are affirmed.

WHITE v. AVERY.

(Filed September 29, 1888—Not to be reported.)

Practice—Permature submission—As this is an action to recover land the title to which is in parties who are not before the court the judgment must be reversed. As the plaintiff, appellant, objected to the submission and thus raised the question before the judgment was rendered, it was not necessary to make a motion to set aside the judgment in the court below.

R. S. Montague and J. M. Wood for appellant.

Chas. Patterson and J. T Collins for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Pryor.

The trial below was premature. The action is to recover a tract of land the title to which is in parties who are made defendants to the original and cross petition, and not before the court. The plaintiff objected to the submission, and raised this question before the judgment was rendered, and it was not, therefore, necessary to make the motion to set aside the judgment in the court below.

Without passing on the matter or considering the other legal questions raised this judgment must be reversed and remanded that the parties in interest may be served with process.

WAHL, &c. v. MURPHY.

(Filed September 29, 1888—Not to be reported.)

1. Husband and wife—Fraudulent conveyance—Although husband and wife, by means of their joint labor, paid for property sought to be subjected by the husband's creditors, and the improvements since erected thereon, yet in law the husband must be regarded as having made such payment. But as the husband was solvent when the property was purchased and paid for, and the liability now asserted against him had not then been created, and there is no evidence that the deed of the property was made to him and his wife jointly with a view to defrauding any then or future creditor of the husband, the wife's right as a grantee is valid.

2. Improvement of wife's estate by husband—As the property has been enhanced in value by the improvements made by the husband since the creation of the liability asserted against him, and the improvements were not necessary to the comfortable occupation of the property as a homestead, the property is liable to the extent of such improvement, whether the improvements be considered as having been made to the wife's interest in the land or to the homestead, the husband being entitled to a homestead in the property, as in either case it was an improper diversion of the husband's means.

3. Same—Homestead—The court set apart a homestead of the value of $1,000 and then subjected the remainder of the lot, estimated to be worth $720.

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to sale for the payment of the amount estimated as the enhancement in value of the property, to be applied on the plaintiff's debt, together with interest on said sum from the time of bringing the action, and cost. Held—That the liability has been as equitably imposed as was perhaps possible under the circumstances. It was not improper to thus allow interest, as the appellants had the use of the improvements when the creditor was entitled to the use of the money expended in making them.

4. Same—While the property should have been rented out and the rents applied, yet, as it appears that the sale has been made and the portion ordered to be sold purchased by the wife in satisfaction of the liability, the judgment should not, under such circumstances, be reversed because it ordered a sale.

W. N. & J. J. Sweeney for appellants.

Weir, Weir & Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

Conceding that the appellants, as husband and wife, by means of their joint labor, paid for the property in contest and the improvements since erected thereon by them, yet in law the husband must be regarded as having made such payment. He was solvent, however, when the property was purchased and paid for, and the liability now asserted against him had not then been created. There is no evidence tending to show that the deed for the property was made to him and his wife jointly with a view to defrauding any then or future creditor of the husband. Her right as a grantee is, therefore, valid.

The claim that the averment in the petition, that the husband has, since the creation of the liability now in suit, built and paid for the dwelling thereon at an expense of $1,500, is undenied, is not well founded. It is substantially traversed. It is averred in the answer that all of the improvements were erected prior to that time save "a stable and saloon, costing about $280."

The husband is entitled to a homestead in the property. He has, together with his family, occupied it as a home since about the time of its purchase in 1881. If, however, since the creation of the liability now asserted, he has, by lasting and permanent improvements, enhanced the value of the wife's interest in the land, it may, to the extent of such enhancement, be subjected to the debt; and if he has erected such improvements upon the homestead since the creation of the debt, and they were not necessary to make it habitable or to its comfortable occupation, then this increased value is equally liable.

The law will not permit him to thus apply his means and leave his creditor unpaid. They should go to pay his debt instead of enriching his wife or himself under an exemption law which, while it is liberal to him, requires him at the same time to deal justly by his creditors. In this instance not only is it stated in the answer, but it is shown by the evidence, that, since the creation of the liability in suit, the husband has erected upon this joint property of himself and wife, which originally cost $1,500, a stable, or a large addition to a stable, and also a saloon, both costing about $280, and there is testimony showing that they have enhanced the value of the property to that extent. These improvements were not necessary to the comfortable occupation of the place as a homestead. It was the duty of the husband to have paid the money that he so used to his creditor. Whether, then, the

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improvement be considered as having been made to the wife's interest in the land or to the homestead, it was equally an improper diversion of the husband's means, and the liability by reason of it, therefore, exists.

The testimony is conflicting as to the extent of the enhancement, but the chancellor passed upon this question of value and fact, and there is evidence sufficient to support his conclusion:

He, by his commissioners, set apart a homestead of the value of $1,000 in the property, and then subjected the remainder of the lot, estimated by the commissioners to be worth $720, to a sale for the payment of said $280, to be applied on the appellee's debt, together with interest on said sum from the time of the bringing of this action and the costs. It was not improper to thus allow interest, as the appellants had the use of the improvements when the creditor was entitled to the use of the money expended in making them, and the allowance of costs was an incident of the recovery.

It is questionable whether the property should not first have been divided and the liability then imposed ratably upon each portion, or altogether upon that of the husband. The homestead, while belonging to the husband, is, however, not only allowed for his benefit, but also for the wife and children, if any; and the liability, in view of this fact, has been as equitably imposed as was, perhaps, possible under the circumstances. It was improper to decree a sale. The property should have been rented out, or its use so applied by the chancellor as to satisfy the liability without depriving the owner of the estate.

It, however, appears from the record that the sale has been made and the portion ordered to be sold purchased by the wife in satisfaction of the liability, and under such circumstances the judgment below should not, in our opinion, be reversed because it ordered a sale. The party interested has merely paid what was a charge upon the land, and yet holds it.

Judgment affirmed.

SCOBEE, &c. v. BRIDGES & CO., &c.

(Filed September 29, 1888.)

1. Descent and distribution—Purchaser of heir's interest—Advancements—The estate of an intestate descends to the heir free of any lien for debts due by the heir to the estate, the estate standing as any other creditor of the heir. Therefore, if a judgment creditor has the interest of the heir sold under execution before suit is brought for a settlement of the estate, or before any steps have been taken by the estate or the other heirs to acquire a lien, the purchaser will hold as against the other heirs, being required, however, to account in the division of the estate for advancements made by the intestate to the heir, as the heir himself would have been required to do, the purchaser acquiring no greater interest than the heir had in the estate.

In this action by the purchasers, under an execution in their favor, of the undivided interest of a son in the estate of his deceased father, seeking to have the estate divided, it is held that money furnished by the father to the son, for which the son executed his notes with the understanding that they were to be accounted for out of the estate at his father's death, is to be regarded as an advancement, for which the purchasers must account in the division of the estate.

2. Same—Subrogation—The fact that the debts for which the land was sold were debts for which the father was liable as surety for the son does not affect the rights of the purchasers, the execution creditors, or furnish any reason for subrogating the heirs to their rights.

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John D. Carroll for appellants.

Wm. Carroll for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Pryor.

Christopher Scobee at his death was the owner of a tract of land in the county of Henry, and left surviving him several children. He died intestate, and his personal estate was insufficient to pay his debts. His son, J. W. Scobee, was indebted to the appellees, and they having reduced their debts to judgment, had an execution or executions issued and levied on the undivided interest of the son, J. W Scobee, in the land that descended to him from his father. The land was sold and purchased by the appellees, who obtained a conveyance from the sheriff and are now seeking a division of the land, claiming that they are the owners of J. W. Scobee's undivided interest. The other children are resisting the claim of the appellees on two grounds:

First. They say that their father was liable as the surety of J. W. Scobee on several notes, amounting to a considerable sum of money, and his personalty not being sufficient to pay his debts his personal representatives filed a petition for a settlement of his estate and a sale of the land to pay the debts; that among the debts for which the land was sold were the debts for which the intestate was liable as the surety of his son, and before the individual creditors of J. W. Scobee can take this land, purchased under the execution, they must account to the other heirs for the amount the estate has had to pay for their brother. There was no action pending for a settlement of the intestate's estate when the executions issued by the appellees on their judgment against J. W. Scobee, or any action pending by the administrators or heirs of the intestate, under which any lien had been created on the land descending to J. W. Scobee from his father. The estate of the intestate stood only as an ordinary creditor of the son, the latter becoming a debtor only to the personal representatives upon their payment of the debts due by the son, and for which the father was liable as the surety. The estate descended to the son free of any lien for the debts due to the father, and these creditors having levied their executions and purchased this interest of Jas. W. Scobee, will hold it as against any other creditor when no lien exists. The statute gives no lien, and the most vigilant in acquiring a lien by operation of law will be entitled as against those who fail to coerce payment.

The second ground relied on is: that two notes, executed by Jas. W. Scobee, the son, to his father, were given to evidence the amount of advancements made to him, and must be accounted for by James or those claiming his interest in the division of the estate.

The statute provides: "Any real or personal property or money given or devised by a parent or grandparent to a descendant shall be charged to the descendant, or those claiming through him, in the division and distribution of the undivided estate of the parent or grandparent, and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributive share of the whole estate, real and personal, devised and undevised." (General Statutes, chapter 31, section 15.)

The notes claimed as advancements are executed in the ordinary mode, and amount, the principal, to $330. It was held below that the money was

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not given as an advancement, and, therefore, only a debt and no account was required to be taken in the division of the estate with a view to producing equality in the division. There is a direct issue raised by the reply of the creditors as to whether the money was an advancement or gift by the testator.

There are but two witnesses on this point, both of them sons of the intestate, and one the debtor. They both swear that the money was given, and the notes to be collected or accounted for out of the portion of the estate going to J. W. Scobee at his father's death. J. W. Scobee says the notes were executed after the money was given to him, and to evidence only the amount received by him in the way of advancements. That the money was given to the son the father repeatedly declared, and if such a gift is required to be accounted for by the heir in the division of the estate the creditor purchasing the interest of the heir under a coercive sale acquires no greater interest than the heir had in the estate. These notes had been executed for years prior to the death of the intestate. His son was insolvent, and always had been, and if the testimony of the two sons is to be relied on, and there is nothing affecting their credibility in the record, the money evidenced by the notes was a gift and not the creation of a debt, and must be accounted for by the son in the division. The estate was small, and all the land has been sold for the payment of the intestate's debts but 116 acres, and this includes the widow's dower.

The appellees claim that their purchase under their executions gives them a perfect title as against the other heirs by reason of section 8 of article I., chapter 44, General Statutes, that provides: "When the heir or devisee shall alien, before suit brought, the estate descended or devised, he shall be liable for the value thereof, with legal interest from the time of alienation; * * * but the estate so aliened shall not be liable to the creditors in the hands of a bona fide purchaser for a valuable consideration."

This statute was evidently intended to apply to voluntary sales made by the heir, upon whom the descent had been cast, to a bona fide purchaser, and not to coercive sales made under an execution or other legal process.

The purchasers under this forced sale acquired no greater interest than the heir had; that interest subject to be enlarged or diminished (the parent dying intestate) by the advancements made, if any, to the various children.

It is insisted by counsel for the appellants that these appellees are not bona fide purchasers for value: first, because the debts for which judgment had been rendered were long since due, and, further, that the appellees had notice before the deed was made to them by the sheriff of the pending of the action for the settlement of the estate. We perceive nothing showing that these creditors had any notice whatever that Jas. W. Scobee was indebted to his father, and having levied these executions and obtained the legal title, we see no reason for subrogating the heirs to the rights of their creditors, whose debts were paid by the father's estate by reason of his liability as surety, and paid after the legal title had been obtained.

The 10th section of chapter 44 seems to provide for the heir in a case like this. It provides that the heir may obtain, "by the proper procedure, a lien on any specified property descended or devised, not theretofore aliened, but not so as to prejudice thereby any other creditor." No lien was created on the land descended to J. W. Scobee by either the heirs or the administrator

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of the father before the legal title was acquired by these purchasers, and, therefore, they hold as against the heirs, accounting, in the division of this land, for the amount of the principal of the two notes executed by the son to the father.

The judgment is reversed and the cause remanded, with directions to permit the appellees to pay this money to the heirs; or, if not, they will account for it in the division of the land between them.

On a petition for a modification it is asked that the claim of the appellees be confined to the 116 acres, the balance of the land left after the sale made for the payment of debts. We understand that this is the only land left about which the appellants and appellees can have any controversy. There is nothing else out of which the advancements can be equalized, and it therefore follows, so far as appears from this record, that the appellees take the interest of the heir in the 116 acres, subject to the two notes, for which they must account, either by paying them or by obtaining less land in the division.

STEVENS, &c. v. DEERING, &c.

(Filed September 29, 1888—Not to be reported.)

1. Void judgments—The proceedings authorized by the Civil Code for reversing, vacating or modifying judgments apply where a judgment is merely erroneous and, therefore, voidable, but are not necessary, nor intended to be resorted to, where a judgment is a nullity. Therefore, a void judgment may be resisted in any court of general jurisdiction, and not merely in the court which rendered it.

2. Same—Married women—Where a married woman who has not been made a feme sole executes a note, not in consideration of necessaries for herself or family, it is a mere nullity, and no personal judgment on it can be legally rendered against her.

3. The failure of a married woman to plead coverture as a defense to an action does not conclude her from afterwards, and in another action, contesting the enforcement of the judgment, or from claiming that the proceedings had under it are void, if it be in fact a void judgment.

Geo. Denny, Jr., for appellants.

D. G. Falconer for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Lewis.

In 1878 W. M. Wilson instituted, in the Fayette Court of Common Pleas, an action ordinary and recovered judgment on a promissory note for $56, executed March 1, 1876, by Sarah F. Stevens and Matthew Stevens, and bearing interest at the rate of 8 per cent. from date.

April, 1879, an execution was issued on the judgment, and, as appears from an endorsement thereon, was levied upon the interest of Sarah Stevens in a tract of land, and, August, 1880, under an exponas, said interest, appraised at $765, was sold, the plaintiff becoming purchaser at the sum of $54.29, being, as stated in the return of the officer, amount of debt, interest and cost.

March 16, 1883, a deed was executed by the sheriff for the interest so sold to Eliza R. Wilson, widow and devisee of W. R. Wilson, then dead, and, March 9, 1885, Eliza R. Wilson conveyed it to R. H. Wilson, who, on the

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same day, mortgaged it to appellees, William Deering & Co., to secure payment of a debt for $950.

March 20, 1887, William Deering & Co. instituted this action in the Fayette Circuit Court against the mortgagor and the other parties owning undivided interest in the land, asking judgment dividing the land and subjecting the alleged interest of R. H. Wilson in right of Mrs. Stevens to the payment of the plaintiff's mortgage debt. And, May 20, 1887, Sarah F. Stevens and Matthew Stevens tendered their petition and moved the court to make them parties to the actions, and the court permitted it filed. But subsequently, May 21, 1887, the court sustained a motion of the plaintiffs to strike from the record and dismiss the petition, from which order this appeal is prosecuted.

The ground upon which the right to file the petition and to contest the right of the plaintiffs to subject the said interest in the land, as alleged, is that at the date of the note upon which suit was instituted by W. M. Wilson in 1878, and at the date of the judgment in his favor, Sarah F. Stevens was and has ever since been, a married woman, and that consequently the note was, as to her, a nullity, and the judgment and all the proceedings under it are void. Treating the motion to strike from the record and to dismiss the petition of Sarah F. and Matthew Stevens as equivalent to a general demurrer, and the judgment thereon as if rendered on demurrer, the question is presented for our consideration whether the facts stated by them are sufficient to constitute a defense to the action to subject and sell said interest in the land to satisfy the plaintiff's debt. And the determination of that question involves the inquiry whether the judgment rendered in 1878 by another court can be attacked in this action; and, if so, whether that judgment is to be treated as valid and effectual for any purpose, or void.

The questions involved here have all been recently passed on and decided by this court in the case of Parson, &c v. Spencer, &c., 83 Ky., 305, and if the principles there settled are to be adhered to there is no room for discussion of the questions presented here. In that case the judgment was rendered in another court and county than where it was attached.

The proceedings authorized by the Civil Code for reversing, vacating or modifying judgments applies when they are merely erroneous and, therefore, voidable, but are not necessary nor intended to be resorted to when a judgment is a nullity, and its enforcement, consequently, may be resisted in any court of general jurisdiction. Nor, as decided in that case, does the failure of a married woman to plead coverture as a defense to an action conclude her from afterwards, and in another action, contesting enforcement of the judgment, if it be in fact a void judgment. For, said the court in that case: "If, as is unquestionably true, a judgment is void if the court rendering it had no jurisdiction for want of service of process, then, it seems to us, that it should be equally so if the one served with process is incapacitated by law from retaining an attorney, or has no such legal existence as authorized a personal liability. In the one case the court has no jurisdiction, and in the other there is nothing within its jurisdiction which has a legal existence."

It is stated in the petition of appellees that Sarah F. Stevens never had been made a feme sole; that the consideration of said note had not been given for necessaries for herself or family, nor had credit been given to her for same.

It seems to us, if these statements be true, the note upon which Wilson, in 1878, was, as held under similar circumstances in Green v. Page, 80 Ky.,

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368, a mere nullity, and no personal judgment on it could be legally rendered against Mrs. Stevens, and that it is now competent for her to prevent its enforcement as it would have been for her, or her husband for her, to set up the same defense in the original action. In our opinion the lower court erred in dismissing the petition which contains a statement of facts that, if true, constitute a defense to the action and are sufficient to prevent the subjection and sale of Mrs. Stevens' interest in the land to satisfy the plaintiff's debt.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

BANNON v. ROHMEISER.

(Filed September 20, 1888—Not to be reported.)

Injunction—Rules for contempt—By the terms of the judgment appealed from appellant is "enjoined, directed and commanded" to restore an alley which appellee claims the right to use "to the same condition in which it was just prior to the erection of the walls and the making of the excavations referred to in the petition within thirty days from this date." This is an application for a rule against appellant to answer for contempt in continuing the construction of the building by putting additional stories upon it. Held—That while this may be technically a violation of the injunction, it does not in fact obstruct the alley more than it was obstructed when the suit was commenced, and as appellant alone will suffer injury thereby in the event the judgment is affirmed, the rule asked for is not necessary to the ends of justice.

T. F. Hargis, Lane & Burnett and J. R. M. Polk for appellant.

O'Neal, Jackson & Phelps for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Lewis.

By the terms of the judgment rendered in this case appellant "is enjoined, directed and commanded to restore said alley to the same condition in which it was just prior to the erection of the walls and the making of the excavations referred to in the petition within thirty days from this date, and in the event he fails to do so within said time the plaintiff may restore, or cause to be restored, to said condition at the cost of defendant, and for such failure the defendant may be proceeded against for contempt."

If that judgment should be affirmed ample power will exist in the lower court to compel appellant to remove not only the walls and excavations made by him before, but those put there since the judgment was rendered, and thus completely restore the alley to the condition it was originally.

While, therefore, continuing the construction of the building by putting additional stories upon it after the judgment was rendered may be technically a violation of the injunction, it does not in fact obstruct the alley more than it was obstructed when the suit was commenced, and appellant alone will, in the end, sustain injury thereby in case the judgment is affirmed.

The motion for a rule against him to answer for an alleged contempt is consequently not necessary to the ends of justice, nor for protecting the rights of appellee, and must be overruled.

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KENTUCKY SUPERIOR COURT.

ROGGE v. CASSIDY.

(Filed September 19, 1888.)

1. Negotiable instruments—Misappropriation of accommodation paper—In an action by appellee against appellant upon a note executed by appellant jointly with H., made payable to the "German National Bank of Newport," appellee alleges that the note was executed by the obligors for the purpose of discounting it and raising money thereon; that the bank named as payee refused to discount it, whereupon H. placed it in the hands of K., with instructions to discount it; that plaintiff received it from K., paying him the price agreed upon, which was paid by K. to H. For defense appellant alleges that the note was executed by him to be delivered to the German National Bank in renewal of a note payable to said bank upon which he, appellant, was bound as the surety of H., and that the note was delivered to H. with the distinct agreement that it was to be used for that purpose; that H. was in failing circumstances at that time, and that he would not have signed a note to enable H. to raise money. Held—That the answer presented a good defense. The accommodation party had an interest in the application of the paper to the purpose for which it was intended, and, therefore, the application of the paper to another purpose constitutes a misappropriation.

2. Parties to actions—Where the payee named in a note was merely the nominal payee, and never had any right, claim to or interest in the note, he is not a necessary party to an action by the holder, although the latter has received the note by delivery merely.

C. J. Helm for appellant.

D. A. Glenn for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Presiding Judge Ward.

Appellee instituted suit upon the following note:

"$300.00. Newport, Ky., October 19, 1885.

"Ninety days after date we jointly and severally promise to pay to the German National Bank of Newport, or order, three hundred dollars, negotiable and payable at its banking office in Newport, Ky., for value received, and we hereby direct the proceeds of this note, when discounted, to be placed to the credit of ——

"H. H. HELMAN,
"CHAS. H. ROGGE."

It is alleged, in substance, that the note was executed by the defendants for the purpose of discounting it and raising money thereon, that the German National Bank refused to discount it, whereupon Helman placed it in the hands of Kendall, with instructions to discount it, whereupon plaintiff received it from Kendall, paid him the price agreed upon, which was paid by Kendall to Helman.

Appellant filed a special demurrer to the petition, which was that the German National Bank was not a party.

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We are aware that it has been decided in a number of cases that if the payee of a note transfers it by delivery merely, instead of by endorsement, that the legal title to the paper does not pass to the holder, and that the payee is a necessary party. But the reasons upon which that rule is founded have no application to the facts of this case. Here the allegations of the petition show that the nominal payee never had any right, claim to or interest in this note, and these things being true there could be no reason or necessity whatever for making him a party.

It is true that in the case of Ward v. Northern Bank, 14 B. M., 283, the Northern Bank, who sustained the same relation to the note in that case that the German National Bank does to the one in this case, was united as party plaintiff and its right to maintain the suit for the benefit of the holder commented upon, yet the question as to the necessity of its being made a party was not raised, and that case could, with the same force, be relied upon as an authority that Hall, the assignor of the holder, was a necessary party.

We think the special demurrer was properly overruled.

The defendant, Rogge, did not answer when the demurrer was overruled and judgment was rendered. A few days thereafter he presented an answer and moved to have the judgment set aside and answer filed. This motion was overruled. Why does not appear; but it is said in argument that the answer was refused because it did not, in the opinion of the court, present a defense.

The answer should have been allowed if it presented a defense, and we will, therefore, consider that question.

The answer denied that the note was executed for the purpose or with the intention of being discounted or obtaining the proceeds thereon; on the contrary it was averred "that the German National Bank of Newport, Ky., the payee of said note, held another note in which he, his co-defendants, and one George Bockweg were joint obligors and payors, and said bank the payee, for $500, which was about due, and he executed the note sued on herein with the distinct agreement and understanding with the defendant, H. H. Helman, that said George Bockweg was to execute the same, and that said Helman was to deliver the same when so executed to the said bank in renewal of $300 of said note of $500, and to pay the remaining $200. He says that said Helman, at said last-named date, was in failing circumstances and that he did not in fact and would not have signed said note for him to raise money on, but only for the purpose of extending the time of payment of an existing liability of defendant for said Helman. * * * He says he was in fact the surety of Helman on said note, and received no part of the loan or proceeds of said note." He denies any knowledge or information as to what plaintiff paid for the note, and calls upon him to state what he did pay for it. He denies that the note was ever presented to the German National Bank for discount or the receipt of the proceeds.

It is insisted for appellee that the cases of Smith v. Moberly, &c., 10 B. M., 266, and Ward v. Northern Bank, 14 B. M., 283, and Frank, &c. v. Quast, &c., 9 Ky. Law Rep., 781, are conclusive against appellant.

Without stating the facts of said cases at length it is deemed sufficient of them to say that it was admitted that the notes were made for the purpose of enabling the principal to borrow money thereon, and that in each case the note accomplished the purpose for which it was made, that of borrowing money, and it was, therefore, held to be a matter of little or no consequence

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whether the money was borrowed from one person or another, or whether the payee named in the note was the holder; as the note was assignable any one to whom it might be assigned would become the creditor of the makers. In one case it is said: "The note was used to accomplish the object for which it was originally intended, not, it is true, in the manner contemplated, but in one that did not alter or increase the liability of the surety."

In another case it is said: "The main purpose for which they signed the note was to give it credit and to enable Johnson (the principal) to realize money by its sale, and although the defendants doubtless expected that the money would be procured from the Northern Bank of Kentucky, to whom the note was made payable, this expectation was founded upon the idea that it was the proper business and interest of the bank to discount notes and thus employ its capital; but it does not follow that because it was designed or expected to have the paper discounted by the bank that the authority to the principal was necessarily so restricted and limited as that it might not be purchased, and the money paid upon it, by any individual who should give credit to the paper on account of the signatures to it. There is in fact no sufficient reason for supposing that if it had been suggested by the principal, Johnson, that if the defendants would lend him their names on the paper, as his sureties, he could raise the money required from John Hall, that the defendant would have objected to the insertion of the name of Hall instead of the bank as the payee of the note." (Ward v. Northern Bank, 14 B. M., 284.)

It is hardly necessary to say that the facts in this case are so entirely dissimilar to those upon which the argument is made to rest in the cases referred to as to destroy the force of that argument or prevent the application of the principles therein referred to.

In the case named last above the following principles stated by Mr. Daniel, in his work on Negotiable Instruments (volume 1, page 472), are quoted and approved:

"It is immaterial that the paper executed or endorsed for accommodation is not used in precise conformity with agreement when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied. No change in the mere mode or plan of raising the money, though not applied to the purpose intended by the accommodation party, will constitute a misappropriation. The accommodation party must have some interest in the application of the money, otherwise he is in no condition to contend there has been a misapplication of it, or of the security on which it has to be raised."

But here the fact, for the present admitted to be true, is that the note was not made to enable the party to borrow money at all, but to enable him to renew a note for the payment of which the accommodation party was bound, and he, therefore, had an interest in the application of this paper to that purpose.

We are of opinion that the answer presented a defense, and it should have been allowed.

The judgment is reversed and the cause remanded, with instructions to overrule the objections to the answer and for further proceedings.

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SUPERIOR COURT ABSTRACTS.

KENTUCKY CENTRAL RAILROAD CO. v. FOX.

Filed October 10, 1888. Appeal from Mason Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Evidence—Res gestæ—The mule hitched to a cart from which the driver was loading coal into appellant's car on a side track becoming frightened at an engine passing on the main track, threw the cart toward the main track, when it was struck by the engine, and the driver was thrown out of the cart and injured. In this action by the driver against appellant to recover damages on account of the injury a witness stated that just after the plaintiff had been taken away and laid on the platform (which seems to have been five or ten minutes after the accident) he, the witness, said to a man who seemed to be in charge of the engine: "That's a d—d malicious thing to run over a man and kill him that way;" that the man said: "Let him keep his d—d mule and cart out of the way;" that witness then said: "It's you, is it? If it was any one who was anything to me I'd get a gun and blow your head off." The court excluded all the witness said to the man in charge of the engine, but allowed what the man said to the witness to go to the jury. Held—That the testimony was not competent. The declaration is not so nearly contemporaneous with the act as to make it admissible as part of the res gestæ. But even if it were, it could not illustrate or characterize the act in question. Moreover, one of the two persons in charge of the engine denies having had any such conversation, while the other, who was a witness for plaintiff, was not interrogated concerning the conversation. Therefore, it does not appear that the person making the declaration was in charge of the engine at the time of the accident, or that he was even an employe of the company, and for that reason also the declaration was incompetent.

2. Prejudicial errors—While the court will not disturb a judgment for an error that did not prejudice the appellant's cause, the judgment should be reversed unless it satisfactorily appears that the error committed did not, and could not, have prejudiced appellant's rights.

The objectionable evidence in this case was prejudicial for the reason that the jury might have inferred from it that those in charge of the engine saw, but disregarded, the plaintiff's danger. Besides, it was calculated to inflame their minds, and thus operate to appellant's prejudice.

3. Evidence—The evidence of the physicians as to plaintiff's liability to contract disease while confined and suffering from his injuries was incompetent as there was no pretense that he did contract any disease.

4. Instructions—As there is no allegation in the petition that the company failed to keep its engine in proper order, and the injury is not attributed in any degree to such cause, it was misleading to instruct the jury what the defendant's duty was in that particular.

W. H. Wadsworth & Son for appellant; Cochran & Son, T. C. Campbell and E. L. Worthington for appellee.

HALL v. FRENCH, &c.

Filed October 10, 1888. Appeal from Letcher Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. New trial—Newly-discovered evidence—Of alleged newly discovered evidence made ground for a new trial some related to an issue not made by the pleadings: some was merely cumulative, and the remainder consisted in statements which witnesses who had testified would make contradicting:

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their former testimony. Held—That a new trial for such reasons, in an action that had been pending from 1878 until 1886, was not improperly refused.

2. Practice—These were actions involving legal issues only, and the conclusions of the court are to be treated as the verdict of a properly instructed jury.

John L. Scott for appellant; G. W. French and J. M. Fields for appellees.

TRUSTEES OF TOWN OF MARTINSBURG v. WHITT, &c.

Filed October 10, 1888. Appeal from Elliott Circuit Court. Opinion of the Court by Judge Bowden, reversing.

1. Powers of municipal corporations—While there is an incidental power in a town to enact appropriate by-laws which are necessary, although the charter does not expressly confer power to pass ordinances, the power to tax or to prescribe fines for violations of law can not be implied.

2. Same—The power to create a debt can not be admitted when the town has no funds and no means of raising funds to pay it; therefore, the trustees of the town of Martinsburg had no power to bind the town for a debt created for repairing a street.

3. Same—Street improvements—Even if there are municipal purposes for which a debt could be created by the town, that of repairing streets is not of them, as the residents of the town could have been called on to do the work. An amendment to the charter exempting the residents of the town from working the roads out of the corporate limits presupposes that they are liable to be called on to work the roads in that district.

M. M. Redwine for appellants.

WENDT, ASS'EE v. DROSTE.

Filed October 10, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Judge Bowden, overruling motion to dismiss.

Final order—The judgment appealed from ordered the master to sell all the personal property which the debtors had conveyed in trust for creditors—such of it as the assignee was not using in the completion of a contract made by the debtors was to be sold immediately, after notice, and the remainder was to be sold after the contract was completed. Held—That this was a final order. The objection to the judgment that it leaves it to be determined out of court what part of the property was in use and what was not in use when the order of sale was made goes to the regularity and not to the finality of the order.

C. J. Helm for appellant; John S. Ducker for appellee.

NESBITT & GUDGELE v. WHALEY'S ADM'R.

Filed October 10, 1888. Appeal from Bath Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Attorney and client—Pleading construed—A pleading, like any other instrument, must be construed as a whole, and such an interpretation given to it as will sustain the verdict if it can be done by reasonable intendment.

In this action to recover of the defendants money which they, as attorneys for the plaintiff, had collected, the petition avers that the defendants, when they received the demand, agreed to pay the plaintiffs the full amount thereof "when collected, less a reasonable attorney's fee;" that they had collected the whole amount, and had paid part of it, but refused to pay the balance, etc. The defendants resist a recovery against them upon the ground that they have a right to retain the amount in their hands as a fee, and in their answer "deny that there was any agreement at the time of receiving the note for collection as to what sum should be paid them for their services." They aver that their services were of extraordinary diligence and skill, "and that for said services they are entitled to retain one-third of the amount of money made by them for the plaintiff, to wit, the sum of $604.25, their service being worth that sum, which amount the plaintiff promised and agreed to pay the defendants if they made said debt for him, or a sum

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equivalent to one-third of whatever should be realized upon said claim." The reply denies that the defendants have the right to retain one-third of the amount collected, or $604.25, and avers that they are entitled to retain only a reasonable attorney's fee. The defendants insist that the answer alleges that the plaintiff agreed to pay the defendants a sum equal to one-third of what might be collected, and that this allegation not being denied must be taken as true, and that, therefore, they were entitled to retain $604.25. Held—That the alleged promise should be construed to relate to the worth of the defendants' services, that is, that the plaintiff agreed to pay the defendants what their services were worth, and that they were, in view of their extraordinary character, worth one-third of the amount collected.

2. Defect cured by verdict—When a cause has been tried as though a material allegation of a pleading had been denied, it will, after verdict, be deemed to have been denied, although it was not in fact denied.

Therefore, even if the defendants' interpretation of their answer in this case be the correct one, yet as they introduced evidence to support an agreement, and the court, upon their motion, instructed the jury to find for the defendant, if they believed from the evidence that the plaintiffs agreed to pay the defendants a sum equal to one-third of what might be collected, the omission to make the denial was cured by the verdict.

3. Attorney and client—Evidence—If defendants, by extraordinary efforts, made the debt, they had the right to prove that fact as enhancing the value of their services, which they did prove, but evidence as to defendants having had execution issued contrary to their clients' direction was irrelevant; but as they introduced this evidence they can not complain that the plaintiff was allowed to prove facts which tended to show the contrary.

4. Lunatics—Revivor—The objection to the revivor of the action in the name of the personal representative of the plaintiff upon the ground that the plaintiff was at the time he instituted the action, and up to the time of his death, a lunatic was properly overruled. If this fact had been made to appear before the plaintiff's death the court would not have dismissed the action, but would have allowed it to proceed in the name of his next friend, or, upon his being properly adjudged a lunatic, would have allowed his committee to prosecute it.

W. P. D. Bush and R. Gudgell & Son for appellants; C. W. Goodpastor for appellee.

MILLS' GD'N v. CITY OF HOPKINSVILLE.

Filed October 10, 1888. Appeal from Christian Circuit Court. Opinion of the court by Judge Bowden, affirming.

Guardian and ward—Domicile of ward—Taxation—The appellant was appointed guardian by will, with the "power and right of custody," but with an expressed wish that he should permit the ward to remain with her aunt as long as it seemed to him to be for her interest. The father of the ward was domiciled in Hopkinsville at the time of his death. The aunt also resided there, but subsequently removed to Bowling Green, and the appellant's ward went with her. The city of Hopkinsville subsequently assessed and collected taxes upon the personal estate of the ward in the hands of her guardian, who, at the time of the death of the testator and has continuously since, resided in Hopkinsville. Held—That the domicile of the father continued to be that of the ward unless it was changed by the guardian, who had the legal authority to make the change. And the mere fact that the guardian permitted the ward to remain with her aunt during his pleasure can not be regarded as indicating a purpose to change her domicile. Therefore, her personal property was subject to taxation by the city of Hopkinsville.

Landes & Clarke for appellant; Harry Ferguson for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. TIPPENHAUER.

Filed October 10, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

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1. Special damages--In an action to recover damages for an injury to property by reason of the negligence of the defendant, the plaintiff can not recover anything on account of his inability to instantly supply himself with other property in lieu of that injured or destroyed. Such damages are too remote to be the subject of judicial ascertainment. And as the court in this case can not determine how much of the verdict was allowed on account of an instruction authorizing the jury to find such damages, the error of the court in giving the instruction was prejudicial.

2. Railroads—Negligence—Where the view of persons approaching a railroad crossing in a city was so obstructed by cars standing on the track that an accident was inevitable unless great caution was exercised either by those in charge of an approaching train or by those crossing the track, the mere fact that an engine approached the crossing thus obstructed in the usual manner and at the usual rate of speed was sufficient evidence of carelessness on the part of the railroad employes to go to the jury.

3. Care necessary in crossing railroad track—It is not the unconditional duty of a traveler about to use a railroad crossing to stop and ascertain whether he will be endangered by so doing. It is, however, his duty to use ordinary precaution in crossing the track, and if in that he fails, and the accident would not have happened but for such failure, he can not recover.

George Washington and James C. Wright for appellant; O. W. & A. T. Root for appellee.

THORNTON, &c. v. STEWART LOTTERY CO.

Filed October 10, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Practice—The questions involved being purely questions of fact, the court finds nothing in the evidence authorizing it to disturb the finding of the chancellor.

2. Supersedeas—Damages—The contest being over a fund in court no damages are allowed, although the judgment was superseded.

M. A. & D. A. Sachs for appellants; O'Neal, Jackson & Phelps for appellee.

TRUSTEES COLORED BAPTIST CHURCH OF MAYSLICK v. MARSHALL'S ADM'R.

Filed October 10, 1888. Appeal from Mason Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Churches—Land was conveyed to the trustees of the Colored Baptist Church of Mayslick and their successors in office "for the use and benefit of the colored Baptist congregation of Mayslick, Ky., for church and school purposes." Held—That there is nothing in this deed which would prohibit the trustees, acting under the express authority of the church, conferred at a regular church meeting, from erecting a house upon the land to be used as a parsonage.

2. Mechanic's lien—A contract for the building of a house provides that the parties who build the house "shall hold the house until the last dollar is paid," including interest, etc. Held—That this contract did not confer upon the builders such a lien upon the land on which the house is built, or upon the house itself, as could be enforced by a sale of the house and land. The chancellor was only authorized to order the property to be rented upon proper terms until the amount of rent cancels the debt.

3. Amendment of pleading—As the evidence seems to have been taken upon the idea that all the material allegations of the answer were denied, the plaintiff (appellee) should be allowed, if he so desires, to file a reply upon the return of the case, a material allegation of the answer being uncontroverted.

L. W. Robertson and Thomas R. Phister for appellants.

COTTON v. GRAHAM, &c.

Filed October 17, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, reversing.

Trusts—Compensation of trustee—If the creators of a trust induce a person to undertake its execution, an implied agreement necessarily arises

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unless it is in express terms or from the nature of the trust excluded, that such person shall receive compensation for his services and his expenditures, including such counsel fees as it may be necessary for him to incur in the execution of the trust; and such implied agreement is just as enforcible as is an express agreement.

Appellees executed to appellant a writing, whereby they agreed to pay him, as trustee for the widow of their deceased brother, the sum of $5,000. To secure the payment of this sum they executed a mortgage to the trustee on a tract of land. The trust was accepted by appellant, and the obligors failing to pay the note, he instituted this action, asking judgment for $5,000 and for the enforcement of the mortgage lien. It becoming apparent that the trust could not be enforced, appellant filed an amended petition alleging that he was compelled, for the purpose of enforcing the trust, to institute this suit and employ counsel and incur other liabilities in the discharge of his duties. He asks that he be allowed $1,000 as his reasonable attorney's fee and $350 as compensation for his services, and his costs incurred in this action. The original petition was dismissed upon the ground that the trust was unsupported by any valuable consideration, and the amended petition was also dismissed. The dismissal of the amended petition is the only complaint upon this appeal. Held—That upon the face of the pleading the appellant is entitled to the relief prayed for in his amended petition. Prima facie the trust was valid and enforcible, and it will not be presumed that appellant knew that the agreement was not based upon a sufficient consideration to enable him to enforce it, nor does it appear that appellant knew that the enforcement of the trust would be resisted. The mere refusal to pay the money was not a repudiation of the trust, for the reason that appellees provided by their contract that if they failed to pay the money the trustee should foreclose the mortgage to raise it.

Wm. McKee Duncan for appellant; James S. Pirtle for appellees.

JOHNSTON v. DULIN.

Filed October 17, 1888. Appeal from Christian Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Arbitration and award—An agreement to submit to arbitration a controversy growing out of an attempt to settle a farming partnership provided that "the said controversy may be submitted to the arbitrators by an order to be entered of record in the court of G. H. Myers, a justice of the peace, and that the award of said arbitrators in case of disagreement may be entered up as the judgment of said court." It is argued that it was the agreement of the parties to have the matter submitted by an order of court, and as the matters to be determined were not within the jurisdiction of a justice of the peace there was no valid submission. Held—That it is evident the parties did not intend a submission by order of court, because both parties and arbitrators immediately entered upon the business of the submission, the case was heard and the award made in a few days after the agreement was entered into. But if there was any such purpose it was waived and abandoned

2. Same—The arbitrators properly took into account the rent of land put into the partnership concern, the land having been rented as a mode of managing it, and the rents received by the firm. It was also proper to take into account partnership funds withdrawn from the firm and used in buying land which was deeded to the partners individually, the right of each party to the land deeded to him individually being recognized as already settled.

3. Same—As the arbitrators were not clothed with power to take hold of the property and administer the assets, but were merely empowered to state the account, it is no objection to the award that it did not divide the property, allotting to each specific article, or provide what debts each should pay.

4. Same—It was determined by the award "that all the personal property on the premises of A. M. Dulin (appellee), except the household and kitchen

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furniture, is jointly owned by the firm of Dulin & Johnston, and that said property be equally divided between them, each one paying an equal proportion of all the outstanding debts of the firm." There was no specific reference to any notes or accounts due the firm. Held—That certain notes, payable to Johnston (appellant) individually, which were stated as a part of the partnership assets in an account filed by appellee before the arbitrators and filed by them with their award before the justice, were disposed of under the general provision quoted.

5. Same—As it is apparent that the arbitrators acted impartially, the court will not set aside the award for a mere mistake of law or fact, if any there was.

6. Same—As the parties to the controversy were father-in-law and son in-law, and the controversy seemed to have grown out of an estrangement between the latter and his wife and a consequent separation, the fact that the arbitrators called the husband and wife before them and made an effort to reconcile them as a means of settling the controversy was not improper and did not manifest any partiality, but was commendable

The Felands for appellant; Landes & Clark for appellee.

SCOTT v. EVANS, &c.

Filed October 17, 1888. Appeal from Scott Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Guardian and ward—Appellant admitted that as guardian he received $142.54, and this defense was that he had expended all of his pension money in his ward's maintenance from September 13, 1875, to October 19, 1876. The evidence tended to show that the ward lived most of the time with her stepfather, to whom appellant furnished supplies for the family, consisting of more than a dozen, pursuant to an arrangement by which he retained the money as pay for the supplies, and by which the stepfather had credit by the pension money as pay for maintaining the ward. What, if anything, was furnished the ward individually was not shown. Whatever the ward got was received prior to October 19, 1876; and the court instructed the jury that if its value was less than $142.54 they should deduct it and return a verdict for the difference. The verdict was for $80. Held—That the finding was in effect that the guardian had expended $62.54 and had retained $80, and, as matter of law, that balance bore interest. Therefore, the judgment awarding interest from September 10, 1878, was not prejudicial.

2. Same—The guardian was entitled to credit by what the maintenance of the ward was worth, which was a question of fact for the jury, who, being familiar with the cost of living in that section, were the proper judges as to what was a proper charge for maintaining the ward.

J. R. Botts for appellant; T. D. Theobald for appellees.

YOUNG, &c. v. NEAL, KEITH & BARLOW.

Filed October 17, 1888. Appeal from Adair Circuit Court. Opinion of the court by Judge Bowden, affirming.

Accord and satisfaction—A petition seeking to enjoin the collection of an execution alleges that the judgment defendants, by their agent, paid the judgment plaintiffs, the appellees, a named sum in discharge of the judgment, which was for a larger sum, but that, notwithstanding this, execution has been issued for the whole amount of the judgment. Held—That a demurrer to the petition was properly sustained. There was no consideration for the agreement to discharge the judgment, and it furnished no reason why an execution issued to enforce the judgment should be enjoined. The averment that execution has issued for the whole amount of the judgment does not show that the proper credit has not been endorsed.

James Garnett for appellants; Montgomery & Jones for appellees.

CECIL v. SIMPSON.

Filed October 17, 1888. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

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1. Liability of assignor of note—The stipulation in the assignment of a note that the assignee need not sue until notified does not affect the question of diligence which the law requires him to exercise after he is notified.

2. Same—In order to hold the assignor of a note liable upon his contract of assignment the assignee must institute suit at the first term of the court having jurisdiction after the maturity of the paper, unless excused from so doing by his assignor, and prosecute that suit with diligence.

In this case the terms of the quarterly court, which had jurisdiction of the action on the assigned note, began on the fourth Monday in March, June, September and December. The note matured March 10. The assignor notified the assignee not to sue at the March term. The assignee filed his petition June 7, but no summons was issued. Why the county clerk was not called upon to issue the summons, as he might have been, the county judge being absent from his office, does not appear. At the September term the makers of the note filed an answer, thereby entering their appearance. The only defense was part payment. The case was continued, but why does not appear, nor is it explained why judgment was not taken for the uncontested part of the debt. The assignor was made a party defendant for the purpose, as is supposed, of giving him notice of the defense, which the petition showed was expected, but it does not appear that summons was issued against him or any step taken to procure his evidence. At the December term the assignor filed his answer, and the case was tried and judgment rendered. A transcript of the quarterly court proceedings was not filed in the circuit court until eleven days after the sheriff was directed to return the fi. fa. and seven days after it was actually returned. Held—That the evidence fails to show that the suit against the makers was either instituted or prosecuted with diligence, and the assignor was entitled to a peremptory instruction.

3. Same—Whether the assignee has exercised the required diligence in prosecuting the makers to insolvency is a question of law if the facts relied upon to show diligence are admitted. And a motion for a peremptory instruction admits the facts given in evidence, and every reasonable deduction to be drawn therefrom.

4. Commencement of action—An action is commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon.

No action was commenced against the makers of the assigned note until they filed their answer at the September term.

5. Pleading—It is not sufficient in an action by the assignee against the assignor to allege that the assignee instituted suit and prosecuted it with due diligence. The facts showing what he did should be averred.

J. P. Hobson for appellant; James Montgomery for appellee.

THE BELL-COGGSHALL CO. v. BEADLE, &c.

Filed October 17, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Married women—The fact that necessaries have been sold to a married woman and the credit given to her, and that she has signed a writing agreeing to pay for them, will not authorize the court to render a personal judgment against her. All that can be done in such a case is to subject her property to the payment of the debt.

2. Same—It is not necessary that a petition to subject the wife's estate should allege that the credit was given to her. While it must appear that the goods were sold and delivered upon her credit, and with the understanding that she was to pay for them, that there was such an agreement may be inferred from the fact that the goods were sold and delivered to her and her note taken therefor.

The petition is this case alleged that the note sued on was executed by the wife for lumber furnished to her to be used, and which was used, in repair-

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ing a house on a tract of land belonging to the wife, which house was occupied by her and her family as a home: that the repairs were necessary to make it comfortable. Held—That it was error to sustain a demurrer to the petition which sought to subject the wife's property.

E. S. Watts for appellant; I. T. Woodson for appellees.

PACE v. DEPP.

Filed October 17, 1888. Appeal from Barren Circuit Court. Opinion of the court by Judge Barbour, affirming.

Weight given chancellor's judgment—This action involves only questions of fact which were submitted to the chancellor, and as the court can not say that his judgment is palpably against the weight of the evidence, or manifestly not supported by it, it must be affirmed.

Geo. T. Duff and W. P. D. Bush for appellant; W. L. Porter for appellee.

BUTCHER, &c. v. DANIEL.

Filed October 17, 1888. Appeal from Johnson Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Weight given to chancellor's judgment—The conclusions of the lower court drawn from the evidence upon a purely legal issue, although tried in equity, must be treated as the verdict of a properly instructed jury, and to reverse this court must be able to say that there was no evidence which, if credited, would justify the finding.

2. Limitation—The two years' statute of limitation applicable to merchants' accounts for goods sold can not apply to the items of an account for hauling and money paid out, as those items did not concern the trade of merchandise. Because one is a merchant it does not follow that all his transactions are governed by the statute in regard to the sale of goods.

3. Same—Where goods were sold under an agreement by which they were to go as payment on account, limitation did not begin to run as against the bill for goods as long as anything remained due on the account to which they were to be applied as payments. The statute does not apply to payments made.

J. F. Stewart for appellant.

REED, &c. v. NEVIN.

Filed October 17, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Street improvements—"Square" defined—In determining whether or not property sought to be subjected to pay the cost of street improvements in the city of Louisville is embraced in a square binding on the improvement, "each subdivision of territory bounded on all sides by principal streets" is to be deemed a square, it being so provided by the charter, and whether or not a particular way is a principal street is necessarily a question of fact, in determining which the width and length of the way, while not conclusive of the question, may be considered in connection with other facts proved in the case.

In this case a way known as Bertrand street, which is only thirty feet wide and begins at an alley midway between Fourth and Fifth, and runs across Fifth and Sixth to Seventh street, where it ends, and which the weight of the evidence shows was in its dedication to the city designated as an alley, and has ever since been recognized as such, is held not to be a principal street. But, even if the weight of the evidence was not with the appellee, the question is one of fact, and the court would not disturb the judgment of the chancellor unless it was clearly against the weight of the evidence.

2. Same—The mere fact that a way is called a street, even by an ordinance of the general council, does not make it a principal street. Besides, the ordinance relied on in this case was evidently adopted merely for the purpose of designating the way by some name, and for the purpose of determining

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the rights of persons whose property might be affected by the improvement of the streets in the vicinity of Bertrand street.

3. Same—The fact that the general council adopted the original apportionment in this case, which virtually recognized Bertrand as one of the streets binding on the square, is not decisive. The council had no power to authorize the apportionment except in the mode and against the property as prescribed in the charter.

Simrall & Bodley for appellants; Lane & Burnett for appellee.

MEGIBBEN v. SHAWHAN'S ADM'R.

Filed June 16, 1888. Appeal from Harrison Circuit Court. Opinion of the court by Presiding Juge Ward, granting rehearing and reversing.

1. Parol testimony to explain promissory note—In the absence of an allegation of fraud or mistake in the execution of an obligation for the payment of money the intention of the parties must be ascertained from the contract.

Therefore, parol testimony is not competent to show that the parties who signed such an obligation intended to bind a corporation for which they were acting as agents, and not themselves.

2. Liability of agents of corporation on note signed by them—Although it be stated on the face of a promissory note that the money is borrowed for a named corporation, the obligation is to be treated as that of the persons who sign it, and not that of the corporation.

3. The legal effect of a note which is signed by the payee with others is to bind each of the obligors, except the payee, for the payment of the amount called for in the note. But the obligors in the note, other than the payee, may show that it was not intended that the entire consideration should pass, and that it did not in fact pass to them, and defeat a recovery to the extent that the payee enjoyed the consideration, and such a defense as this may now be made at law without having to resort, as formerly, to a bill in equity.

A. H. Ward for appellant; West & Perrin for appellee.

COMMONWEALTH v. BROWN.

Filed June 13, 1888. Appeal from Mercer Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Local option—Elections—An election for justice of the peace is a county election within the meaning of the general local option law, which provides that the election provided for by that law shall be held at a "regular State, town, city or county election," even if it is essential to constitute a county election, within the meaning of the statute, that county officers should be voted for, the court being of the opinion that justices of the peace are county officers. But the statute does not require that the election shall be one at which the voters of the State or county may vote for State or county officials, but that it shall be a regular election to be held in the State or county for the election of such officers as are directed by the statute to be elected.

2. Same—Repeal by town charter—The local option law, which has been voted into effect in the district of which one portion of the town of Harrodsburg formed a part, was repealed, in so far as it affected the town, by an act of the legislature amending and reducing into one all acts in relation to the town, which gave the trustees of the town the power "to license and regulate the sale of spirituous, vinous or malt liquors, * * * at wholesale or retail, in said town or within one mile thereof." And while the fact that the old charter of the town, which was in force at the time the local option law was voted into effect, contained a provision similar to that contained in the new charter, might ordinarily prevent the new charter from effecting a repeal of the local-option law, yet as there had been in this case

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a vote under the local option law at which the voters of the town voted in favor of the sale of liquor, which vote was invalid, it must be presumed that the legislature vested the trustees of the town with power to license the sale of liquors in view of the then existing state of affairs. Moreover, the provision of the new charter referred to is not a mere re-enactment of the former charter provisions, as it grants a power to license not only "in the said town," but "within one mile."

P. W. Hardin, Attorney-General, for appellant; P. B. Thompson, Sr., for appellee.

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KENTUCKY COURT OF APPEALS.

McCARTY v. McCARTY.

McCARTY v. O'HARA & BRYAN.

(Filed September 21, 1888—Not to be reported.)

1. Divorce—Restoration of property—A decree of divorce provided that "all property obtained by these parties during marriage, and directly or indirectly in consideration thereof, is respectively restored to them." To satisfy her costs and attorneys' fees the wife had a lot, which the husband had conveyed to her during marriage (the consideration expressed being "love and affection"), levied on and sold under execution. Upon this appeal from a judgment enforcing the lien asserted by the execution purchasers, Held—That the judgment in the divorce case was evidently intended to restore to the husband the lot in controversy, and the sale under the execution in favor of the wife passed to the purchaser the title; and as they are the owners and the judgment merely gives them a lien, there is no reason why it should not be affirmed as to them.

2. Same—As the judgment in the divorce case may be construed as preventing the wife from setting up her claim for money paid or given to the husband under an agreement to secure it to her, that judgment should be reversed that the wife may show what property the husband obtained from her, and to that extent she should have a lien subordinate to that of the execution purchasers.

Simmons & Schmidt for appellant.

O'Hara & Bryan for appellees.

Facts stated in syl abus.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

The record shows that in June, 1886, the appellant had an execution issued on the judgment, for which she is now appealing, and levied on the lot in controversy to satisfy her costs and her attorneys' fees. The property was purchased by O'Hara & Bryan and the execution satisfied. The appellant now claims that the lot sold by her under the execution, and purchased by the appellees, belonged to her and not the defendant in the execution, and

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is contesting the right of the appellees to hold it. The judgment in the divorce case was evidently intended to restore the lot to the husband, and the levy and sale of the same under the execution by the wife against the husband passed to the purchaser the title. So the appellees, being the owners and only asking to enforce their lien and surrendering what is left to the party entitled, we perceive no reason why the judgment as to O'Hara & Bryan should not be affirmed. As the judgment in the divorce case may be construed as preventing the appellant from setting up her claim for moneys paid or given to the husband under an agreement to secure it to the wife, it should be reversed that the wife may show what property the husband obtained from her, and to that extent she should have a lien subordinate to that of the appellees, O'Hara & Bryan. The judgment as to O'Hara & Bryan is affirmed, and the judgment in the divorce case, in so far as it precludes the wife from setting up her claim for moneys received from her by the husband, is reversed and remanded for proceedings consistent with this opinion.

MARSHALL v. STRANGER, &c.

(Filed September 22, 1888—Not to be reported.)

1. Fraudulent conveyance—Creditors can not complain of the conveyance of a part of their debtor's homestead, the whole being exempt.

2. Same—The assignment of a note by an insolvent debtor was not valid as against his creditors, but the debtor having died, the creditors can not hold his assignee liable as an executor de son tort to any greater extent than they could a regularly appointed administrator, and can, therefore, only require him to account for whatever of the estate may be left after the satisfaction of the claims of the widow and infant children of the decedent to the exemptions allowed by law, and the payment of preferred debts. And the fact that he has paid out upon the debts of his father, the assignor, and in support of the family all that he received upon the note can not protect him.

3. Trust—The verbal promise of the debtor to pay certain creditors out of the assigned note did not transform it into a trust fund for their especial benefit.

4. Exemptions—The widow and infant children were entitled, out of the estate, to the money allowed by the statute in lieu of exempted property not on hand.

H. C. Baker for appellant.

Montgomery & Jones for appellees.

Appeal from Adair Circuit Court.

Opinion of the court by Judge Holt.

In April, 1886, Robert Marshall, who had been an invalid for several years, conveyed to his son, the appellant, James W. Marshall, forty acres of the home farm of one hundred acres, upon which, as a housekeeper with his wife and numerous children, he was then living, the consideration being that the son was to remain with, and care for, the parents during life, and also aid in caring for the minor children until they became of age or able to care for themselves.

The father, at or about the same time and for the same consideration, assigned to the appellant a note for $800 on a third party of perhaps doubtful

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solvency, verbally charging the fund, however, when it might be collected, as appears from some of the testimony, with the payment of a lien debt of about $400 upon the home place, and the payment of the assignor's other debts, if the assignee was able to pay them.

The father appears to have been quite poor, having no other property liable for his debts save a two-thirds interest in some tobacco, the whole of which was worth, and from which there was realized, $112. Indeed he did not own near as much property as was then exempt by law from execution.

The father died the same month, leaving his widow and a large number of children, of whom nine were under age, living upon the sixty acres left to him after the conveyance to the son.

The appellant has continued to live with and care for the family. He succeeded in collecting the $800 note, and the testimony shows that he has paid upon his father's debts nearly $700, including the lien upon the land, and $150 paid to the appellee, Strange, upon his debt asserted in this action.

The remainder of the $800 he appears to have used toward the support of the children, save $47.50 of the fund, this much of it being yet in the hands of Wheat & Williams, who are parties to this action, and with whom the money had been left.

The appellees, Taylor and Strange, who were creditors of the father, brought separate actions against the appellant, seeking to make him liable for their debts, first, upon the ground that as an executor de son tort he had converted the property of the father. They sought to subject the forty acres of land that had been conveyed to the appellant and sued out an attachment, which was levied upon it, and also upon a horse of the appellant's and a crop of tobacco that had been raised by the widow and her children, either upon the sixty or the forty-acre tract, or perhaps both. They also attached the $47.50 in the hands of Wheat & Williams.

By amended pleading they proceeded, in the second place, upon the ground that the $800 note had been transferred to the appellant in express trust for the payment specially of their debts.

The two actions were consolidated and the lower court subjected the forty acres of land, the horse and the $47.50, but not the tobacco crop, to the payment of the claims.

The one hundred acres of land, of which the forty acres were a part, was the homestead of Robert Marshall, and worth less than $1,000. He, therefore, had the right to convey the portion of it that he did to his son; and creditors can not charge the latter with it or complain, because they had no right to look to it for the payment of their debts, even in the hands of the father.

The testimony shows that Robert Marshall often said to the appellants, in substance, that he would pay them out of the $800 debt when collected. It was a promise to pay them out of it, but did not transform it into a trust fund for their especial benefit. No writing to such effect was ever executed to them, nor was the note ever delivered to them, or any one, for such a purpose. The father retained it, the appellees relying upon his promise that when collected by him he would pay them.

The appellant, however, obtained the money after his father's death. The assignment to him was not valid as against the assignor's creditors.

The appellant also received the money for the decedent's two-thirds of the tobacco crop, amounting to about $75, making in all $875 that came to his hands, to which the creditors had a right to look for the payment of their

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debts, subject to the claims of the widow and minor children to exemptions under the statute.

The appellees can not hold the appellant liable to any greater extent than they could a regularly appointed administrator; and they could only require him to account for whatever of the estate might be left after the satisfaction of the claims of the widow and infant children to the exemptions allowed by law, and the payment of the debts declared by it to be preferred as against a decedent's estate.

The testimony shows that no horse of the father ever came to the hands of the appellant. The former owned but one at the time of his death. The widow and infant children were entitled to it, and it was subsequently disposed of for the widow by the appellant.

He appears throughout to have acted in good faith; and the fact that he has actually paid out upon the debts of his father, and in support of the family, all that he received from both the tobacco and upon the note, save the $47.50 above mentioned, appeals strongly in his favor, while it can not protect him from accountability to the creditors, because he had no right to satisfy the claims of some creditors in full in the absence of sufficient estate to pay all, or to use the estate by way of supporting the family.

The decedent, however, owned but one horse and no sheep at the time of his death, and little or no provisions were on hand for the family's support for a year, or live stock suitable for that purpose. The widow and infant children were, therefore, entitled to a certain sum of money out of the estate in lieu of the sheep and another horse, and to $50 each for such support. (General Statutes, chapter 31, section 11.)

It is manifest that this exemption, together with the payment of the debts, such as burial expenses, preferred by law, would leave little of the proceeds of the $800 note, and the two-thirds of the tobacco crop for the payment of the general debts: and that the appellee, Strange, has no ground of complaint because, by the payment to him of the $150, he has already received more than his proper proportion of the estate.

It is difficult to tell, from this record, the exact sum to which the appellee, Taylor, is entitled. It is reasonably certain, however, that it does not exceed the $47.50 attached in the hands of Wheat & Williams, and the appellant should be held liable to this extent only, and said fund be subjected to the payment of the appellee's, Taylor, debt.

The judgment is reversed and cause remanded for further proceedings in conformity to this opinion.

COMMONWEALTH v. COZINE.

(Filed October 2, 1888—Not to be reported.)

1. Peremptory instruction—Whenever evidence is presented in a criminal case, however slight, tending to show guilt, the question should be left to the determination of the jury. It is not sufficient, however, that it should be testimony relating to one fact merely, which in and of itself will not authorize a conviction.

Upon the trial of appellee for murder it appeared that the deceased, when drunk, was struck, at night, by appellee with a stick. After that he was seen climbing a fence, and finally walked off along a railroad track and next morning was found insensible in a ditch near the track with wounds

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upon his person, and died in a short time. Held—That a peremptory instruction for defendant was proper.

2. Upon appeal from judgment upon a verdict of acquittal in a felony case the court has no power to reverse; it can only declare the law.

P. W. Hardin and Finley Shuck for appellant.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The indictment charges the appellee, Charles Cozine, with murder. After the Commonwealth closed its testimony a verdict of acquittal was rendered under a peremptory instruction. It has appealed.

The appellee can not, of course, be tried again, and this court can, upon an appeal by the Commonwealth in this character of a case, merely declare the law. (Criminal Code, section 339.)

The only legal question arising upon the record is whether the court should have submitted the question of innocence or guilt to the jury instead of withdrawing it from them by a peremptory instruction to acquit the accused.

It is the well-settled rule in this State that whenever any evidence is presented, however slight, tending to show guilt, the question should be left to the determination of the jury. It is not sufficient, however, that it should be testimony relating to one fact merely, which in and of itself will not authorize a conviction.

As the judgment in favor of the accused operates as a bar to another trial for the same offense, and can not be reversed by this court, it would be an idle ceremony to discuss the case. Any other case can not be governed by them, but must be controlled by the general rule of law already indicated.

It is sufficient, therefore, to say that there is no evidence in this case tending to show that the action of the accused caused the death of the deceased. The latter, when drunk, was approaching the accused, who, after telling him not to come on him, struck him, in the language of the witness, with a "good-sized stick." It is not even shown upon what part of his person the blow fell. It did not knock him down. He did not even stagger, save as a drunken man. This occurred about 11 o'clock at night. He walked off and was afterward, during the night, seen to climb over a picket fence and knock at a man's door, who cursed him, when he left. From this it appears that the blow from the stick had not rendered him insensible, and he knew what he was doing. He was seen going about in the neighborhood by others during the night and after the difficulty, and was last seen to start along a railroad track, drunk as he was, not long before a night train came along. He was found the next morning in a ditch at the side of the track insensible, with a wound upon his head, a bruise upon his side and his hip broken or injured, and died in a short time.

In the face of these circumstances even a surmise could not well arise that his death was caused by the blow with the stick in the hands of the accused, or that it rendered him insensible, causing him to wander about until he was hurt upon the railroad track. Upon the other hand, it is reasonable to suppose that he was rambling about in the night by reason of his intoxication.

There being no evidence tending to shew that the act of the accused caused his death, or that it resulted naturally and proximately from it, the peremptory instruction was proper, and the judgment is affirmed.

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GRAVES & WELLS v. LONG, ASS'EE, &c.

(Filed October 2, 1888.)

1. Parties to actions—In an action to sell property held in trust for the payment of debts it is not necessary, as it is in a suit to settle decedent's estate, to make all the lien creditors parties.

2. Same—While the debtor, because of his interest in the suit, is not only a proper, but necessary, party to such a suit, he is not a necessary party for the purpose of passing the title to a purchaser, the title having vested in the assignee.

3. Attorney and client—Whenever an agent or attorney accepts another employment in conflict with the interests of his first principal or client, it ends his first engagement. But there is not necessarily any antagonism of interest between a debtor and his assignee for the benefit of creditors; and while a case might arise where it would be improper for the same attorney to represent both, this record does not present it, and the consent of the attorney for the debtor to the rendition of a decree for the sale of the assigned property in an action by the assignee is binding, although the same attorney also represented the assignee.

4. Judicial sales—Redemption—The act of April 9, 1878, providing for the redemption of real estate sold under an order or judgment of a court applies to all coercive sales for debt, and not merely to cases where the judgment is directly against the debtor. It, therefore, applies to a sale of assigned property made under a decree obtained by the assignee for creditors, and the debtor has such an interest as entitles him to except to the report of sale upon the ground that the requirements of the act have not been complied with.

5. Same—Appraisement—In no case to which that act applies can the sale be lawfully made in the absence of the appraisement for which the act provides, and its place can not be supplied by evidence after the sale that the property in fact sold for a fair value, or more than two-thirds of any appraised value that could have fairly been placed upon it.

6. Same—Judgment—It is not necessary that the judgment should direct appraisement to be made, as it is the duty of the commissioner to have it made without such a direction, but as the judgment in this case directed the commissioner to put the purchaser in possession at once, it, by implication, forbade an appraisement, and was, therefore, erroneous.

7. Powers of attorney—The employment of attorneys did not confer upon them the power to waive their client's right to redeem his property, or any steps necessary thereto.

G. G. Gilbert for appellants.

Bullock & Beckham for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Holt.

August 15, 1885, Thomas B. Graves and J. B. Wells made an assignment of their property to a trustee for the payment of their debts. Among the assets was a valuable farm. Graves had previously conveyed his undivided half of it to his wife, but, in October, 1885, she conveyed all her interest in it to the assignee of Graves & Wells for the purposes named in their deed of trust.

In February, 1886, this action was instituted by the assignee for the purpose of obtaining a sale of the land to pay the indebtedness. Graves & Wells were, together with their creditors, made defendants in the petition.

March 23, 1886, a judgment of sale was rendered. It provided that the commissioner making it should, immediately thereafter, put the purchaser

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in possession of the land, save the house, garden, yard and outbuildings, thereby in effect denying any right of redemption, regardless of what the property might bring.

Orders were also made enjoining the creditors from bringing separate actions, and referring the cause to a commissioner for proof of claims.

Up to this time the defendant, Wells, and a lien creditor, one Bergen, had not been brought before the court by service of summons.

Section 438 of the Civil Code provides, however, that in an action to sell property held in trust for the payment of debts it shall not be necessary, as it is in a suit to settle a decedent's estate, to make all the lien creditors parties. The title to the land was not in Wells. He was not only a proper, but a necessary, party to the suit, because of his interest in it, but not for the purpose of passing the title to a purchaser. He had already parted with it for a specific purpose. It had vested in his assignee. Moreover it appears from the testimony, but not by any entry of record, that his two attorneys, in open court, consented for him to the rendition of a decree of sale at the time when it was entered. Their right to do so is now denied. It is urged that they were also the attorneys of the assignee in this suit. It is undoubtedly a safe rule, supported by both reason and sound morality, that whenever an agent or attorney accepts another employment in conflict with the interest of his first principal or client, it ends his first engagement. He can not act for him and at the same time be against him. When such antagonism arises the law steps in and says to him that his further action is likely to tempt him to mischief and dishonesty, and lead to the injury of his principal. Such a case is not here presented, however. There is not necessarily any antagonism of interest between the debtors and their assignee.

It is his duty to apply the property in payment of their debts. They convey it to him for this purpose, and it is their moral and legal duty to throw no obstacle in his way. It is true a case might arise where it would be improper for the same attorney to represent both; but this record does not present it.

The land having been sold, the appellants, Graves & Wells, gave notice and moved to set aside the judgment. They also filed exceptions to the report of sale, but their objections, as well as their motion to set aside the judgment, were overruled, and they have appealed. But one of them was well grounded. Prior to the act of April 9, 1878 (General Statutes, page 972), the debtor's right for twelve months after a sale to redeem his property, if sold for less than two-thirds of its appraised value, was confined to sales under execution. If sold under decree there was no such right. His property was, therefore, often sacrificed.

In view of this fact the legislature passed the act named, which has the general title: "An act providing for the redemption of real estate sold under an order or judgment of a court," and provides:

"Before any real estate shall be hereafter sold, in pursuance of any order or judgment of a court, the commissioner or officer, whose duty it may be to sell the same, shall cause it to be valued. * * * The valuation so made shall be in writing, signed by the persons making it, and returned by such commissioner or officer to the court which made or rendered the judgment for the sale of the property. * * * If the real estate which may be sold in pursuance of such judgment or order does not bring two-thirds of such valuation, the defendant and his representative shall have the right to redeem the same within a year from the day of sale by paying the purchaser

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or his representatives the original purchase money, and 10 per centum per annum interest thereon. * * * If the judgment in pursuance of which such sale is made be not satisfied by such sale the right of redemption herein provided for may be sold in satisfaction of the residue of such judgment, and the said right of redemption shall also be liable to sale under execution. The land shall, in such case, be still liable to redemption from both purchasers until the end of a year from the first sale."

If the wisdom or expediency of this act were open to question, it is not our province to determine it. That is a matter which, subject alone to constitutional restraint, must be left to legislative judgment. Viewed by past and then existing circumstances and the object within the legislative eye, it is evident that the law maker intended to give to the debtor an opportunity to redeem his property in all cases where it might be coercively sold for debt and fail to bring two-thirds of its appraised value. It was the purpose to put all coercive sales for debt of real property upon the same footing. It is urged that in this instance the judgment was not directly against the debtor; that the assignee who asks the sale represents him as well as the creditor, and that, therefore, the act does not apply. Undoubtedly it does not, as was held in the case of Wooldridge v. Jacob's Gd'n, 79 Ky., 250, where the sale is for the benefit of the owner alone, as where the property of an infant is sold upon the petition of his guardian under article 3, chapter 63 of the General Statutes. It relates to sales for debt only. It substantially says so. The case now in hand was a coercive sale for the debts of the appellants. The property was as much liable to sacrifice as if it had been sold under execution or a judgment rendered in an action by the creditor directly against his debtor. If so, and the legislative purpose was to prevent such loss, then the act should be construed to that end if its terms fairly admit of it.

We are not disposed to cramp its operation by a strict construction. It is for the benefit of both the debtor and his creditor. It will often serve to prevent one creditor from obtaining all the property of the debtor, or the benefit of it, at a ruinous price, to the exclusion and injury of his other creditors. The spirit of it, as well as the plain import of its language, show that it was intended to embrace all coercive sales for debt, and it provides that before any real estate shall be sold for this purpose it shall be valued.

Where an administrator sues to subject the real estate of the decedent to the payment of the debts he acts both for the creditor and the estate. He asks that the sale be made, and yet this court, in the case of Cantrill v. Perry's Adm'r, 7 Ky. Law Rep., 446, held that the act in question applied to such a case, and that the sale could not be sustained because the property had previously been valued.

Our conclusion is that the statute embraces a case like the one now before us. Its language gives to "the defendant (meaning the debtor) and his representatives" the right to redeem. He has an interest in the property, although he has placed it in trust for the payment of his debts and passed the title to his assignee for this purpose. If he were to pay all his debts he would be entitled to a reconveyance. We fail to see that such a construction will be likely to work an injury to the insolvent estate or the creditors.

It is likely to do so, but seldom at most; and will not often, it is probable, redound to their advantage by preventing a sacrifice of it. It is true that the act provides that if the property does not bring two-thirds of the appraised value the debtor may remain in possession until the expiration of the year within which it may be redeemed, but this is equally so in cases of sale under execution or under judgments rendered in actions brought

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directly by the creditor against his debtor. Here there was no appraisement before the sale.

It was not essential to the validity of the judgment that it should, in express terms, direct it, because the law required the officer to have it done, but it, by implication, directed the contrary, because it improperly provided that the commissioner should, without regard to what the property might bring, at once put the purchaser in possession. The employment of attorneys did not confer the power upon them to waive their client's right to redeem their property or any steps necessary thereto, even conceding that they attempted to do so.

Evidence that it in fact sold for a fair value, or more than the two thirds of any appraised value which could fairly have been placed upon it, can not avail. If so, it could equally be urged that a judicial sale, made without advertisement or otherwise in violation of law, should be upheld because the property in fact brought a fair price. The law is imperative that the valuation shall be made before the sale. It is not merely directory. It goes to the right of the debtor and reaches to the interest of the creditors. It is the statutory test of the right of the one to redeem and of the other to still look to the property for the payment of their debts. No coercive sale for debt can be lawfully made in the absence of this valuation. The estate forbids it, and it was not intended that its place should be supplied by testimony given after the sale and heard upon the question of its confirmation.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

BLAND v. KITTINGER.

(Filed October 4, 1888—Not to be reported.)

Limitation—Amendment of petition—An action for relief, on the ground of fraud committed by the defendant, having been commenced by the plaintiff within the time prescribed by the statute, he acquired a standing in court that entitled him to pray for and recover in that action whatever was connected with, and a necessary incident of, the original cause of action. And while an amended petition praying for the specific relief granted by the judgment appealed from was not filed within five years after the cause of action accrued, the statute presents no bar to the recovery.

Jep. C. Jonson for appellant.

Chas. Eaves for appellee.

Appeal from McLean Circuit Court.

Opinion of the court by Chief Justice Lewis.

In 1880 appellee instituted this action, alleging in his petition, in substance, that previous to December, 1879, he was the owner of a tract of land which, appellant wrote to him in Texas, where he resided, he could sell to a company, and requested him to fix his price and authorize him, appellant, to sell as his agent. Appellee thereupon wrote to appellant, who resided in Kentucky near the land, authorizing him to sell the land at $1,100, or the timber upon it at $800.

Soon thereafter appellant went to Texas, and informing appellee he had sold the land for the price of $700, and paying to him that sum, a deed for

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the land was executed to him. But, as stated in the petition and proved, appellant had in fact sold the timber upon the land to the company mentioned at the price of $1,050, leaving the land still the property of appellee.

Upon the ground of fraud by appellant, thus alleged and proven, the court in which the action was instituted rendered judgment cancelling the deed executed by appellee to appellant, and also for the payment by the latter to the former of $350, the residue of the purchase price of the timber. But upon appeal to this court that judgment was reversed as to the $350, upon the ground that the only relief prayed for in the petition was a cancellation of the deed and an injunction restraining Chess & Wyman, the company mentioned, from cutting and removing timber from the land. But it was directed by this court that upon the return of the cause appellee should be permitted to amend his petition so as to have complete relief. And, at the first term after the mandate of this court was filed, he did file an amended petition in which he stated Chess & Wyman had cut and carried from the land the timber, under their purchase from appellant, and that the latter never having paid or accounted for any part of the purchase price thereof except $700, judgment for the residue, $350, be rendered. And this appeal is from the judgment of the lower court for that sum.

There is no contract with Chess & Wyman, who appear to have acted in good faith, and paid to appellant the price agreed on for the timber and cut and removed it. Nor is there any dispute or room for dispute of the fraudulent attempt of appellant to appropriate and keep the $350, balance for which he sold appellant's timber. But the sole ground upon which a reversal of the judgment is contended for is that the amended petition was not filed within five years after the commission of the fraud by appellant, when, as argued, appellee's cause of action accrued.

Section 2, article 3, chapter 71, General Statutes, provides that an action for relief on the ground of fraud or mistake shall be commenced within five years next after the cause of action accrued. And section 6, same article, provides that in actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake.

More than five years had expired after the discovery, as well as after the commission of the fraud, when the amended petition was filed. But the action was commenced in 1880, less than one year after the fraud was perpetrated, and the single question is whether a recovery of the $350 is barred because judgment for it was not specifically and formally prayed for in the original petition.

Section 39, Civil Code, provides that "an action is commenced by filing in the office of the clerk of the proper court a petition stating the plaintiff's cause of action." And pleadings, as defined by section 87, are statements by parties to an action of their causes of controversy.

In this case the cause of action was the fraudulent procurement by appellant of a deed from appellee for the land for the consideration of $700, which was paid over. But as the sum paid was money which appellant had received from Chess & Wyman in the sale of timber on the land, the cancellation of the deed necessarily operated to give to appellee the right to not only retain the $700, which it was adjudged he should retain, but also a right to the $350, balance of proceeds of the timber.

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The action for relief on the ground of fraud committed by appellant having been commenced by appellee within the time prescribed by the statute, he acquired a standing in court that entitled him to pray for and recover in that action whatever was connected with, and a necessary incident of, the original cause. And as the amended petition set up no new and distinct cause of action, but was filed so as, in the language of this court, to enable appellee to have complete relief, on the ground of fraud already alleged, proved and adjudged by both courts to exist, we do not think the statute, construed even literally, presents an obstruction to the judgment appealed from, which is affirmed.

HARRIS v. GUNNELL, &c.

(Filed October 4, 1888—Not to be reported.)

1. Judicial sales—Commissioner's report—Where a decree directs the sale of separate tracts of land it is not necessary that the commissioner's report of sale should show whether he offered the tracts separately, or that it should show that he offered only so much of the land as was necessary to pay the judgment; he is presumed to have done his duty until the contrary is made to appear.

2. Same—Mistake of appraisers—A mere error of judgment upon the part of appraisers in valuing land will not avail to set aside the sale.

3. Same—Inadequacy of price alone, unless it be so great as to import fraud, does not furnish ground for setting aside judicial sales. Nor will a sale be set aside merely upon a guaranty of an advanced price.

4. Same—Advertisement—The statement of the commissioner in his report of sale, that he advertised the sale as required by the judgment, should, in the absence of testimony, be taken as true. But as the commissioner was introduced as a witness in this case, and his testimony shows that he did not personally know whether the notices were posted as required by the judgment, the presumption arising from the face of the report is rebutted, and, upon such a state of case, a sale prejudicial to the owner of the property should not be upheld unless it be shown by testimony that the land was advertised as required by the decree.

W. W. Dickerson and C. C. Cram for appellant.

A. G. DeJarnett for appellees.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Holt.

This is a contest between a debtor and the purchaser of his land at a decretal sale. It was made on September 14, 1885, under a judgment rendered in May previous. It was reported to court on December 8, 1885, and confirmed three days thereafter.

December 19, 1885, the purchaser asked for a writ of possession. The debtor objected and moved, upon various grounds, to set aside the order confirming the sale and the sale itself. This, of course, the court had the power to do, upon sufficient ground, at any time during the same term at which the order of confirmation was made.

The debtor purchased the land, about 110 acres, in 1877, for $23 per acre, upon extended payments without interest.

At the sale now in question it was appraised at $15 an acre, amounting

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in all to $1,657. It was purchased by the appellant, John T. Harris, for $1,244.71, or more than two-thirds of the appraised value.

It consists, as described in the judgment, of four tracts; and it is urged that they should have been appraised and sold separately; and that the commissioner, in making the sale, should have offered only so much of the land as was necessary to pay the judgment.

It appears, from the description of the land, that the four tracts adjoin. Lot denominated as No. 2 adjoins lot No. 1, and they all appear to make but one tract. The report of sale does not show how the commissioner offered it. This is not required. He is presumed to have done so properly, and the record contains no evidence to rebut this presumption. Moreover, these objections are made in argument, and were not embraced in the grounds filed, upon which it was sought to annul the sale. They were, that the appraisement was untrue and false; that the land sold at a sacrifice, and that the sale was not properly advertised.

Considerable testimony has been taken, pro and con. as to the correctness of the valuation of the land fixed by the appraisement. This was unnecessary, and the evidence can only be considered upon the question whether the land brought a fair value. The appraisement is not attacked upon the ground of fraud, mistake or unfairness. It is only assailed for error of judgment upon the part of the appraisers. This can not avail. It furnishes no ground for setting aside a sale.

The valuation of the appraisers, if fairly made, furnishes the legal test of the debtor's right to redeem, although they may err in judgment in fixing it. An incorrect appraisement can only avail to set aside a sale when it is the product of fraud or unfairness or mistake other than one arising merely from an erroneous opinion as to value. (Lawrence, &c. v. Edelen, 6 Bush, 55.)

If the rule were otherwise, yet in this instance eight witnesses support the valuation, while but four think it incorrect.

It is well settled that inadequacy of price alone, unless it be so gross as to import fraud, does not furnish ground for setting aside judicial sales. The law, in establishing his rule, looks to their promotion and stability.

In the absence of all unfair dealing public policy requires that the rights of the purchaser should be regarded. The chancellor is not vested with a mere arbitrary discretion in the matter. If there has been fraud, surprise, accident or any unfairness, he should annul the action of the commissioner, who is his agent; but in their absence, and where the sale has been conducted in pursuance of the judgment, the claims of the purchaser can not be disregarded.

If inadequacy of price alone would authorize a disregard of them, then inducement to bid would be taken away and purchases at judicial sale would become a mere speculation.

While courts incline to the relief of the debtor's burden by affording him an opportunity to apply the fair value of his property upon his indebtedness, yet a rule must be applied, which, while as liberal to him as public policy will permit, must yet be of such a character as to invite reliable bidders and secure competition. The interest of the debtor really so requires. nor should a sale be set aside merely upon a guaranty of an advanced price;

This has been, and is, perhaps, yet, the English practice, if it be as much as ten per centum and costs, but it has never obtained in this State.

One who was present, perhaps, at the sale, or who, at least, might have

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been, should not be allowed to make it a mere matter of play by thereafter offering an advanced price.

It follows that the bond given in this case, stipulating that upon a resale eighty acres of the land should be made to pay the debt or bring as much as the entire tract brought at the sale in question, did not of itself authorize another sale.

The judgment, however, provided that the sale should be advertised at the courthouse door of the county in which the land is situated, and at "three or more public places in the vicinity of the land."

The commissioner in his report says that he advertised the sale as required by the judgment. This, in the absence of testimony, should be taken as true. The presumption is in favor of a proper performance of his duty. But he was introduced as a witness, and his testimony shows that he did not show whether the statement was correct or incorrect. This rebuts the presumption arising upon the face of the report that he did his duty. Upon such a state of case a sale prejudicial to the owner of the property should not be upheld unless it be shown by testimony that the land was advertised as required by the decree.

The commissioner testifies that he posted a notice of the sale at the courthouse door and sent copies to be posted at four places in the vicinity of the land; but that he does not know that any of them were received or posted. Such a practice should not be favorably regarded.

It is shown by other evidence that one was received and posted at one of the places in proper time; that another was posted at one of the other places, but the witness is unable to say how long this was done before the sale.

There is no evidence that any notice was ever posted at either of the other two points, and hence it does not appear that the sale was advertised at the courthouse door and three or more public places in the vicinity of the land as required by the decree.

The debtor had no notice or knowledge of the sale until a few hours before he moved to set aside the order confirming the report of it. A suspicion arises that he must have been somewhat neglectful, but yet this fact addressed itself to the discretion of the court upon the motion to set aside the order of confirmation. It had the power to annul the order, and, under the circumstances, it was not an abuse of legal discretion to do so.

All of the evidence shows that the land did not bring its fair value. The appraisement fixed its value at over $400 more than it brought. None of the witnesses value it at less than the appraisement, and some at much more.

If the sale be upheld the appellant secures a good bargain. His effort to have it sustained confirms what the testimony makes evident. His gain is that much loss to the debtor.

A sacrifice of the land is shown; and there is an absence of both testimony that the sale was advertised as required by the decree, and of presumption that the officer did his duty.

It must be assumed, as the record is made up, that the sale was not advertised as directed; and this fact, coupled with the prejudice to the debtor by a sale of his land at much less than its fair value, forbids its confirmation; and the judgment of the lower court, ordering a resale, is affirmed.

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BALL v. COMMONWEALTH.

(Filed October 6, 1888—Not to be reported.)

Appellate jurisdiction—The indictment against appellant is for a misdemeanor. The judgment is a fine of $25 and ten days' imprisonment. Held —That no appeal lies either to this court or the Superior Court. (Criminal Code, section 347.) Therefore, the appeal is dismissed instead of being transferred to the Superior Court.

P. A. & J. S. Cline and James M. York for appellant.

P. W. Hardin for appellee.

Appeal from Pike Criminal Court.

Opinion of the court by Judge Holt.

The indictment against the appellant, Dan Ball, is for a misdemeanor.

The judgment is a fine of $25 and ten days' imprisonment. No appeal lies from it.

Section 347 of the Criminal Code provides: "The Court of Appeals shall have appellate jurisdiction in penal actions and prosecutions for misdemeanors in the following cases only, viz: If the judgment be for a fine exceeding $50, or for imprisonment exceeding thirty days; or if the judgment be for the defendant, in cases in which a fine exceeding $50, or confinement exceeding thirty days, might have been inflicted."

As neither this court nor the Superior Court has jurisdiction the appeal is dismissed, instead of being transferred to the last-named court.

WHITE v. COMMONWEALTH.

(Filed October 6, 1888.)

Criminal law—Breaking into "outhouse"—The expression "any outhouse belonging to or used with any dwelling house," as used in section 4, article 5, chapter 29 of the General Statutes, which provides for the punishment of any person who shall feloniously break into such a house and take away anything of value, embraces such structures as are ordinarily attached to and used in connection with dwelling houses, and, therefore, can not reasonably be construed to include a tobacco barn, built and used expressly for the storage of tobacco. Such a structure is a storehouse or warehouse within the meaning of section 4 of article 6, chapter 29 of the General Statutes, and one who feloniously breaks into such a house and steals anything of value is subject to punishment under that section, and not under section 4 of article 5.

The building broken into in this case being a tobacco barn, the appellant was prejudiced by an instruction telling the jury that if they found him guilty they should fix his punishment at confinement in the penitentiary not less than two nor more than ten years, as appellant was thereby deprived of the right of allowing the jury to fix his punishment as low as one year's imprisonment, which is the minimum punishment under section 4 of article 6, chapter 29, General Statutes.

W. H. Botts for appellant.

P. W. Hardin for appellee.

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Appeal from Monroe Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Wm. White, was indicted under section 4, article 5 of chapter 29 of the General Statutes, which provides: "If any person shall feloniously * * * break any dwelling house, or any part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously take away anything of value, although the owner or any person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years."

The building broken into was a tobacco barn, situated in a ten-acre field, in which there was no other structure. It was from ninety to two hundred yards from the owner's dwelling house. It had been built for the purpose of storing tobacco, and was, when the offense was committed, being so used. The property stolen from it was a lot of tobacco.

This instruction was given to the jury over the objection of the appellant: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant, Wm. White, did, before the finding of the indictment read to them, in the county of Monroe, unlawfully and feloniously break and enter a barn, the property of T. N. Turner, used with his dwelling house, and did feloniously steal and carry away from and out of said barn tobacco, a thing of value, and which was the property of Wm. Jordan, they should find him guilty, and fix his punishment at confinement in the penitentiary not less than two, nor more than ten years."

The evidence did not support this instruction or render the perpetrator, whoever he might have been, liable to the punishment prescribed by the provision of the statute supra. Upon the contrary, he was subject to punishment under section 4, article 6 of chapter 29 of the General Statutes, which reads thus: "If any person shall feloniously, in the night or day, break any warehouse, storehouse, office, shop, or room in a steam, wharf, or other boat, whether such place be or be not a depository for goods, wares or merchandise, and whether the goods, wares and merchandise be or be not exposed for sale in such place, with intent to steal, or shall feloniously take therefrom or destroy any goods, wares or merchandise, or other thing of value, whether the owner or other person be or not in such house, office, room or shop, he shall be confined in the penitentiary not less than one nor more than five years."

The legislature intended, by this provision of the statute, to embrace buildings not included by that first above cited.

The expression, "any outhouse belonging to or used with any dwelling house," embraces such structures as are ordinarily attached to and used in connection with dwelling houses. It can not reasonably be construed to include a tobacco barn, built and used expressly for the storage of tobacco. Such structure is a storehouse or warehouse within the meaning of the statute. The family are in and about the dwelling and outhouses belonging to and used with it. It is the home; and it was intended to give greater protection thereto, by providing a greater penalty for their unlawful invasion, than in case of a warehouse or storehouse. A tobacco barn or tobacco storehouse has no proper connection with the owner's dwelling. It belongs to that class of buildings named in section 4 of article 6, all of which have no connection, by use, with a man's home. It would not be ordinarily under-

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stood as an outhouse of the dwelling house, and in construing the term the usual and ordinary acceptation and meaning must be given to it.

In the case of Ray, &c. v. Commonwealth, 12 Bush, 397, it was held that a granary, built and used for keeping and preserving farming implements and products, was within the meaning of the terms "warehouse" and "storehouse," thereby deciding that such a structure was embraced by the statute relating to them, and not by that under which the instruction was given in this case. The appellant was prejudiced by it. The jury were told that if they found him guilty they must fix the punishment at "confinement in the penitentiary not less than two nor more than ten years;" whereas if guilty, he was only liable to be so confined not less than one nor more than five years. It deprived him of the right, if found guilty, of allowing the jury to fix the punishment as low as one year's confinement in the penitentiary.

The judgment is reversed and cause remanded for further proceedings under this opinion.

CREAGER v. CREAGER, &c.

(Filed October 6, 1888.)

1. Homestead—A debtor is not entitled to a homestead in land upon which he had never resided up to the time it was sold under a decree obtained by his assignee for the benefit of creditors. The mere fact that it was acquired by descent and not by purchase is not sufficient to entitle him to a homestead.

2. Assignment for creditors—A creditor claiming the benefits of a deed of assignment for the benefit of creditors may join issue with the debtor as to his right to a homestead attempted to be reserved by the deed, provided he does so before he has accepted any of the benefits of the assignment.

3. Same—An assignee for the benefit of creditors is not responsible to creditors for crops growing on the debtor's land at the time of the assignment, he having accepted the trust with the understanding and agreement with the debtor that said crops were to be excepted from the assignment, and the debtor having held and disposed of them under that agreement.

4. Same—A deed of assignment was made about the middle of April. The assignee, on the second of June, commenced proceedings for the purpose of selling the lands assigned and making distribution. The land was sold in August. Held—That the assignee was not culpable in not renting out the land.

Wilson & Sprigg for appellant.

W. H. Marriott for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Bennett.

Thomas Creager, cross appellant, in April, 1885, conveyed to the appellee May, all of his real estate, in trust for the equal benefit of appellant's creditors, but the appellant, in said deed of conveyance, reserved to himself the right of homstead in said real estate. The appellant, Levi Creager, having, in May, 1885, instituted an equitable action, in the Hardin Circuit Court (the county in which said deed of trust was made and recorded), for purpose of subjecting said land to mortgage liens, and the assignee, May, in June, 1885, having been made a party, upon his own motion, to said

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action for the purpose of having said interest properly subjected to the payment of the cross appellant's debts, and the cross appellant also, in June, 1885, having, upon his own motion, appeared in said action and set up his claim to a homestead in said lands, and his right to the same having been denied by the appellant, Levi Creager, and the circuit court having adjudged that said cross appellant was not entitled to a homestead in said lands, he has appealed to this court.

The cross appellant, Thos. Creager, contends, first, that as a portion of said land was derived by descent from his father he is entitled to a homestead in the same, notwithstanding he created debts after said descent was cast upon him. He relies upon the case of Jewell v. Clark's Ex'or, 78 Ky., 398, as supporting this contention.

Jewell, in that case, was a housekeeper with a family, residing on a piece of his father's land at the time of his father's death. Jewell continued to live on said land as housekeeper with his family until the same was allotted to him, and he continued to live on the same after it was allotted to him. After said allotment judgment was obtained against Jewell on a debt created in his father's lifetime, and while he was thus living on said land as a homestead execution was levied upon it, and it was sold to satisfy the same. Upon the foregoing facts this court held that as the debt was created prior to Jewell's acquisition of said land by descent, and as Jewell did not acquire said land by purchase, that is to say, as he did not disappoint the expectation of the creditor by expending money or property for said land, he was entitled to a homestead therein. The case at bar does not fall within the rule of the Jewell case for the following reasons:

The cross appellant's indebtedness was created after he acquired said property by descent, and he, at no time, resided on said land as a housekeeper with a family until after the assignee had sold, by the order of court, the whole of said land. As, therefore, the land belonging to the cross appellant at the time he created said indebtedness, and as he was not a housekeeper with a family, residing on said land, and as the same was liable to his debts at the time they were created, the presumption is that credit was given him on the faith of said land. So it is readily seen that the reason of the Jewell case does not apply to this case. In the former case Jewell, by the acquisition of said land, invested neither money nor other thing to which the creditor had the right to look as a means of payment. But in this case, after acquiring the land, he obtained credit upon the faith of it, and to allow him a homestead simply for the reason that he acquired the land by descent would entitle a large portion of the landholders in this State to homesteads, in the face of the fact that their indebtedness was created after descent was cast upon them and while they were not housekeepers with families, residing on the land.

The cross appellant, Thomas Creager, also contends that the appellant, Levi Creager, having accepted his pro rata distribution under said deed of assignment, which deed attempted to reserve to the cross appellant, Thomas Creager, a homestead in said land, the appellant, Levi Creager, is estopped to deny Thomas Creager's right to a homestead.

The case of Hasty's Heirs v. Berry, 8 Ky. Law Rep., 55, is relied on as sustaining this view of the case. In that case the creditor of the assignor appeared in the case without objection to the assignor's reserving a homestead in the land conveyed to his assignee, and received his pro rata distribution of the proceeds of the estate in the hands of the assignee; and the

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homestead was actually allotted to the assignor without objection. Upon the foregoing facts this court held that said creditor could not, after the estate was wound up, subject the assignor's homestead to the unpaid balance of his debt. It was so held upon the ground that the creditor having, without objection and with his eyes open, claimed and received his pro rata under the deed of assignment, he thereby recognized it as binding for all purposes therein contained, and was estopped to thereafter impede its provisions. But the case at bar is not like that case. In this case, as soon as the cross appellant, Thomas Creager, asserted his right of homestead in said land, the appellant, Levi Creager, denied, by appropriate pleadings, his right to it, and the circuit court decided the issue against Thomas Creager. The issue thus made was before Levi Creager had asserted any right under the deed of assignment, and his right to put in issue Thomas Creager's right to a homestead was not denied in the circuit court. The issue was, in that court, fairly presented and decided against Thomas Creager. And it seems to us that Levi Creager, before he accepted any of the benefits of the assignment, had the right to join issue with the assignor, in order to test his legal right to the attempted reservation of a homestead.

The appellant, Levi Creager, attempted to hold the assignee, May, responsible for the value of the crops of hay, wheat and clover which were growing on the land at the time the deed of assignment was made. It satisfactorily appears that May accepted the trust with the understanding and agreement with Thomas Creager that said crops were to be excepted from the assignment; and that Thomas Creager held and disposed of said crops with that understanding and agreement. The appellee, May, also provides a sufficient excuse for not taking charge of the corn and lumber.

The deed of assignment was made about the middle of April, 1885, and the appellee, May, on the 2d day of June, 1885, commenced proceedings for the purpose of selling said lands and making distribution. These proceedings were pushed to completion as rapidly as possible. The land was sold in August next following the date of the assignment. In view of the foregoing facts it seems that the assignee was not culpable in not renting out the land.

The judgment is affirmed on original and cross appeal.

BERRY v. SHEEHAN, JAILER FRANKLIN COUNTY, &c.

(Filed September 29, 1888.

1. A respite of the governor staying the collection of a judgment for a fine, except commissions, fees, costs, etc., does not prevent the collection of that part of the judgment to which the attorney for the Commonwealth is entitled, and to enforce its collection the defendant may still be imprisoned.

The appellant being in jail under a capias pro fine, the governor respited all the fine except commissions, fines, costs, etc. The jailer refusing to release the appellant, this action was instituted against him to recover damages for the alleged unlawful detention. Held—That the governor did not, in express terms, or by implication, respite more of the fine than was going to the State, and for that reason the jailer was justified in refusing to release the appellant from prison.

2. The attorney for the Commonwealth has a vested interest in so much

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of a judgment for a fine as is allowed him by law, and of this he can not be deprived by the respite or remission by the governor, or by any legislative action had after the judgment has been obtained.

The inquiry in this case, however, is not whether the governor has the power to respite as to the whole amount of the fine, but whether he has done so.

Ira Julian, W. H. Julian and R. A. Thomson for appellant.

A. Duvall for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Berry, was indicted in the Franklin Circuit Court for suffering gaming on his premises, and on his trial was adjudged to pay a fine of $200. Having failed to pay the judgment he was imprisoneed in the county jail. During the month of March following the governor respited the collection of all the fine except the commissions, fees, costs, etc., for the period of six months. The respite was handed to the jailer, and when the prisoner demanded his release the jailer refused, on the ground that the collection of the entire fine had not been respited, and thereupon the appellant instituted this action against the jailer to recover damages for the alleged unlawful detention. A demurrer was sustained to the petition and the action dismissed, of which the appellant now complains. The present Constitution prohibits the executive from remitting the fees of the clerk, sheriff or Commonwealth's attorney in penal and criminal cases. (Section 10, article 3.)

By section 5 of article 4 of chapter 5, General Statutes, the attorney for the Commonwealth is entitled to 30 per centum of all judgments rendered in favor of the Commonwealth, etc., and in the same section it is made unlawful for him "to receive any portion of any fine, forfeiture or recovery in the name of the Commonwealth, and to which, by existing laws, he is entitled to a part until the collecting officer shall have received the same, unless the portion belonging to the State has been remitted by the governor," and when a part of the fine has been collected the attorney shall receive his pro rata portion, applying, of course, to cases where no fine can be collected by reason of the insolvency of the defendant. Under this statute it is plain that the attorney for the State is entitled to 30 per cent. of the judgment, but is powerless to collect any part of it unless the State remitted its part of the fine. If there is no remission, the attorney must receive his part from the collecting officer. That he has a vested interest in so much of the judgment as is allowed him by law is manifest, and of this he can not be deprived by the respite or remission by the executive or by any legislative action had after the judgment has been obtained. It is urged for the appellant that as the attorney for the Commonwealth has no right to collect or receive the amount allowed him until collected by the sheriff or other officer, that no right to the judgment or any part of it vests until the collection is made. In this conclusion we can not concur. It is true the collecting officer, unless under some special statute, is alone authorized to pay this money to the attorney, and the latter has no right to settle or receive it from the defendant unless the State has been satisfied or that portion of the fine going to the State has been remitted. This statute was enacted to prevent the compromise of judgments at the expense of the State, and to secure to the Commonwealth its part of the judgment by requiring the money col-

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lected on fines to pass through the hands of its collecting officer, and this being the mode of collection only, it can not be construed as depriving the Commonwealth's attorney of his interest in the judgment or the amount collected under it.

The imprisonment under the capias is not a punishment, but the means resorted to for compelling those who violate the penal laws to discharge the penalty imposed. The party indicted and fined may be incarcerated in the county jail, but not "for a longer period than at the rate of one day for each $2 of the fine." and still the imprisonment does not discharge the fine that, after the discharge, may still be made by a fieri facias. (Section 304, Criminal Code.) The imprisonment is, at least, a coercive measure for compelling satisfaction for the wrong done, and, while it does not relieve the defendant from liability to the State or the attorney, it by no means follows that, because the collection of that part of the judgment due the State has been remitted or respited, that the State may not proceed, for the benefit of the attorney, to collect the amount due him, and to use the coercive means provided by the statute for that purpose. The inquiry in this case is limited as to the extent or effect of the respite. It is not as to the power of the executive to respite as to the whole amount of the fine; but has he done so is the question to be determined. He has only respited the collection o so much of the judgment as the State would be entitled to, and has left the defendant to satisfy the commission due the attorney and constituting a part of the judgment; and, to enforce its collection, all the means provided by the statute may be resorted to.

The case of Rout v. Feemster, 7 J. J. Marshall, 131, and relied on by counsel, was a construction of the act of 1823 that gave to the attorney for the Commonwealth 25 per centum of the sum collected, but not on the sum recovered, this court holding that the power of the governor to remit fines under the Constitution at that date was unlimited; and the attorney having no interest in the fine separate from the Commonwealth, the constitutional power to remit was not affected by the statute.

Under the present Constitution the power to remit the fees or commission of the attorney is taken from the executive, and the attorney for the Commonwealth is allowed 30 per centum of the judgments, to be paid him when the same is collected by the sheriff. With this inhibition on the power of the governor to remit, the mere fact that the attorney is required to receive the per centum from the collecting officer does not divest the attorney of his interest in the particular judgment, or the right to insist that the part of the fine or judgment not remitted shall be collected as provided by the statute.

It is plain, we think, that the governor did not, in express terms or by implication, respite more of the fine than was going to the State, and for that reason the jailor was justified in refusing to release the appellant from imprisonment.

It is also maintained by counsel, in support of the views urged for a reversal, that as judgments imposing penalties have, in many instances, been permitted to be satisfied in full by the labors of the offender in the workhouse or on the public roads, and all compensation denied the attorney in such cases, it could not have been the intention of the legislature to vest the attorney for the Commonwealth with any interest in judgments rendered in penal prosecutions. The provisions of the Code, section 304, already referred to, except from its operation judgments in city and police courts, which may be discharged in the manner provided by special statutes; and besides, the legislature has the power to regulate the fees or commission of

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the Commonwealth's attorneys; and, to reward vigilance and a faithful discharge of duty, often gives more of the penalty to the attorney, in the prosecution of certain offenses, than in others, and hence the difference in the various special statutes on the subject.

The demurrer having been properly sustained the judgment is affirmed.

JOHNSON v. KESSLER, &c.

(Filed October 9, 1888.)

Homestead—Where husband and wife own jointly property in which a right of homestead exists, the husband, as against his debt, is entitled to have the entire homestead allotted to him out of his interest. The wife's interest can not be required to contribute to make up the homestead which the statute exempts to the husband out of his property.

Morrow & Newell for appellant.

Curd & Waddle for appellees.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Holt.

The appellees, J. F. and Susan Kessler, are husband and wife.

Prior to the creation of the appellant, Johnson's, debt upon the husband, they owned jointly, by inheritance from their deceased daughter, a house and lot, which does not admit of division without sacrifice. The wife is not liable for the debt, nor is her property.

During the pendency of the suit in the lower court the entire property was, by agreement of parties, sold, the proceeds to remain the subject of the litigation. It brought $1,700. It is agreed that it was worth no more.

It is conceded that a right of homestead in the property existed. The appellee, J. F. Kessler, occupied it as a housekeeper with his family prior to the creation of the appellee's debt, and continued to do so up to the time of this effort to subject it to its payment.

The question presented is, whether the homestead is to be carved out of the entire property, or whether the wife is entitled to her interest, leaving the residue subject to the homestead right. In other words, must each joint owner's interest contribute in such a case to the making up of the homestead?

In the case of Miles, &c. v. Hall, &c., 12 Bush, 105, it was held that where a widow owned in her own right one-fourth of a tract of land upon which was situated the dwelling occupied by her husband, when he died, as a homestead, she was entitled to land, including the house, worth $1,000, as a homestead; but that her own interest in the land thus alloted must be estimated as part of the exemption.

An examination of the case of Giblin v. Jordan, 6 Cal., 416, shows that it was not there decided, as claimed, that where land is owned by a husband, wife and child, as tenants in common, all of it must contribute to make up the homestead; but merely that land so held was not subject to homestead right under the laws of that State, and that the relation of the parties in that particular case did not alter the rule.

In Lowell v. Shannon, &c., 60 Iowa, 713, the dwelling was on the wife's land, contiguous to land owned by the husband, both tracts being occupied

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as a homestead. It was held that she could claim a homestead carved in part out of her own land and in part of that of her husband.

These cases are unlike this one. We have referred to them, as they are relied on by counsel. The first and last one cited relate to the allotment of a homestead to the widow; and our statute provides that it must include the dwelling house.

Here the wife of the debtor owns an undivided half of the property, and he owns the other half. Our statute allows an exemption of "so much land, including the dwelling house and appurtenances, owned by the debtor, as shall not exceed in value $1,000;" and it is to be "set apart to him." It is an exemption of the debtor's property against his debt.

It is true the right to the homestead attaches to the widow upon the husband's death, so long as she occupies it; and that any mortgage, release or waiver of the exempted homestead is not valid unless it be in writing, subscribed by the debtor and his wife, and acknowledged and recorded in the proper office; but the exemption during the debtor's lifetime is to him. He may make an absolute disposal of the homestead. It is an exemption to him out of his property. There is no need of any exemption of the wife's property, because it is not liable for his debts. He is the housekeeper; and the exemption is to him that, as the head of the family, he may provide it with a home. If, where property is owned jointly by the husband and wife, the homestead, which the law gives to the husband, be taken partly from her interest, then she would be compelled to contribute to an exemption to him, not allowed out of his own property. In such case, upon the death of the husband, would the wife own any portion of the homestead in fee, or merely have a qualified or conditional interest in it? The exemption is to him, against his debt, out of his property, and it follows that the interest of the wife can not be made to contribute to it. The voluntary conveyance by J. F. Kessler to his wife of his undivided interest in the property, although made subsequent to the creation of the appellant's debt, cuts no figure, inasmuch as the homestead exemption was upon such portion only, and, it not being worth $1,000, it was exempt, and beyond the reach of his creditors.

Judgment affirmed.

BAKER v. BAKER, &c.

(Filed October 9, 1888.)

1. Appeals—Filing of mandate—Where the opinion and mandate of the appellate court, upon the return of a case to the circuit court, are filed of record in open court, no notice is required to be served on the adverse party in order to give the case the same position on the docket it had before the appeal was taken, as both parties are regarded as being present in court; and the case stands ready for submission, subject to an order of continuance if not then prepared for trial consistent with the opinion of this court.

2. Reversal of judgment—Restitution—The rule that the reversal of a judgment for the sale of land does not divest the title of the purchaser under the judgment, even though he be the plaintiff in the action, does not apply where the land ordered to be sold and purchased by the plaintiff was the property of another than the defendant, and the supposed indebtedness of the defendant, which it was sold to satisfy, has been finally adjudged not to exist.

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A personal judgment was rendered against the defendant, and land which he had conveyed to others was ordered to be sold to satisfy it. Upon appea that judgment was reversed, and the plaintiff adjudged to be indebted to the defendant. The land having been sold under the judgment, and purchased by the plaintiff, upon the return of the case the owners of the land, by mo tion and pleading, asked to have the land restored to them, which was done Held—That they were entitled to the relief granted.

C. W. Lester and E. W. Hines for appellant.

J. L. Scott and A. Duvall for appellees.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Lewis.

In March, 1880, D. C. Baker recovered a personal judgment for about $6,000 against John W. Baker, and two tracts of land, which the latter had, in 1877, conveyed to Caroline F. Jackson and John E. Baker, were made subject and directed sold to satisfy it.

From that judgment an appeal was taken, and in April, 1883, it was reversed by this court.

At the February term, 1884, of the lower court, the opinion and mandate of this court were filed, and it appears from the transcript before us an amended answer was then filed, and the actions submitted; though another order filing the answer was made at the succeeding term, and evidently there was not then a submission.

In the answer the former judgment, opinion and mandate are set forth, and the further statement made that during the pendency of the appeal to this court the two tracts of land mentioned had been sold under the judgment, the plaintiff, who, it is alleged, is insolvent, becoming the purchaser and then having the land in his possession.

The relief prayed for was a reference of the accounts between D. C. and John W. Baker for a settlement, and judgment in accordance with the opinion of this court, and also judgment setting aside the sales of the two tracts of land and restoration of possession thereof to Jackson and John E. Baker.

At the February term, 1885, personal judgment was rendered in favor of John W. Baker against D. C. Baker for about $2,000, being the amount reported by the master commissioner as due, and also setting aside the sales of the two tracts of land, and for the possession, as prayed for.

It is contended, as a ground for reversal, that the judgment is void because no notice of the filing of the opinion and mandate was given to D. C. Baker, as subsection 2, section 761 of the Civil Code, requires. That subsection is as follows: "If a judgment is reversed and the case remanded for a trial or other proceedings, it shall stand for trial or for such other proceedings in the court whence the appeal was taken at the next term thereof: Provided, That the mandate of the Court of Appeals be filed in the clerk's office of the lower court, and notice thereof given to the adverse party, if he be in the county, or, if he be absent from the county, to his attorney, ten days before the commencement of such term. Such case shall have the same position on the docket of such court as if no appeal had been taken, and, at any time after the mandate is filed and notice thereof given, either party may take depositions as in other cases."

It seems to us the proviso in that subsection was intended to apply only when the mandate is filed in the clerk's office, — [illegible] it is necessary to take

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depositions to prepare the case for trial. But when the opinion and mandate are filed of record in open court no notice is required to be served on the adverse party in order to give the case the same position on the docket it had before the appeal was taken, for both parties are regarded as being present in court, and the case stands ready for submission, subject to an order of continuance if not then prepared for trial consistent with the opinion of this court.

Here, however, no question of notice could properly arise under any construction of that subsection, for the plaintiff, here appellant, excepted to the order being entered at the August term, 1884, filing the amended answer to the written motion to set aside the deeds made to him, which was then acted on and overruled, and to the motion to refer the case to the master commissioner, which not only show he was present in court, but amount to a waiver of notice if it had been required.

No exception was taken to the report of the master commissioner filed at the February term, 1885, nor is objection now made to the personal judgment based thereon in favor of the defendant, John W. Baker. But a reversal is contended for only to the extent it set aside the sales of the two tracts of land and restored the possession thereof to appellees, Jackson and John E. Baker, and whether the court erred in that respect is the principal question in this case.

In the case of Yocum v. Foreman, 14 Bush, 494, upon a review of authorities upon the subject of purchases at judicial sales, the general rule was announced, as then said, in accordance with previous decisions of this court, that "the validity of judicial sales depends upon the jurisdiction of the court rendering the judgment, and when this fact is conceded, parties to the record, who are purchasers, as well as strangers, will be protected, and the reversal of the judgment on an appeal will not divest them of title."

In that case the property sold under the erroneous judgment belonged to the defendant and alleged debtor to the plaintiff, and, in stating the rule, it was limited in its application to title acquired under a judicial sale as against a defendant. But it was not then decided, nor do we think any consideration of policy would require or justify courts in holding, purchases of property belonging to another than the judgment debtor as valid when the judgment has been reversed, and the plaintiff and purchaser finally adjudged to be the debtor instead of creditor.

In this case, Jackson and John E. Baker were purchasers of the two tracts of land for a consideration that was, between them and John W. Baker, valid and binding, and the right of D. C. Baker to subject them to sale was based upon the supposed indebtedness of the vendor to him, that it has been finally adjudged does not, in fact, exist.

Judicial sales are upheld as a matter of policy, so far as the creditor and debtor are affected, it being supposed to be the interest of both that bidding should be encouraged that the property may bring a fair price; and as to strangers, they have a right to rely on the validity of a judgment which directs a sale of property. But the interest of neither the debtor nor creditor should be conserved by doing a positive wrong and injury to third parties who do not sustain the attitude of debtor to the plaintiff. The effect of reversing the judgment in this case would be to permanently deprive Jackson and John E. Baker of the two tracts of land, without any fault of theirs, and invest the title in appellant, who has never, and, being insolvent, probably never will [illegible] them.

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He instituted the actions to recover on a debt it has been adjudged was not, in whole or in part, due him. The two tracts of land are in his possession by a purchase at a sale erroneously made to satisfy the unfounded claim, and to permit him to hold and enjoy them to the injury of the rightful owners, who are not in fault, is not required by sound policy or sanctioned by justice.

Judgment affirmed.

ROBERTS v. COMMONWEALTH.

(Filed May 8, 1888—Not to be reported.)

1. Murder—Evidence—The testimony which is reviewed in the opinion was sufficient to authorize the conviction of appellant for murder.

2. Same—It was competent to prove that the appellant had, before the day of the killing, stolen money from the deceased, as the testimony, aside from the motive of robbery, tended to show a motive for putting the deceased out of the way, the deceased having, just before the killing, virtually accused the appellant of stealing the money.

3. Same—Self-defense—The court properly refused to instruct the jury as to the law of self-defense, as the evidence establishes the fact, conclusively that the deceased was assassinated by appellant, either for the purpose of robbery or to conceal the crime of larceny.

Wood & Day and Salyer & O'Rear for appellant.

P. W. Hardin for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, Roberts, at the November term, 1864, of the Morgan Circuit Court, was indicted for the murder of James L. Kendall. But having made his escape and remained away for many years, he was not tried until 1887, when he was convicted of said charge and his punishment fixed at confinement in the penitentiary for life.

The facts are that James L. Kendall was murdered on Sunday evening, about sunset, October 2, 1864, near the residence of Miles Caskey, by having his throat cut with a knife.

The appellant, just a short time before James L. Kendall was killed, lived with him, and the proof is clear that, while living with Kendall, the appellant stole some money from him. Just before sunset, on Sunday evening, Kendall was at the yard fence of said Caskey; while there, one witness swears that she heard Kendall say to the appellant, "Dave, give me back my money;" that she did not hear the appellant's reply; that shortly afterwards Kendall rode off, and the appellant followed him; that appellant, about thirty minutes afterwards, returned to the house of Caskey and remained about fifteen minutes, and then left the house and returned about midnight, and left again Monday morning before daybreak. The appellant had plenty of time in which to kill Kendall during the thirty minutes that he was gone from the house of Caskey on Sunday evening. Kendall's body was found in a hollow about sixty yards from the road; the body was covered up with chunks and brush. The evident purpose of the appellant in leaving Caskey's house the second time was to conceal Kendall's body. Caskey and his wife swear that the appellant was at Caskey's house at the time Kendall left, and did not leave until Monday morning about one hour

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and a half by sun. Their evidence directly contradicts that of the woman which is above detailed, and, if their evidence be true, it was impossible for the appellant to be the guilty party; but it is evident that the jury disregarded their testimony, and we think that the jury was right in disregarding it, for it is clearly established that about sunrise, on Monday morning, the appellant was seen several miles away from Caskey's residence, with his clothes wet up to his waist; it is a reasonable inference that he had washed the blood from them. The Caskeys say that he left their house on Monday morning after breakfast, about one hour and a half by sun; the woman says that he left about daybreak; she is corroborated. It also appears that the appellant was seen on Monday with a knife which appeared to be bloody; it was proved, with reasonable certainty, that Kendall's pocketbook, which he had in his possession on Sunday, was in the possession of the appellant on Monday; also that he had money in his possession corresponding in amount with the amount that Kendall had in his possession on the day that he was killed; also one witness swears that while the appellant was under arrest, in October, 1864, he heard him confess to Col. Phillips that he killed Kendall; that he was sorry for it; that he had killed the best friend he ever had; also another witness swears that, after the appellant was arrested the second time, he told him that he killed Kendall. Taking the evidence altogether, the guilt of the appellant is clearly established.

The Commonwealth introduced evidence to show that the appellant had stolen money from Kendall prior to the day that he was killed. The appellant objected to this evidence. But, in the light of the circumstances of the case, we think the evidence was competent, for the reason, aside from the motive of robbery, the appellant having, on Sunday evening, been virtually accused by Kendall of taking the money, it tended to show a motive for putting Kendall out of the way.

The lower court declined to give an instruction upon the subject of self-defense. The appellant assigns this as error. The evidence established the fact conclusively that Kendall was assassinated by the appellant, either for the purpose of robbery or to conceal the crime of larceny—probably both—therefore, there was not, and in the nature of things could not be, the semblance of self-defense, and the court did right in not instructing the jury on that subject The instructions were correct in every particular.

Having carefully considered all the errors assigned by the appellant, we find none to his prejudice.

The judgment must be affirmed.

BASHAM v. COMMONWEALTH.

(Filed September 29, 1888.)

Criminal law—Evidence—It is competent for the Commonwealth to prove that the defendant, after he was accused of the crime with which he is charged, fled or concealed himself, or was guilty of any other conduct inconsistent with his innocence. It was, therefore, competent in this case to prove that, after the defendant was put in jail by the order of the examining court, he conducted himself in such a way as indicated that he was feigning insanity.

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J. G. Haswell, D. R. Murray, E. H. Brown and M. Eskridge for appellant.

P. W. Hardin for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Bennett.

The appellant having been convicted in the Breckinridge Circuit Court of the crime of rape, committed on his niece, a girl sixteen years of age, and the court having overruled his motion for a new trial, he has appealed to this court.

The girl swore positively that the appellant raped her. The appellant swore that he did not touch her.

The Commonwealth's attorney was permitted, over the objection of the appellant, to prove, by the jailer of Breckinridge county, that shortly after the appellant was put in jail by the order of the examining court, he was guilty of such conduct as indicted that he was feigning insanity. The appellant now complains of the ruling of the court in reference to that matter. It is competent for the Commonwealth to prove that the accused, after committing the act or having been accused of it, fled or concealed himself, or was guilty of any other conduct inconsistent with his innocence. If the appellant did feign insanity the jury had a right to infer, from that fact, that he, having no meritorious defense, purposed to fix up a spurious defense as the only available one against the truth of the charge; and such conduct being inconsistent with innocence, it was proper for the jury to consider it for what it was worth.

The judgment of the circuit court is affirmed.

HALL, &c. v. SNIPES, &c.

(Filed October 11, 1888—Not to be reported.)

1. Practice—A petition seeking a division of land need not be verified.

2. Action by next friend—In this action by infants, suing by next friend, the fact that the next friend did not show, by affidavits, his capacity to sue, as required by the Code, did not authorize the dismissal of the action, as there was no rule or motion against the next friend requiring him to make such an affidavit, the action being dismissed because the petition was not verified.

3. Revivor—Before the expiration of a year from the defendant's death an amended petition was filed in vacation, making his heirs defendants. They were served with process, and when the case was heard they made no objection to the filing of the amended pleading, and the cause was submitted on the motion to dismiss without such an objection. Held—That although the amended petition was filed in vacation, yet as no objection was made on that account the court will treat it as part of the record, and the revivor in time, the pleading having been filed within one year from defendant's death.

J. H. Hereford, Jr., for appellants.

Jas. Goble for appellees.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Pryor.

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This is an action on the part of infants, by their next friend, seeking a division of land. On the hearing the action was dismissed, for the reason, as appears from the record, that the petition was not properly verified. This objection should not have prevailed, as, by an epxress provision of the Code in regard to filing "petition for a division of land, no verification is required." (Subsection 14 of section 499, Civil Code.)

It is urged, however, that the proceeding should have been dismissed because of the failure of the prochein ami to show, by affidavit, his capacity to sue, as provided by section 37 of the Code, and for the additional reason that the defendant had died, and no revivor within a year from the time in which it might have been revived.

Before the expiration of the year from defendant's death an amended petition was filed in vacation, making his heirs, or those entitled from him, defendants to the action. They were served with process, and when the case was heard the defendants made no objection to the filing of this amended pleading; nor was there any rule or motion made against the next friend requiring him to make the affidavit required by the Code, but the chancellor, regarding a verification necessary, dismissed the petition on that ground.

It is stated by counsel for the appellees that the amended pleading was filed out of term time. The record shows that it was filed in January, 1877, within a year from the death of the defendant, and, therefore, in time, and as no objection was made to the filing, although in vacation, and the cause submitted on the motion to dismiss without such an objection, this court (as should the court below) will treat it (the amendment) as part of the record, and the revivor in time.

As the verification was not required the judgment below is reversed, with directions to the court below to consider the amended pleading as part of the record, and on the failure of the appellant (if the appellee requires it) to show, by his affidavit, his capacity to sue, the action should be dismissed without prejudice. The affidavit being made, the action should be heard on its merits.

SOWARD v. COPPAGE.

(Filed October 11, 1888—Not to be reported.)

Former adjudication—The payees of a note secured by vendor's lien assigned it to another, who instituted suit thereon, seeking personal judgment against one of the obligors, and also to enforce the lien. The defense to the recovery was the failure of title to a part of the land, and the want of consideration. On motion of plaintiff the cause was submitted, resulting in a judgment dismissing the petition, and also a judgment for costs against the plaintiff. The assignee, the plaintiff in the action, then re-assigned the note to the original assignors, and now suit is instituted by one of them, seeking the same character of relief that was sought by the former action. Held—That the judgment in that action is a complete bar to the present action.

C. H. Lee for appellant.

L. T. Applegate for appellee.

Appeal from Pendleton Circuit Court.

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Opinion of the court by Judge Pryor.

The payees of the note in controversy assigned it to A. Soward, who instituted an action in May, 1877, seeking to recover a personal judgment against the obligors, or one of them, and also to enforce a lien upon land, it being alleged that it evidenced the last of the purchase money notes. Other parties were made defendants, who had purchased the land of the obligors.

The defense to the recovery was the failure of title to a part of the land and the want of consideration; also other defenses not necessary to notice.

At this stage of the proceeding, on motion of the plaintiff (the assignee of the note), the cause was submitted, resulting in a judgment dismissing the petition and also a judgment for costs in favor of all the defendants against the plaintiff. With this final judgment in full force, the assignee of the note re-assigned it to the original assignors, and now suit is instituted by them, or by one of them, seeking the same character of relief.

The judgment in the former controversy is a complete bar to the present action, and whether the defense in that case was or not available, the chancellor, upon the hearing, adjudged for the defendants. Here was an absolute dismissal, not on motion of the plaintiff or his attorney, but by the chancellor, under a submission made at the instance of the plaintiff, and the judgment standing unreversed is a bar to any recovery on the note by the payee or his assignee. If the title to the land, or a part of it, is in a stranger, his rights are not affected by the judgment, but, as between the appellant and her former assignee and these appellees, their rights were determined by the judgment of 1877.

Judgment affirmed.

SMITH'S TRUSTEE v. SMITH.

(Filed October 11, 1888—Not to be reported.)

1. Fraudulent conveyance—The transaction the history of which is given in the opinion was designed to defraud creditors, and the court will not aid the plaintiff, who was a party to it, but will leave the parties where it found them.

2. Assignment for creditors—Trust—The plaintiff having made an assignment for the benefit of creditors, the notes sued on passed to his assignees in whom is the right of action, if any exists; and the fact that plaintiff did not surrender the notes to the assignee does not give him the right to them. And while the plaintiff sues as trustee for his wife and children, it is evident that if there was any trust it extended only to his wife, and she having died the notes became the property of plaintiff, and subsequently passed to his assignee.

3. Descent—The rule that where the obligee in a title bond dies before the breach of the bond it passes to the heirs and not to the executor, or the husband through the executor, has no application in this case, although it may have been agreed that the notes sued on were to be discharged by the conveyance of land, as there was no writing binding the obligor in the notes to do so.

W. G. Bullitt for appellant.

Harris, Husbands & Husbands for appellee.

Appeal from McCracken Circuit Court.

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Opinion of the court by Judge Holt.

This case is not peculiar in the fact that Smith is the name of the parties to it, but because of the somewhat singular transactions shown by it.

The testimony is somewhat conflicting; but it tends to show this state of case:

The father-in-law of John K. Smith's wife gave to her some personal estate. It was put in charge of her husband as her trustee. They used a considerable portion of it as they pleased, but $1,500 of the money was loaned, in 1866, to Henry Smith, a brother of John K. Smith. A note for it was taken, payable to John K. Smith, "agent," which appears to be yet in the possession of, or under the control of, the obligee.

In 1868, Henry Smith, who owned a house and lot in the city of Paducah, had become involved. Two judgments had been rendered against him. One in favor of one King for a balance of purchase money owing upon the lot, and the other in favor of a man by the name of Jones for the amount of a street improvement lien upon the property. It was sold for these debts, and bid in by King, at the amount of them, at the commissioner's sale. There is some evidence tending to show that he did this for Henry Smith, and some to show that he did not, but for himself. This sale was in April, 1868. In May, following, John K. Smith, who did not live in the county, came there, and upon a consultation with King, who was an attorney and appears to have been the adviser of all the Smiths in these transactions, if not their retained attorney, was advised that the transaction they proposed could not be accomplished with any degree of safety, save through some third party in whom they had implicit confidence.

The appellee, Wm. H. Smith who was a cousin of the other Smiths named, and who lived some distance in the country, was thereupon sent for, and was, upon his arrival, as he testifies, and in the presence of John K. Smith, informed by King, in whom he appears to have placed implicit confidence, that they desired to help Henry Smith in his financial troubles, and that he (William) could safely do what they desired. The latter objected, for fear that he would thereby be involved in trouble; but his apprehension was allayed by the assurance of King that there was no danger. Contra to this, John K. Smith testifies, in substance, that while he desired to help his brother, yet the main object was to secure the $1,500 debt.

In any event the judgments were counted up, amounting to a little over $500, and, as the preponderance of the testimony shows, paid to King by John K. Smith. For this sum, together with the amount of the $1,500 note and its interest, and another debt of between $200 and $300 owing to a third party, the appellee, Wm. H. Smith, was induced to give his two notes to King for $1,166.66 each, dated May 15, 1868, and due in one and two years. They recited that they were the second and third payments for the lot.

The bid of King for the lot was transferred to the appellee, Wm. H. Smith, and the commissioner's deed was subsequently made to him.

The two notes thus executed were assigned by King to John K. Smith, "trustee." The evidence is conflicting whether this was done at the time of their execution or not, or whether the appellee knew of it then or not

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until several years thereafter. The assignment does not show who the cestui que trust was under the assignment.

It appears, however, that the failing condition of Henry Smith was then known to all the parties; and the testimony tends to show that it was the agreement that he was to have the privilege of paying off the two notes, if able to do so, at maturity, and keeping the property; and if he did not do so, that then the appellee could discharge them by turning over the land to the holder of them. The appellee denies this arrangement in part. He insists that it was merely a device to save the property to Henry Smith, and nothing more.

In any event, however, it is certain that payment of the notes was never to be enforced. Upon the very next day after this transaction Henry Smith went into bankruptcy, King acting as his attorney. He did not give in the house and lot as a part of his assets. He has occupied, controlled and claimed this property ever since, and is now doing so. The wife of John K. Smith died in 1871, and he was forced into bankruptcy in 1872 or 1873. Neither the two notes on the appellee nor the $1,500 one on Henry Smith were given in by him as a part of his assets. In 1885 his agent went to the appellee and demanded that he convey the house and lot to John K. Smith, offering thereupon to deliver him up his two notes. To this end a deed was prepared, but, Henry Smith objecting to its delivery, it was destroyed, and the appellee refused to make another.

In May, 1886, being nearly twenty years after the main transaction, this action was brought by John K. Smith, styling himself as "trustee," but without naming the cestui que trust, asking the appellee be compelled to convey the property to him upon the delivery of the notes, or if this could not be done that then judgment be rendered upon them with an enforcement of lien against the property for their payment.

In an amended petition it is averred that the gift from the father-in-law was in trust for the wife and her two children, the latter being yet alive. It may be regarded, therefore, that the appellant is suing as trustee for them. The appellee, Wm. H. Smith, among other defenses, claims the transaction was a fraudulent one, and that no action can, therefore, be maintained upon it or the notes; but if this be not so, that then the notes belonged to John K. Smith individually, and the right to them upon his bankruptcy, ipso facto, passed to his assignee. The appellant urges that it was but an honest effort to secure a bona fide debt; that it was not fraudulent per se, but only made so by statute, which provides that it shall not be assailed save within a certain time, which was not done. It is plain, however, that other purposes existed in the minds of the actors to the transaction. The property was, in fact, to be held in trust for the debtor, Henry Smith. The appellant, John K. Smith, testifies, in substance, that it was expected and understood that his brother would pay the notes at maturity and keep the property. Nominally and apparently it belonged to another. It was put in secret trust for the debtor. It was, in short, a covering up and concealment of his property interests. The circumstances all point to this conclusion. They must often be looked to in determining the fair dealing and integrity of men, rather than their professions.

The debtor and the creditor are brothers. A third party was called in for the purpose of concealment. As soon as the title to the property was hid, the debtor went into bankruptcy. He has retained the control of it undisturbed and unquestioned ever since, and now, after such a long lapse of time, one of the parties to this transaction invokes the aid of the chancellor.

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It is true that it does not lie in the mouth of the appellee, Wm. H. Smith, to take advantage of it. But it is equally true that a court of equity should not lend its power to aid another party to it. The trust claimed to have been created in John K. Smith by his father-in-law is not proven very satisfactorily. It is averred in the pleadings that by its terms it extended to the wife's children, and it is urged that as the money loaned to Henry Smith, who has not been made a party to this action, as well as that paid to King, was a portion of the trust fund, that, therefore, the action can be maintained by John K. Smith as trustee for their benefit.

The only evidence upon this point, however, is that of John K. Smith, who says, in speaking of the money, that "it was given to her (the wife) to do as she pleased with, I presume." The truth of this is confirmed by the use made of a portion of the fund. This being so, upon her death, in 1871, it became the property of the husband, and any note upon any third party, representing any portion of it, belonged, of course, to him, and was a part of his estate when he subsequently became a bankrupt. The fact that he did not surrender to his assignee these notes does not give him a right to them; nor did the statement in them that they had been executed to him as trustee affect the right of his assignee to them, if they, in fact, belonged to John K. Smith. There was no condition in the notes that they might be discharged in land. There was no writing binding the obligor in them to do so, and the rule that where the obligee in a title bond dies before the breach of the bond, the right under it passes to the heirs and not to the executor, or husband through the executor, has no application in this case.

The appellee has, in this suit, disclaimed right to the property, and, in our opinion, the lower court properly left the parties to this record where it found them.

Judgment affirmed.

MASON & FOARD CO. v. MAIN JELLICO MOUNTAIN COAL CO.

(Filed October 13, 1888.)

1. Constitutional law—Hiring of convicts—The legislature has the power to let and hire the labor of convicts, and, whenever deemed necessary or expedient, to transfer them from one place of confinement in the State to another. Such a change is not the infliction of another or greater punishment than they were adjudged to suffer, and a statute authorizing the leasing of convict labor, and the working of the convicts in mines, can not, therefore, be regarded as an ex post facto law.

2. Same—Construction of contract—Although the appellant's contract of lease with the State did not, in express terms, authorize it to hire the convicts to labor in coal mines or, on other public works mentioned in the statute, belonging to another than the lessee, yet it did not, in letter or spirit, interdict such hiring, and, therefore, appellant acquired that right under its contract.

3. Estoppel—But even if appellant has violated its contract with the State, the appellee, having received the full benefit of its contract with appellant, can not complain. The State is the only party having the right to complain.

Wm. Lindsay and Brown, Humphrey & Davie for appellant.

Hargis & Eastin for appellee.

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Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Lewis.

This appeal is from a judgment pursuant to the verdict of a jury, rendered under a perempory instruction, in three consolidated actions instituted by appellant against appellee.

The first is an action on two promissory notes; the second on an open account for labor and services performed under a contract between the parties, dated June 30, 1885, the amount sued for being the balance left after deducting, besides other credits, the two notes mentioned that were given in part payment of the account; and the third upon an open account for like labor and services under a contract dated May 1, 1886.

The defenses set up and relied on in the answers of appellee, besides a general denial of the correctness of the accounts, are, first, a special plea of non est factum; second, alleged fraudulent collusion between the person at the time its president and appellant in making the contracts; and, third, the illegality of the contracts.

There was evidence introduced which conduced to prove the alleged services were rendered by "Mason & Foard Co.," and accepted and enjoyed by "the Main Jellico Mountain Coal Co.," and that the contracts were made by the president of the latter in good faith, and with the knowledge and assent of its directors and stockholders. Consequently the only apparent ground for the peremptory instruction to the jury to find for the defendant is the supposed illegality of the two contracts upon which the plaintiff based its right to recover.

By those contracts, which do not differ substantially from each other except as to the mode of determining the amount of wages to be paid, Mason & Foard Co., claiming to be lessees of the Kentucky penitentiary, in virtue of a contract made April 27, 1885, with the Commonwealth, through the commissioners of the sinking fund, agreed, for the consideration stated therein, to hire and furnish for specified periods of time a certain number of able-bodied convict men from the penitentiary to labor in the coal mines of the Main Jellico Mountain Coal Co., situated in Whitley county, and, without cost to the latter, to guard and control the convicts while inside as well as outside the mines, assume all risk of their escape, and to maintain, care for and support them, erecting buildings necessary for the purpose.

By the contract of April 27, 1885, the Commonwealth of Kentucky, in terms, let and hired to Mason & Foard Co. the labor of the convicts who were then, or might be, in the penitentiary, for the period of four years, and agreed the lessee might employ all the males able to perform such labor, except those convicted of certain enumerated crimes and such as were then employed upon the branch penitentiary, "upon public works in Kentucky, such as the construction and improvement of railroads, canals, waterways, levees and mining," upon the condition, however, that whenever there should be provided sufficient rooms and accommodations for them within the walls of the penitentiary at Frankfort, or any branch penitentiary thereafter erected, the commissioners of the sinking fund might require the return to the penitentiary of all convicts employed outside, upon giving six months notice to the contractors.

On its part the company agreed to pay into the treasury quarterly a stipulated net sum, and to acquit the Commonwealth of all expense on account

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of officers, guards and inspectors of the penitentiary, to provide for the convicts as comfortably, in sickness and in health, as might be consistent with good discipline, and to faithfully conform to all rules and regulations prescribed by the commissioners of the sinking fund respecting the labor, diet, clothing, care, discipline and safe keeping of the convicts. For the performance of its covenants the lessee executed a bond, which was accepted by the commissioners of the sinking fund.

The statute authorizing that contract was approved May 10, 1884 (Acts 1883-4, volume 1, 173), and section 1 thereof is as follows: 'That section 6 of an act entitled 'An act to provide for the relief of the penitentiary,' approved May 3, 1880, be amended so as to read as follows: 'That the commissioners of the sinking fund are hereby authorized and directed to let and hire the labor of all convicts who are, or may be, in the Kentucky penitentiary, except those who are now prohibited by law from working out, to be employed upon public works within this State, such as the construction and improvement of railroads, canals, waterways and levees and in mining, and all convicts so hired out shall be confined at night, and at all times when not at work, in houses or stockades built or rented for the purpose: Provided, That no one convicted of murder, rape, attempted rape or arson, or who has a longer period than five years to serve, shall be let or hired; and no convict shall be worked within the corporate limits of any city or town, nor quartered within two miles thereof, nor within one-fourth of a mile of a private residence, unless by written consent of the resident: Provided, That the provision in regard to quartering convicts shall not apply to those engaged in mining.' "

The commissioners of the sinking fund, when they made the lease to Mason & Foard Co., were, by express enactment, "ex-officio directors of the Kentucky penitentiary," and invested with authority to let and hire the labor of the convicts, except those employed on the branch penitentiary, in their discretion, to one company, as they did do, or to more than one company or individual, and in making that contract they seem to have observed every condition, and complied with every requirement, of the statute on the subject. And, in our opinion, according to a fair construction, the lessee thus acquired the right to make and carry out the two contracts with the Main Jellico Mountain Coal Co., which it is seeking in these actions to enforce. For, although the contract of lease did not, in express terms, authorize, it did not, in letter or spirit, interdict, the hiring of convicts to labor in coal mines, or on other public works mentioned in the statute, belonging to another than the lessee.

But, as the Main Jellico Mountain Coal Co. has received the full benefit of its two contracts with the Mason & Foard Co., it does not seem to us a legitimate subject of inquiry in these cases, whether the latter had or had not the right to make them. For the Commonwealth, being the only party to the contract of lease, can alone complain of its violation.

It thus results that if the act of May 10, 1884, in strict conformity to which the lease was made, be constitutional the two contracts between the parties to these actions are valid and enforceable, otherwise not.

If the act is invalid at all it is so because it deprives the convicts of some right guaranteed, or inflicts upon them some wrong forbidden, by the Constitution. But in deciding the question it should, to prevent confusion, be

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kept in view that a convict is not placed in the penitentiary in virtue of a contract mutually binding on him and the Commonwealth, and for a violation of which he can claim redress, but under a sentence for crime that for the time not only deprives him of liberty but renders him civilly dead.

The single inquiry, then, is whether the act is an ex post facto law in the sense that it authorizes the infliction upon each convict another and greater punishment than he was adjudged to suffer.

By section 21, article 1, chapter 29, General Statutes, it is provided, that persons sentenced to punishment by confinement in the penitentiary shall be kept at hard labor and solitary confinement, and such is the judgment of the court in each case. Consequently the effect of a conviction for felony and sentence to the penitentiary, according to the law existing when the act of May 10, 1884, was passed, and as it always has been in this State, was to effectually restrain the liberty of the person, and though kept at hard labor, to withhold from him the fruits of his labor. It, therefore, makes no difference to the convict whether he be kept under guard at hard labor within the walls of the penitentiary at Frankfort or at coal mines. Nor does the change of place operate to change in character or degree his punishment, for wherever he may be the sentence of the law is inexorable and the same, that he be kept at hard labor in solitary confinement.

In the case of California v. McAuley, 15 Cal., 455, a question the same as the one before us, arose, and the court used this language: "The objection to the constitutionality of the act, that it authorizes the transfer of the convicts to private individuals, and the leasing of convicts, is untenable. Power over the whole subject of punishment for crime is vested in the legislature. The only limitaiton upon its execution is the inhibition against the infliction of cruel and unusual punishments, which are held to mean those of a barbarous character and unknown to the common law. The first object of punishment is the protection of society. The reformation of prisoners is only subsidiary and incidental to this. Their conviction has subjected them to the situation of involuntary servitude."

The same question has been before courts of various other States, and by none of them, so far as we have seen, has the legislature been denied the power to let and hire the labor of convicts, and, whenever deemed necessary or expedient, to transfer them from one place of confinement in the State to another. The location of a penitentiary, which is simply a building for confinement and safe keeping of convicts, or of more than one, and whether they shall be placed in the custody of a lessee, who hires their labor from the State, or in that of a warden, or the two systems shall be combined, are questions of policy which the legislature has full power to regulate by statute, and with which the court can not interfere.

To deny the power might cause not only serious loss to the State, but calamitous consequences to the convicts themselves. For, as indicated by its title, the act of March 3, 1880, heretofore mentioned, was passed for the purpose of removing some of the convicts from the penitentiary at Frankfort, which was overcrowded, to work on railroads, canals, etc., though it was not until the act of May 10, 1884, that authority was given to work them in mines.

As the convicts were kept at hard labor, controlled, guarded and cared for at the mines of appellee as if they had been in the penitentariiy at Frankfort, the place of their confinement there was essentially and in legal contemplation a penitentiary. Consequently there was not, nor could be, inflicted under the act of May 10, 1884, different and greater punishment

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than they were sentenced to receive, and it must be held constitutional. And it follows the lower court erred in giving the peremptory instruction, and the judgment must be reversed for a new trial and proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

HENSHAW, &c. v. BELL.

(Filed October 8, 1888.)

Title to rent—The legal title to the rent is incident to the reversion, and passes with it, unless expressly reserved in the grant.

In this case the land was leased for the year ending March 1, 1883, at which time the rent became due, and was sold and conveyed December 4, 1882, without reservation of rent. Held—That, as incident to the reversion conveyed, the right to the rent passed to the grantee.

Spalding & Adair for appellants.

W. O. Haynes, Ken. Chapeze and John S. Geiger for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Bowden.

The construction placed by the Court of Appeals on section 8, article 2, chapter 56 of the Revised Statutes, now section 7, article 2, chapter 66 of the General Statutes, in Epperson v. Blakemore, 2 Bush, 242, recognizes, if it does not enlarge, the common law rule that the legal title to the rent is incident to the reversion, and passes with it, unless expressly reserved in the grant. (Williamson's Adm'r v. The Richardsons, 6 Mon., 596; Childers v. Smith, 10 B. Mon., 237.) In this case the land was leased for the year ending March 1, 1883, at which time the rent became due, and was sold and conveyed December 4, 1882, without reservation of rent. As incident to the reversion conveyed the right to the rent passed to the grantee.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

ORIENTAL INSURANCE CO. v. DRAKE, &c.

Filed October 24, 1888. Appeal from Hopkins Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Fire insurance—Pleading—In this action upon a contract of fire insurance the averment of the reply that "there was written and indorsed on the original policy the consent of the defendant that plaintiff might keep gunpowder and coal oil in his storehouse," was but the legal conclusion of the pleader, and while the pleader should have stated what was written on the policy that the court might determine from the writing what it meant, yet, as the pleading may mean that there was indorsed on the policy in writing "consent that insured might keep gunpowder and coal oil in his storehouse," that meaning must now be given to it since there was no objection to the pleading, no motion to make the allegation more specific, and no objection to the evidence given to support the allegation; and whether the fact was so or not was submitted without objection, and by consent, to be specially found by the jury.

2. Same—Even if the sale of spirituous liquors, to be drunk on the premises, would make such a change in the business of merchandising as would increase the risk and avoid a policy upon a building used for merchandising, under a provision of the policy that it is to be void if the risk is increased by any change in the occupation of the building, or by any means whatever, which is not decided, such a defense will not avail in this case, as the averment is that such sales were made after the procurement of the policy, and not that they were first made after the procurement, or that no such business was conducted before the procurement of the policy.

A. Duvall and Waddell & Pratt for appellant; W. P. D. Bush for appellees.

COMMONWEALTH v. COLLINS.

Filed October 24, 1888. Appeal from Grant Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Criminal jurisdidction—An act of the legislature, approved April 13, 1886, makes it an offense for any one to sell liquors within one and one-half miles of a church situated in the town of Crittenden, Grant county, and provides a penalty therefor. It further provides that "the police judge of the town of Crittenden, or any justice of the peace for Grant county, shall have jurisdiction to try all offenses charged under this act." Held—That this provision does not give exclusive jurisdiction to these courts, or either of them, of all offenses under this act, and, therefore, the circuit court had jurisdiction of this prosecuiton under that act. (Criminal Code, section 13, subsection 3.)

M. D. Gray for appellant; DeJarnette & Dickerson for appellee.

FONDA v. PARR.

Filed October 24, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Party walls—A party wall is one erected on the line between two estates, owned by different persons, for the use of both estates. The owners are not tenants in common, but each is proprietor of his own land, with a right to use the wall, and it is this which creates the easement. It is not necessary to the existence of a party wall that both parties should pay for it.

2. Same—Injunction—The parties can not use the wall for any other purpose than that for which it was intended. One of them can not, therefore, open a window through such wall without the consent of the other.

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Appellant and appellee, owning adjacent lots, entered into a contract for a party wall, the contract providing that appellant should build the wall on the dividing line between the lots, the center of the wall to be on the dividing line, and, when completed, appellee to pay appellant one-half the cost to the extent of three stories in height, "and, as to the fourth story, he is only to pay for it when he shall use it, and is to be the owner of one-half the wall so paid for as a party wall." When appellant had built the wall four stories high he made a window in the wall looking out from his fourth story over appellees' land. Appellee immediately notified appellant that he must take out this window and build a solid wall, but appellant disregarded this, and, when the wall reached the fifth story, was proceeding to make another window, when appellee instituted this action and obtained an injunction against the opening and maintenance of the windows. Held —That the entire wall, and not merely to the extent of three stories in height, was a party wall, and that appellant had no right to open windows in it without appellee's consent. And, to prevent this, injunction was the proper remedy.

B. F. Buckner for appellant; O'Neal, Jackson & Phelps for appellee.

PATTERSON, &c. v. HARPER, &c.

Filed October 24, 1888. Appeal from Hart Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Guardian and ward—It is made the duty of a guardian to provide for the necessary and proper maintenance and education of the ward out of the funds in his hands; and, in the absence of an allegation to the contrary, it should be presumed that the guardian has performed his duty in this respect. Therefore, a party seeking to recover the entire sum alleged to have been received by the guardian, with interest thereon, should allege that the guardian failed to expend any part of the estate in his hands, or interest thereon, for the maintenance and education of the ward.

2. Same—The allegation that the guardian, by virtue of her appointment, received a named amount belonging to the ward does not mean that she received it immediately on her appointment, or entitle the plaintiff to interest from that date.

3. Same—The marriage of a ward to an adult husband terminates the guardianship and wardship, and interest with biennial rests can not be recovered after the wardship ceases, either by such a marriage or by the infant attaining majority.

4. Husband and wife—Judgment—It was error to render judgment against the husband of the guardian, who married after she was appointed, as there is no allegation that he received property by his wife; nor is the judgment as to him to be satisfied only out of property received by him from his wife.

H. C. Martin for appellants; G. A. Taylor for appellees.

COMMONWEALTH v. SCRUGGS.

Filed October 24, 1888. Appeal from Mercer Circuit Court. Opinion of the court by Judge Bowden, affirming.

Indictment—Liquor-selling—The indictment in this case charges a sale of spirituous liquors by the defendant "in voting district and precinct No. 2, of Mercer county, without a license," alleging that he was then a druggist selling drugs, and that the sale of such liquors was then prohibited in that district by law. An act of February 6, 1872, provides that "it shall be unlawful for any person in the second magisterial district in the county of Mercer to vend ardent, malt or vinous liquors in the said district." Held—That the indictment does not charge that a sale was made in that district. A magisterial district may include two or more voting precincts, and it may be that the precinct known as No. 2 is not in the second magisterial district, and that that district is only one voting precinct. A demurrer was, therefore, properly sustained.

P. W. Hardin for appellant; Phil. B. Thompson, Sr., for appellee.

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CHURCH, &c. v. HALLEY, &c.

Filed October 24, 1888. Appeal from Boyd Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Appellate jurisdiction—Title to land—As this is an action to recover the possession of some tanbark, and damages for its detention, and not an action of trespass, the averment of the petition that the bark was cut from trees growing upon land which belonged to plaintiff, and was in his possession, was mere surplusage, and the defendant's plea of liberum tenementum did not put in issue the title to the land, and this court has jurisdiction of the appeal. Without any allegation as to the title the evidence as to title would have been competent upon the single question as to who was the owner of the bark.

2. Deeds—Evidence of heirship—The defendant's objection to the introduction, as evidence, of a deed to S. from M., as the sole heir of W., was properly overruled, as there was nothing to show that W. was dead or that M. was his heir.

3. Adverse possession—There can be no constructive possession of the same land by conflicting claimants. In the absence of any actual possession, if there be any constructive possession it must necessarily be in the holder of the best title, unless he had renounced it. And his constructive possession can never be ousted by any constructive possession claimed under the inferior title; nothing short of renunciation or actual disseisin can evict him.

If the plaintiffs in this case, by themselves or their tenants, entered upon the land described in their deed with the intention of taking possession of the whole land, they were, by construction of law, in the actual possession of the whole boundary, and the defendants, who do not claim to have any paper title, acquired no title as against them to any part of the land not actually inclosed. The defendants did not acquire title by marking a boundary and exercising acts of ownership over the land for fifteen years.

T. R. Brown for appellants; R. C. Burns and L. T. Moore for appellees.

WILKES, &c. v. McCORD.

Filed October 24, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Pleading—The denial of the defendant, by his answer in this case, that he made any agreement with the plaintiffs by which they were to have the dividends on certain shares of stock "for any time whatever," was a sufficient denial of the alleged agreement of the defendant to pay to the plaintiffs any dividend which should be declared on the stock for the year 1885. And especially is this so when no objection was made to the answer, and the evidence was taken pro and con upon the idea that the only issue in the case was as to the alleged agreement.

2. Practice—As there was no equitable issue in the action, and it presented simply a question of fact, the judgment will not be disturbed, as it is not palpably against the evidence.

Lane & Burnett for appellants; D. M. Rodman for appellee.

McMEEKIN v. HACKETT.

Filed October 24, 1888. Appeal from Owen Circuit Court. Opinion of the court by Judge Bowden, affirming.

Joint owners—Assignment—Appellant took from M. an order upon a tobacco warehouse for a part of the proceeds of a lot of tobacco, which was the joint property of M. and H., the order being taken in payment of a claim appellant held against M. Appellant had notice that H. was the owner of an undivided one-eighth of the tobacco sold. Held—That appellant took the chance that on an adjustment of the accounts of M. and H., the entire sum would fall to H. It is not material that he did not know the state of their mutual accounts.

Montgomery, Lindsay & Botts and J. F. Askew for appellant; J. W. Green for appellee.

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PEARCE v. MANN, COMMITTEE, &c.

Filed October 31, 1888. Appeal from Bourbon Court of Common Pleas. Opinion of the court by Judge Barbour, reversing on original and affirming on cross appeal.

1. Limitation—Upon the institution of this action by the committee of a lunatic for the settlement of the lunatic's estate, the statute of limitations ceased to run upon demands against the lunatic.

2. Same—Limitation does not begin to run against a claim by one partner against another, growing out of the partnership transaction, until the termination of the partnership. And where a partnership was entered into for the purchase of certain notes, the profits to be equally divided, the partnership did not end until the completion of the adventure by the collection of the notes in full.

3. Same—An attorney purchased a buggy in 1880, agreeing to pay for it by rendering legal services. He was adjudged a lunatic in 1886. He never refused to render the services. Held—That the claim of the seller against the lunatic's estate for the price of the buggy is not barred by limitation. In such a case the statute would not begin to run until the promissor had refused to render the services.

W. W. Kimbrough for appellant; Russell Mann for appellees.

PIKE v. GREENBAUM.

Filed October 31, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Ward, affirming.

Warehouse receipts—Appellee, a warehouseman, issued to S. a warehouse receipt for a number of barrels of whisky, which provided upon its face that the goods named therein were to be delivered on return of the receipt to appellee, "properly indorsed and in payment of government tax and storage at the rate of 5 cents per month from date, and upon payment of all moneys due hereon." Appellant, who obtained the receipt from S., seeks to recover the whisky. Appellee asserts a lien for purchase money. Held—

1. The case of Western Bank v. Marion County Distilling Co., 9 Ky. Law Rep., 500, is conclusive against appellant's right of recovery.

2. Section 5 of the Act of March 6, 1869, providing for the issuing of warehouse receipts, upon which appellant bases his right of recovery, has no application to a case like this; appellant's rights, whatever they may be, depend upon section 3 of said act, which places all receipts issued under the act on a footing with bills of exchange. Therefore, as the rights of the parties are to be determined as if the receipt were a bill of exchange, the holder of the receipt is not a purchaser for value without notice. The receipt, taken in connection with the laws of the United States providing for the keeping of whisky in bond, furnished notice to all persons that the whisky had been bought by the party to whom the receipt was issued from the party issuing the receipt; and there was sufficient to suggest an inquiry as to the meaning of the words "and upon payment of all moneys due hereon." Therefore, appellant must be regarded as having notice of every fact which the inquiry, if set on foot, would have disclosed.

3. Section 5 of the act was not intended to prescribe the means by which a warehouseman, who should sell his goods stored therein, could retain a lien for his purchase money, but was intended to prevent the warehouseman from issuing receipts for his property subject to prior incumbrance.

D. M. Rodman for appellant; Lieber & Lincoln for appellee.

HILL & HILL v. DEPOSIT BANK OF OWENSBORO.

Filed October 31, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Usury—There can be no payment of usury until the debt, with legal interest, has been paid. All payments made upon a debt go first to the satisfaction of legal interest then due, then to the extinguishment pro tanto of the principal.

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2. Same—Limitation—An action to recover usury is barred after the expiration of a year from the payment.

3. Same—Application of payments—While the creditor may make an application of payments in the absence of an election or direction by the debtor, still the application must be to an enforceable demand so long as there is one. He will not be allowed to appropriate the debtor's means, without his consent, to the payment of usury while there is a subsisting demand against the debtor to which the payment might be applied, and then to rely upon the statute to prevent the debtor from compelling the proper application. If the sum so received by the creditor, and which he attempted to appropriate to the payment of agreed, but illegal, interest, was in excess of the amount legally due by the debtor, it might be that the statute could be relied upon to prevent the recovery of the excess.

The evidence in this case, however, shows that proceeds of property belonging to the debtor, which were received by the creditor, were received as payments on the debts to which applied, and were not received generally and by the creditor applied to particular debts.

Geo. W. Williams & Son for appellants; Weir, Weir & Walker for appellee.

COCHRAN'S ADM'R v. GERMANIA BANK OF NEW ORLEANS.

Filed October 31, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Revivor—As the action was revived against the appellant as administrator de bonis non, not only by an order of court, a copy of which was duly executed upon him, but an amended petition was filed, making him a party defendant and summons issued thereon and was served on him, the objection to the revivor is without foundation.

2. Demands against decedent's estate—After a demand has been made of the administrator, accompanied with the proper affidavit, and an action instituted against him, and the administrator dies pending the action, it is not necessary to make another demand, with affidavit, of the administrator de bonis non.

3. Res adjudicata—As the court, upon a former appeal in this case, expressly held that the claimant's affidavit was sufficient, that question is now res adjudicata.

4. Costs—In an action by the creditor of a decedent against the personal representative the plaintiff, if successful, is entitled to recover his costs, just as the successful party in any other case is entitled to his costs.

Charles Eginton for appellant; D. A. Glenn for appellee.

ALBRECHT v. L. & N. R. R. CO.

Filed October 31, 1888. Appeal from Franklin Circuit Court. Opinion of the court by Judge Bowden, reversing.

The measure of damages against a common carrier when it fails to deliver within a reasonable time is the difference between the value of the goods, where they are to be delivered, at the time they should have been delivered, and at the time they are actually delivered, and this rule is not altered by a stipulation in the bill of lading to the effect that "in case of any delay, loss, detriment or damage," the loss or damage so accruing "shall be computed at the value of cost of the said goods or property at the time and place of shipment under the bill of lading," as such a provision can not be applied when the grievance is that the thing was delivered out of time, and when the damage, if any, results from delay merely, the actual value of the thing not being an element in the estimate of damage.

J. L. Scott for appellant; Ira Julian for appellee.

LIVERPOOL, LONDON AND GLOBE INSURANCE CO. v. HALL, &c.

Filed October 31, 1888. Appeal from Shelby Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Arbitration and award—Even if an umpire, selected by arbitrators who have disagreed, may act upon their representation as to the evidence heard

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by them, he can not privately receive such statements and proceed to a decision when the parties have not only no notice that the hearing is going on, but are ignorant that he has been selected.

2. Peremptory instruction—Prejudicial errors—In the opinion of the writer (Judge Bowden) the trial court can not assume, in favor of a party, that his witnesses, although uncontradicted, are credible, and that their testimony is true, and then decide as matter of law that the facts thus assumed to be true are sufficient. But it is the opinion of the other judges, and, therefore, of the court, that if the lower court erred in assuming, as matter of law, that the award relied upon by the defendant was invalid, the error was not prejudicial, as the evidence was of a character so conclusive that the jury could not have found that the award was valid.

Bullock & Beckham for appellant; G. G. Gilbert for appellees.

HELM v. DAMERON & CO.

Filed October 31, 1888. Appeal from Campbell Chancery Court. Opinion of the court by Judge Bowden, affirming.

Sale bonds—When the purchaser of property at a sale made under a decree in equity fails to pay his sale bonds at maturity the chancellor may proceed by rule and order a resale of the property. The fact that the Code provides that such bonds may be enforced by execution does not take away the right of the chancellor to enforce them by rule.

O'Hara & Bryan for appellant; J. C. Wright for appellees.

FRANTZ & SON v. HARMAN, &c.

Filed October 31, 1888. Appeal from Louisville Chancery Court. Order dismissing appeal.

Final order—"By the order complained of the chancellor simply expressed an opinion that the plaintiff was not entitled to subject to the satisfaction of his demand all of the goods in a certain store, and directed the master to take proof so that the opinion thus expressed might be executed by a final judgment. There is nothing in the order which will prevent the chancellor from granting such relief, on final preparation, as the rights of the parties show them entitled to."

John T. Milburn for appellants; Lane & Bennett for appellees.

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KENTUCKY COURT OF APPEALS.

FIRST NATIONAL BANK OF COVINGTON v. GAINES, &c.

(Filed October 13, 1888.)

1. Sureties—The statute which provides that no person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal, applies as well to private as to official obligations.

2. Same—Although a promissory note reads, "We jointly and severally promise to pay," etc., an obligor may, in an action on the note, show that he was only a surety, without showing that the obligee had knowledge of the fact at the time the obligation was executed. Such evidence does not contradict the writing.

3. Renewal note invalid as to some of obligors—When a creditor who holds a note on two or more obligors accepts what purports to be a renewal note signed by all the obligors, and it turns out that the renewal note is invalid as to some of them, their obligation on the original note revives, and the obligee may sue them and recover judgment against them. But as the plaintiff in this case sued on the renewed notes, and in the face of the plea by some of obligors that they were sureties, and that their names were signed without their written authority, insisted that their names were signed by their written authority, it can not, after being defeated upon this issue by the proof, have judgment upon the original notes.

4. Same—Pleading and practice—The plaintiff in such a case is not without remedy upon the filing of a plea of non est factum. He may, by an amended petition, confess the truth of the plea and declare upon the original note; or he may aver that he knows nothing of the truth of the matters alleged, but ask that if they turn out to be in fact true he be allowed to have judgment on the original note.

J. F. & C. H. Fisk for appellant.

O'Hara & Bryan for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Bennett.

The appellant's petition alleges, in substance, that Alonzo Milton and W.

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W. Gaines, on the 15th day of May, 1877, executed to the appellant their joint and several promissory note for the sum of $20,000, due and payable four months after date; that said obligors, at the maturity of said note, paid a part of it and executed a new joint and several promissory note for the balance; that said obligors continued to make partial payments on said original debt and executed, from time to time, renewal notes for the unpaid balance of said debt, until November 18, 1884, when said obligors executed to the appellant a joint and several renewal note for the sum of $10,000—the amount of the then unpaid balance of said debt—due and payable four months from said date.

The second paragraph of the appellant's petition sets up that on the third day of March, 1877, the said obligors executed to the appellant another joint and several promissory note for the sum of $10,000, due and payable four months after date; and that said obligors, from time to time, made partial payments on said debt and executed renewal notes for the unpaid balance, until the 20th of October, 1884, at which time said obligors executed to the appellant a note for $3,000, due and payable four months after said date, which sum represented the unpaid balance of said $10,000 debt.

The two notes—one for $10,000, bearing date the 18th day of November, 1884, and one for $3,000, bearing date the 20th day of November, 1884—are made the foundation of the appellant's action, and upon which it seeks judgment.

The appellees, Milton Gaines and Joseph Gaines, the latter being the executor of W. W. Gaines, filed, as against said two notes, first, the general plea of non est factum; second, that said Milton and W. W. Gaines were, at most, sureties of Alonzo Gaines, and that he signed their names to said notes without any written authority from them so to do.

The appellant traversed these pleas, and upon the issue thus joined they went to a jury. The lower court, upon the conclusion of the appellant's evidence, gave the jury peremptory instruction to find for the appellees.

The appellant having theretofore brought suit against Alonzo Gaines, who is now dead, and Milton Gaines, on said two notes, and the genuineness of Milton and W. W. Gaines' signatures thereto having been brought in question, Alonzo Gaines testified in said case in reference to said matter; his evidence, with a view to an appeal to this court, was reduced to writing. The appellant, upon the trial of this case, introduced that evidence, which was all the evidence of any importance that the appellant succeeded in getting before the jury, and upon the conclusion of which (the appellant having announced itself through) the lower court instructed the jury to find for the appellees. The substance of said evidence is that Milton and W. W. Gaines signed the original notes—one for $20,000, and the other for $10,000—as the sureties of him, Alonzo Gaines; that five or six years prior to the time of his giving his evidence Milton and W. W. Gaines ceased to sign the renewal notes, but gave him, Alonzo Gaines, verbal authority to sign their names as his sureties to said renewals, which he did, including the two notes sued on.

Section 20, chapter 22 of the General Statutes, provides: "No person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal." It is contended that this statute relates to the authority of an agent to sign his principal's name to official, and not private, obligations as surety. But this court, in

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the case of Ragan v. Chenault, 78 Ky., 546, decided that said statute has reference to the authority of an agent to sign his principal's name to private obligations as surety, and that the agent's authority must be in writing, and that the principal whose name is signed by an agent, under verbal authority, to an obligation, is not bound thereby. Subsequently this court decided that said statute also applies to the agent's authority to sign his principal's name to an official obligation, and that said authority must be in writing. So, according to the decisions of this court, said statute applies to both private and official obligations. The agent's authority in both cases must be in writing. The appellant also contends that as the notes sued on read "we jointly and severally promise to pay," etc., the obligors, as between them and the obligee, are, prima facie at least, principals, and that no one of the obligors can show by proof, aliunde, that he was only surety, so as to affect the rights of the obligee, unless he can show that the obligee, at the time the obligation was entered into, was apprised that the obligor was only surety.

In the cases of Lewis v. Harbin, &c., 5 B. M., 564, and Emmons v. Overton, 18 B. M., 647, it was expressly decided by this court that as between the obligors and the obligee, although the obligation read, "we jointly and severally promise," etc., any one of the obligors could show that he was only surety so as to be protected in his rights as surety, without alleging and proving the scienter on the part of the obligee. To show that one or more of the obligors are sureties, even though the obligation reads, "we jointly and severally promise," etc., does not contradict the writing, for the reason that they are in law, though some of them are only sureties, jointly and severally bound. Such language does not contradict the proposition that some of the obligors may be merely the sureties of the others. Indeed, it is safe to say that in a large majority of cases promissory notes, on which are principals and sureties, are drawn up "we or either of us promise to pay," etc., or "we jointly and severally promise to pay," etc., which forms of expression are synonyms, and it has always been held, and it has not for years past, except in this case, been seriously questioned, that the surety in a contest between him and the obligee might show that he was only surety without taking the scienter home to the obligee, for the reason that such forms of expression in the obligation do not contradict the idea of his being merely surety, as it is a fact that he, whether as surety or principal, is jointly and severally bound. Such forms of expression, according to the adjudications of this State, do not fix the legal status of the obligors; and as they do not contradict the idea that some of the obligors may be merely sureties, it follows that the obligee must, at his own peril, look out for the fact. So, as the names of said obligors were signed by Alonzo Gaines to said notes without their written authority so to do, and as the appellant's proof of that fact was uncontradicted, it was not improper for the court to instruct the jury to find for the appellee, unless, as contended by the appellant, it was entitled to relief upon other grounds, which we will proceed to notice.

The appellant contends that as the two notes sued on were renewal notes, and, as to the appellees, were invalid, obligation on the original notes was revived, and the appellant was entitled to judgment thereon for the unpaid balance.

It is the settled doctrine of this court that where a creditor holds a note on two or more obligors and accepts what purports to be a renewal note signed by all of the obligors, and it turns out that the names of some of

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them were forged, or that the renewal note is, as to some of them, invalid, their obligation on the original note revives, and the obligee may bring suit thereon and recover judgment against them.

Does the appellant's petition set up a cause of action on the original notes? We think not. We think that the action was brought on the two renewed notes; and that the reference to the original notes, andthe renewal of them from time to time, merely shows the consideration of the two notes sued on.

To the general plea of non est factum the appellant joined issue; to the special plea of non est factum the appellant joined issue, thereby affirming that Milton and W. W. Gaines did sign said notes, or authorized Alonzo Gaines, by writing, to sign their names to the same. The allegations and denials were distinctly made in reference to these two notes. The object of pleading—to make known to the court and adversary, by petition, in a clear and concise manner, the cause of complaint and relief demanded, and the denial or confession and avoidance thereof by answer—was skillfully complied with by appellant and appellee. The issue thus formed was upon these two notes. The appellant could recover no judgment except within this issue. It must recover on the notes sued on or not at all. It follows, therefore, that as the original notes were not sued on the appellant could not recover thereon. It affirmed, even in the face of the pleas, that the signatures of Milton and W. W. Gaines were genuine, or made by their written authority. As long as that affirmation was relied upon and insisted upon as the basis of a judgment the appellant should have been bound by it, and not allowed, if defeated by the proof, to recover judgment upon another and distinct cause of action.

We do not mean to say that the appellant, upon the filing of said pleas, was without remedy. It had one of two remedies, if it was true that Milton and W. W. Gaines signed the original notes and were not released from the payment of the same by lapse of time, as follows: It could have dismissed its petition without prejudice and have brought suit upon the original notes; or it could, upon the filing of said pleas, by amendment, have confessed their truth and have declared upon the original notes, or the last renewals that were genuine, and have asked judgment thereon for the unpaid balance; it could have, by amendment, set forth alternately that it knew nothing of the truth of the matters alleged; but if they were in fact true, then they asked judgment on the original notes for the unpaid balance. But instead of doing either of these things the appellant went to trial, affirming that said notes as to the appellees were genuine and collectible. It must abide the issue thus formed. For these reasons we think the appellees were entitled to the instruction given by the circuit court.

The views of the court, as above expressed, dispense with the necessity of discussing the other questions raised by the appellant.

The judgment of the lower court is affirmed.

BONNEY v. BONNEY.

(Filed October 13, 1888—Not to be reported.)

Custody of infant child—Disobedience of mandate—Upon a former appeal in this case, which is a contest between husband and wife as to the right to the custody of their infant daughter, this court reversed the judgment of

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the lower court giving the custody to the mother, upon the ground that the father appeared to be a man of good morals and of financial ability to provide for the child, and that the separation was without his fault, the chancellor being directed to reserve the power, upon sufficient cause being shown, to take the child from the father and give it to the mother. Upon the return of the case the chancellor entered judgment in conformity to the mandate, but upon the hearing of the mother's response to a rule against her to show cause why she refused to obey the judgment the chancellor declined to enforce the judgment. Held—That this was not a disregard of the mandate of this court, as it appeared, by uncontradicted evidence, that the father, pending the former appeal, had made an indecent exposure of his person to a woman on the streets of the county seat, which, although the result of his intoxicated condition, was such immoral conduct as was of itself sufficient to cause the chancellor to confide to the pure and affectionate mother the care and nurture of her infant daughter.

John Bennett and C. F. & A. R. Burnam for appellant.

W. B. Smith and J. W. Caperton for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Pryor.

When this case was heretofore in this court the alleged cause for the separation by the wife from the husband was so trifling in its character, when considered in the light of the testimony, as to impress us with the belief that a reconciliation must soon take place, and the child restored to the custody of both parents. It then appeared that the husband was a sober, industrious man, and was kind and affectionate to his wife, who seems to be a pure and lovable woman, and no reason was shown why these two persons, husband and wife, should live apart from each other and litigate as to the custody of their only child.

On the return of the case from this court the mandate was entered as it should have been, and proceedings were taken by which the mother was required to show cause why she should not surrender the custody of the child to the father, and in response to the rule the chancellor, again hearing the complaint of the mother, declined to restore the infant to the custody of the father. It is urged that this was in effect a disregard of the mandate of this court. We think not. It was said, in the opinion delivered, that when looking to the excellent character of the father, with his financial ability to provide for the infant, it was best to leave it in his custody, the chancellor reserving the power, when sufficient cause was shown, to take the child from the father and place it in the custody of the mother. The chancellor set aside the judgment rendered by him and entered a judgment giving the custody to the father, but declined to enforce it for reasons apparent from this record. The wife, in response to the rule to show cause why she refused to obey the judgment, said that the husband should not have the custody of the child on account of his dissipated habits and immoral conduct, and for other causes assigned.

That he was afflicted with any loathsome disease is in nowise sustained by the testimony, and the charge that he is an habitual drunkard is also refuted by the testimony of a large number of witnesses who have known him long and well, and who speak of him as a sober and moral man; in fact but for his grossly immoral and indecent conduct on the streets of his county seat since the original judgment was rendered, and whilst the appeal

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was pending in this court, there could have been no reason for withholding from him the custody of the little girl. The testimony as to his conduct on the occasion alluded to is uncontradicted and unexplained, even by himself. He had the opportunity of disabusing the mind of the chancellor of the impression it must have made upon him when hearing his case, but failed to do so because the statements must have been true. The exposure of his person in an indecent manner to a woman on the streets of the town, although the result of his intoxicated condition, was, of itself, sufficient to cause the chancellor to confide to the pure and affectionate mother the care and nurture of her own offspring. This court, in the former opinion as to the custody of the infant, said: "In making the selection the chancellor must have in view the benefit of the infant, and for that purpose should look to the morals, the financial condition, etc., of each parent to properly care for and raise the child and give it to the care of that parent who, under all the circumstances, seems best calculated to take charge of and provide for all its wants."

As the record then stood, the father appearing to be without fault, the surrender of the child to his custody seemed to be not only proper, but justified the belief that it would attract the discontented wife to the home of her husband, where both could aid in the care, protection and training of their only child; but as the record now appears, with the grossly immoral conduct of the father on the one side, and the purity, love and devotion of the mother on the other, the chancellor should not long hesitate in selecting the mother as the proper custodian of their infant daughter, and having so adjudged, reserving, by his judgment, the power to control its custody and permit the father to visit it, we must affirm his action.

Judgment affirmed.

JENKINS, &c. v. CROFTON'S ADM'R, &c.

(Filed October 13, 1888—Not to be reported.)

1. Void judgment—A judgment for the sale of land belonging to the estate of a decedent in an action brought by the administrator to settle the estate, in which the heirs of the decedent were not before the court, was void, and the confirmation of the report of sale can not aid the unauthorized judgment.

2. Same—Motion to set aside—The response to a rule against the purchaser and his surety to show cause why they should not pay the bond executed by them for the purchase money of the land sold under the judgment was in effect a motion to set aside the judgment as required by section 763 of the Code, and entitles the purchaser to appeal, although the judgment was void.

3. Service of summons on an infant under fourteen years of age by delivering a copy to the infant, and also a copy to one (other than the father) who had the custody of the infant, was not sufficient to bring the infant before the court. The father being alive, a copy should have been served on him.

4. An attempt to amend the return on the summons after judgment had been rendered, and the purchaser had appealed, can not be regarded, as the appellant was not then in court.

5. Practice—Appearance—A writing signed by some of the heirs, consenting to a sale of the property, did not have the effect to enter their appearance to the action by the administrator asking a sale of the property.

6. Same—A power of attorney to enter a party's appearance to an action and suffer judgment, given before the action is instituted, is void.

7. Same—The court should not give credit to a writing authorizing the entry of a defendant's appearance to the action in the absence of some au-

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thentication of the writing or satisfactory evidence of its free execution.

8. Married woman—A power of attorney executed by a married woman is not binding upon her.

9. Quaere—The administrator being not only the plaintiff in the action, but interested in a debt that was a lien upon the land, was not his attitude so far antagonistic to the heirs as to render it improper for him to exercise the power attempted to be conferred upon him by the heirs to enter their appearance to the action?

W. H. Mackoy and W. T. Ritchie for appellants.

D. A. Glenn for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Holt.

This action was brought by the administrator of Thomas Crofton to sell the real estate, settle the estate and distribute any balance of it remaining after the payment of the debts.

All of the decedent's heirs are nonresidents save one, and she is an infant under fourteen years of age. At the decretal sale the appellant, Thomas Jenkins, purchased a portion of the real estate, and executed bond for the purchase money. Failing to pay it at maturity, a rule was taken against him and his surety to do so. His response was held to be insufficient, the rule made absolute, and execution awarded to compel payment. He has appealed.

There was no reply to his response. Its statements are to be taken as true. The appellant insists that the lower court had no jurisdiction to render the judgment because those interested in the property had not been brought before the court, and that it is, therefore, void; and that, as he got nothing by the sale, he should not be compelled to pay his bond.

The return upon the summons against the infant is as follows: "Executed the within summons on Maggie McMann, an infant under fourteen years of age, by delivering to her a true copy thereof; also executed the within summons on Maggie McMann, an infant under fourteen years of age, by delivering to Bettie Martin, custodian of said Maggie McMann, a true copy thereof, all on the 17th day of May, 1886."

This service was insufficient. Under the then law, as the infant was under fourteen years, it was necessary to deliver her a copy.

Section 52 of the Civil Code provides: "If the defendant be under the age of fourteen years, the summons must be served on his father; or, if he have no father, on his guardian; or, if he have no guardian, on his mother; or, if he have no mother, on the person having charge of him." In this instance the father of the infant was alive.

An attempt was made to amend the return of the officer, but, conceding that it was sufficient, yet it was done after the final judgment had been rendered against the appellant, an appeal prayed by him and granted, and even after the judgment had been superseded. He was not then in court. He had no opportunity to question its correctness, and it can not be regarded. The appearance of all the other heirs as defendants to the writ was entered by the administrator, who was the plaintiff, and who also appears to have been interested in one of the lien debts against the estate. This was doubtless done by him bona fide, believing that he had the power to do so under some informal powers of attorney purporting to be from them. Two of them had, however, merely consented, or apparently so, in a writing, which

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is neither attested nor acknowledged, to a sale of the property. This purported consent of one of them bears date prior to the institution of this suit. So if it could be regarded as power of attorney to enter the party's appearance to the action and suffer judgment it would be void under section 1, chapter 19 of the General Statutes, which provides: "Powers of attorney to confess judgment, or to suffer judgment to pass by default or otherwise, and every release of errors given before an action is instituted, are declared void."

The writings appearing to have been executed by these two parties did not, however, authorize an entry of their appearance to the action, and it results that they were not before the court. What purports to be a power of attorney from the other heirs authorizing the entry of their appearance to the action is unattested and unacknowledged. A court should be slow to give credit to such a writing. It properly should not do so in the absence of some authentication or satisfactory evidence of its free execution. Moreover, it is quite questionable whether, in this instance, the attitude of the administrator was not such and so far antagonistic to these parties as to render the exercise of such a power improper. He was not only the plaintiff in the action, while they were defendants, but he was interested in a debt that was a lien upon the land.

However this may be, it appears that at least one, if not more, of the parties to the last-named power of attorney was, when it purports to have been executed, a married woman, and it is, of course, not binding upon her. It results that the right of these parties in the property did not pass by the sale. Not being before the court, it could not divest them of their interest, and the purchaser took nothing, at least so far as the parties are concerned whom we have above indicated as not being before the court. The judgment being void as to them, a confirmation of the unauthorized sale can not aid it.

It is suggested that, admitting the judgment was void, yet there can be no appeal because in such a case section 763 of the Civil Code requires that a motion shall be first made to the court rendering it to set it aside.

This, however, the appellant in effect did do by his response, and it should have been sustained, the sale to the appellant set aside and his sale bond quashed.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

GALLAGHER v. WHALEN, &c.

(Filed October 11, 1888—Not to be reported.)

1. Payment—The existence of the notes sued on, which were filed with the petition, rebuts any presumption of payment that might arise from lapse of time, and they must be regarded as unpaid, except to the extent shown by plaintiff's attorney, the only witness in the case.

2. Vendor and vendee—Limitation—Payments voluntarily made by the widow of the obligor in a note do not operate to suspend the running of the statute of limitation.

3. Same—The heirs of a vendee asking that a deed be made to them can not resist the payment of the purchase money because of the lapse of time. But they may, in this case, withdraw their counterclaim asking for a deed if they desire to do so.

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John C. Walker and Wm. Lindsay for appellant.

Lewis & Farleigh for appellees.

Appeal from Meade Circuit Court.

Opinion of the court by Chief Justice Lewis.

In 1857 Mary Gallagher, Michael Gallagher and Perry Haynes sold, and, by title bond, agreed to convey to John B. Whalen two small tracts of land for $933.33. A short time thereafter the purchaser died, leaving his widow and his two children, Mary and Elizabeth Whalen, then infants, in possession of the land.

This action was instituted in September, 1885, in the name of Michael Gallagher, Mary Gallagher and Kate Haynes, administrator of Perry Haynes, deceased, against Mary and Elizabeth Whalen, to recover judgment on two of the notes, executed in 1857 by John B. Whalen for $233.33 each, and to enforce a lien on the two tracts of land to pay the debt. The defendants (appellees) in their answer pleaded payment of the two notes, and also the statute of limitation in bar of recovery. They made their answer a counterclaim against the plaintiffs and prayed judgment, requiring them to convey said lands in fee simple to the defendants, heirs at law of John B. Whalen, deceased.

The existence of the two notes, which were filed with the petition, rebuts any presumption of payment that might arise from lapse of time, and, in the absence of any proof to the contrary, must be regarded as unpaid, except to the extent shown by the testimony of the plaintiffs' attorney, the only witness in the case, or admitted in the pleadings. There are no credits endorsed on the notes, but the attorney mentioned testifies in his deposition that the notes were placed in his hands for collection in 1868, but he did not then bring suit on them because, having a discretion, he forebore, in order to enable the widow of John B. Whalen to pay them off and save the land for the use of herself and the defendants, who were then infants; and that she did make small payments, from time to time, for the benefit of herself and children, one of them being made as late as 1879, but died a short time thereafter.

We do not think payments voluntarily made by the widow of the obligor of notes should, or, consistently with the rule laid down in Hopkins v. Stout, 6 Bush, 375, can operate to suspend the running of the statute of limitation, although they may have been made before the cause of action was barred; and, consequently, as more than fifteen years had elapsed after the notes became due when this action was commenced, the plea of limitation would have availed the defendants if they had not, in their counterclaim, asked the chancellor to compel the plaintiffs to make to them, as heirs at law of John B. Whalen, a title to the land. But as said by this court, in the case of Tucker v. Bently, MS. opinion, delivered January 8, 1887 (8 Ky. Law Rep., 599), a vendee can not be allowed to ask that a deed be made to him, and refuse to pay the purchase money because of the lapse of time. The pleadings and proof in this case show that neither of the two notes have been fully paid; and as the defendants have had, and still have, the possession and enjoyment of the land, they should, when asking the chancellor to cause the plaintiffs to make to them a title, be required to pay off the balance shown by the record to be due, or submit to having the land sold for that purpose.

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Wherefore, the judgment is reversed and cause remanded for a sale of the land to satisfy the debt sued on, and for further proceedings consistent with this opinion.

(Response to petition for rehearing—Filed November 24, 1888.)

It was held in the opinion, upon the authority of Tucker v. Bently, and in accordance with a plain principle of equity, that a vendee should not be allowed to avoid by a plea of limitation his agreement to pay the purchase price, while asking a court of equity to compel the vendor to convey him the title to the land, for he can not repudiate his part of the contract and at the same time, in good conscience, ask the enforcement of it against the vendor; and it was, therefore, error to dismiss the petition while the counterclaim was pending. But it was not intended appellees should be precluded from withdrawing their counterclaim upon the return of the cause, which they may do. In that respect the opinion is extended, and petition for rehearing overruled.

ANDERSON'S ADM'R v. MEREDITH.

(Filed October 13, 1888—Not to be reported.)

1. Trusts—Limitation—Res adjudicata—New trial—Various notes upon third parties were transferred by A. to M. A suit was brought by A. to make M. account and settle the trust. The matter was investigated by a commissioner and a judgment rendered making M. liable for the notes which the commissioner reported that he had received. A. having died pending that action, his administrator prosecuteed it to judgment. More than three years after that judgment was rendered A.'s administrator brought this action to make M. account for certain notes embraced by the same trust which the former action was brought to settle, but which were not included in that litigation. The plaintiff alleges that he brought this action within a few months after he discovered that the defendant received the notes named in his petition. The defendant pleads res judicata and limitation. Held—1. The defendant was the trustee of an express trust, and, therefore, the plea of limitation is not available.

2. The former judgment is a bar to this action, as the notes which are made the basis of this action could, and should, have been embraced in the former suit.

3. The petition in this case could be treated as a petition for a new trial upon grounds discovered after the term at which the judgment was rendered, except that it was not brought until more than three years after the judgment was rendered.

Sturgeon & Lay for appellant.

Edwards & Hazelip for appellee.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Holt.

The appellant sues to compel the appellee to account for certain notes transferred to him by the intestate, William Anderson, in 1873. The appellee in defense relies upon the statute of limitation, and also claims that the matter is res judicata.

The intestate brought an action against the appellee, seeking a reconveyance of land, and also an accounting as to a lot of notes, claiming that he

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had transferred all the property to the appellee merely in trust for himself. In his petition he described quite a number of notes, and averred that there were others not then remembered. It called upon the appellee for a list of them, and asked a full settlement of the alleged trust. It did not specifically set forth the notes, which are the subject of the present action.

The appellee, in his answer in the former suit, denied the receipt of any save as set forth in the petition. A considerable litigation followed. The case was referred to a commissioner, with directions to report what property the appellee had received. He did so, showing that the appellee had received a good many notes from the intestate upon third parties, naming them, but not mentioning or including those to which this suit relates. The record is silent as to them. While the action was pending the intestate died. His administrator, who is the plaintiff in this action, prosecuted it to judgment, the appellee being held liable for the property therein shown to have been transferred to him. He was treated as a trustee of the property for the intestate, and upon an appeal this court affirmed the judgment of the lower court. The intestate had, in confidence, transferred the property to the appellee. It was an express trust, subject alone to equitable control. The statute of limitation is not, therefore, available as a defense to this action. (Clay's Adm'r v. Clay, 7 Bush, 95.)

It is true it was the duty of the appellee in the former suit, if he recollected that he had received the notes to which this suit relates, to have disclosed it. But while this is so, yet that was an action for the settlement of the entire trust. It sought to make the appellee liable for all the property he had received. The matter was investigated by a commissioner, and while the debts that form the basis of the present suit were not by name included in the former litigation and then acted upon by the court, yet they could, and should, have been then adjudicated. It is, perhaps, a misfortune to the intestate's estate that they were not, and an injustice may have resulted therefrom; but the peace and repose of society must, in such a case, be regarded rather than individual hardship, and they require that, when parties proceed to a judgment, it shall be regarded as an end not only to what was actually put in dispute, but of all matters that could and properly should have been embraced in the suit. The notes upon which this action is based do not, as against the appellee, constitute a distinct claim or cause of action. If they were received by him they were embraced by the same trust which the previous action was brought to settle.

If the judgment in the former suit is not to be regarded as a bar to the prosecution of this action we do not well see how one could arise in any case. Here various notes upon third parties were transferred in trust by A. to M. A suit is brought to make M. account and to settle the trust. Ample time is afforded to investigate the matter, and it is done. Through, first, forgetfulness of A. and then want of knowledge upon the part of his personal representative, some items that entered into the trust are overlooked, but a final judgment is rendered after the parties have made up their case. Public policy dictates, and the legal rule founded upon it requires, that it should be an end of the matter, and it must be so regarded in this instance.

Section 344 of the Civil Code provides for the filing of a petition for a new trial where grounds for one have been discovered after the term of court at which the judgment was rendered, provided it be done not later than the second term after the discovery. The petition in this case could have been

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treated as one for this purpose, but for the further provision that this can not be done when more than three years have elapsed from the date of the judgment. The appellant avers that he brought this action within a few months after he discovered that the appellee had obtained the notes named in his petition. It was not done, however, within the legal limit. More than three years had elapsed from the rendition of the judgment in the former action before he again appeared in court.

Judgement affirmed.

BROWN v. CITY OF FRANKFORT, &c.

(Filed October 13, 1888—Not to be reported.)

Municipal corporations—Contracts—Injunctions—Parties to actions—The city of Frankfort having constructed a reservoir near the city, and desiring to lay pipes through the farm of appellant so as to conduct the water to the city for the use of the public, the city council entered into a contract with appellant whereby he granted to the city the right of way for the pipes in consideration, among other things, of their agreement that he should have "at all times on such place on said land as he may designate the free use of two ordinary hydrants," the service pipes to be furnished and kept up by him. After this contract had been entered into, and when each party from its execution had been in the enjoyment of the rights acquired by it, the city contracted with a water company to furnish water to its inhabitants from a different reservoir that the company was to construct, and sold to the company all of its rights and franchises pertaining to the old way, giving to them the right to dig up the pipes on the old way, to be used in the construction of their new works. This action was instituted by appellant to prevent, by injunction, this breach of his contract with the city. Held—

1. The city council had the power to contract with appellant for the right of way, and the city can not violate the provisions of that contract to the injury of appellant, who is not asking any affirmative relief, but merely asking that his connection with the reservoir shall not be severed.

2. A court of equity is the proper tribunal for the protection of the rights of appellant; he should not be compelled to resort to his action for damages. Nor is it necessary to show irreparable injury in order that the chancellor may interfere where there is a palpable breach of a contract like this, resulting, if carried out, in depriving the appellant of the use of the water.

3. The city is a proper party defendant, as well as the water company, the latter claiming under a contract with the city.

4. The water company must be presumed to have had notice of appellant's contract with the city, as it was spread on the records of the city council and embodied in full in the grant of the right of way by appellant to the city, by virtue of which the company entered on the land of the appellant.

Wm. Lindsay for appellant.

Geo. C. Drane, D. W. Lindsey and W. C. Herndon for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

The city of Frankfort, many years since, constructed a reservoir two or three miles from the city and laid its pipes so as to conduct the water for the use of the public. The pipes were laid on the farm of Orlando Brown, Sr., from one extremity to the other, under an arrangement by which Brown was to have the use of the water upon terms that are not clearly de-

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fined. After the death of Orlando Brown the present appellant, Orlando Brown, Jr., became the owner and controlled the land through which the pipes were laid. In the year 1882 the city, desiring to lay down new and larger pipes, entered upon the land without the consent of the appellant and dug a new and separate ditch for the new pipes. Brown claiming damages for the trespass, the city, through its council, appointed one of the members to arbitrate or settle the differences existing between him and the city. They entered into an amicable settlement of the claim of Brown, the latter "agreeing to release his claim for damages and also to convey to the city the right of way for the pipes leading through his land between the city limits and the reservoir, with the right to enter on said lands to make any necessary repairs on the pipes and to relay the same on the payment by the city to Brown of $200; and Brown to have, at all times, on such place on said land as he may designate, the free use of two ordinary hydrants, the service pipes therefor not to exceed three-fourths inches in diameter, and to be furnished and kept up by said Brown without cost to the city. The deed to be made by Brown, describing the right of way, and the $200 to be paid when the deed is acknowledged and accepted by the council." The deed was made by Brown, setting forth all the terms and conditions of the agreement recited, and was accepted by the council in the year 1883. After this contract had been entered into and when each party, from its execution and acceptance, had been in the enjoyment of their rights acquired by it, the city contracted with a water company, incorporated by an act of the legislature, to furnish water to its inhabitants from a different locality or reservoir that the company agreed to construct; also sold to the company its water mains and appurtenances and franchises of the old way, giving to the company the right to dig up the larger pipes on the old way, to be used by them in the construction of their new works It is alleged, or the fact exists, that the water company took up all or most of the new or large pipes, and were proceeding to take up all the pipes, or to sever the connection between Brown's premises and the reservoir, when an injunction was obtained by Brown to prevent this breach of the contract, by which his right to the use of the water would be completely destroyed. The injunction was dissolved by the chancellor, and Brown has appealed. It is insisted by counsel for the city that the contract with Brown was ultra vires, or its binding efficacy existed no longer than the use by the city of the way in question, and having abandoned the use of the way agreed under the contract, for the reason that the interest of the inhabitants required it, all the rights of Brown ended with the nonuser by the city. Whether the rights acquired by Brown under this contract are perpetual or must terminate at some period is a question not necessary to be determined. It is plain that the city council had the power to contract for the construction of this reservoir and the right of way to it, in order to furnish water to the inhabitants, and if they had the power to contract, the city can not violate the provisions of that contract to the injury of Brown.

Brown is not asking that the city be compelled to keep the way in repair or to furnish him with water as long as the corporation exists, but that the contract rights of the parties remain as they were in the year 1883, when the right of way was granted. Two ditches have been dug nearly a mile in length through the farm of the appellant, the one under a contract fully executed in the year 1883, and it is now maintained that the city has the

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right, in four years thereafter, to reopen the ditches and remove the pipes without indemnity to him or any compensation made for the injury sustained. The right to this water, in the mode provided for by the contract, may be of great value to the land, and when the party injured is not even asking any affirmative relief, we perceive no reason why the city should not be compelled to let the pipes remain or prohibited from severing the connection by the removal of the pipes between Brown's land and the spring or reservoir. If the facts are true, and they seem to be conceded, Brown has the right to have, at all times, the free use of two ordinary hydrants, the service pipes to be furnished by him, in consideration of this right of way granted to the city, and while he is not claiming the perpetual use by the city of this way for his convenience, the claim that the condition of things shall remain as when this contract was entered into is both equitable and just.

The city of Frankfort is a proper party defendant as well as the water company, the latter claiming through the city, or by contract with its council, to take up and remove the entire line of pipes. It seems to us a court of equity is the proper tribunal for the protection of the rights of the appellant, and that he is not compelled to resort to his action for damages. The appellant is entitled to the use of the water, and, as said in the case of Legg v. Horn, 45 Conn., 409, "a court of law can not restore that use," nor can it in this case prevent the appellee from destroying that use. A court of equity, therefore, is the proper tribunal in which to seek the remedy, and where there is a palpable breach of contract like this, resulting, if carried out, in depriving the appellant of the use of the water, it is not necessary that irreparable injury should be shown in order that the chancellor may interfere. (Gould on Waters, 719.) It can not be said that under a proper construction of this contract the appellee could enter on the land of the appellant and dig this ditch for a mile through his premises, impose upon him the cost of procuring service pipes, etc., and then the next day remove the entire plant and leave the appellant without remedy or compensation.

It is evident that the appellee, the water company, had notice of this right of the appellant. It entered on the land of the latter by virtue of the contract between him and the city of Frankfort, and must be presumed to have had notice of appellant's contract with the city that was spread on the records of the city council and embodied in full in the grant of the right of way by Brown to the city. The prayer of the petition should have been granted—that is, the right of the plaintiff to the use of this water by prohibiting the severance of the connection between Brown's land and the reservoir—in other words, to leave the parties in the condition they were when this suit was instituted. We infer that one line of the pipes has been taken up between the hydrants on appellant's land and the reservoir. The one line is a sufficient connection and should not be disturbed by defendants.

For the reasons indicated the judgment is reversed and remanded for proceedings consistent with this opinion.

(Response to petition for rehearing—Filed November 24, 1888.)

Counsel for the appellee seems to ignore the real point involved in this case and persists in maintaining that, under the deed made to Brown, or in the contract between him and the city, that no perpetual right to this water or the use of the pipes was granted, and, if so, the city, as counsel argues,

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had no right to make this grant or right perpetual. Whether it had this right is a question not determined or necessary to be passed on.

The city certainly has the power to erect and construct waterworks and to go outside of the city limits in order to acquire the water and the use of the realty of others upon which pipes may be laid in order to bring the water to the city. Now whether the city can say to the owner, if you will let me run a ditch for a mile through your land you shall have water furnished you as long as you live, or forever, is ultra vires, is a question of too much importance to determine when not necessary to the decision of this case. The city had dug a ditch through the land for which Brown claimed $1,000 damages. This claim was settled by the payment of $200, and the agreement that Brown was to have, at all times, his heirs and assigns, the use and privilege at such place as he may designate water from the main pipes of the city—Brown to make the connection at his own expense. This right and contract is evidenced by the deed made by Brown to the city. The ditch was dug; the pipes laid down; the connection made by Brown; and now the city maintains that it can destroy the ditch, take up the pipes and deprive Brown of the use of the pipes already laid. That the city can take up its pipes, except such as connect Brown's hydrants with the reservoir, is evident, and can stop the flow of water to the town, changing its reservoir whenever the city council sees proper. What right has a municipality to violate such a contract and leave appellant without remedy? The contract is fully executed, and what the appellant asks is that the city be compelled to leave its pipes leading to the reservoir and not disturb the contract relation as it existed when made. He is not asking that the city be compelled to furnish this water forever to his farm, or do any act whatever in the way of perpetuating the contract for all time. All that is asked or granted is that the line of pipes remain as laid down from Brown's hydrants to the reservoir.

Petition overruled.

CHAPEZE v. YOUNG.

(Filed October 16, 1888.)

1. The relation of the parties to a note, whether as principal or surety, may be shown by parol, and this rule applies also as to the relation of the sureties to each other.

2. Sureties—Evidence—Where one signs a note under an agreement with the principal that he is to be liable, not as surety for the principal alone, but as surety for both the principal and a prior surety, he may show such an agreement by parol, and recover of the prior surety whatever he may have been compelled to pay on account of his suretyship.

Thos. B. Fairleigh and Chapeze Wathen for appellant.

Bullitt & Shield for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

Joseph Gleason executed his note, payable to the German Insurance Bank, for the sum of $500, with Ben Chapeze as his surety. There was nothing on the face of the note indicating the relation of the obligors, the one to the other. They were joint makers, but the bank knew that Chapeze was only surety.

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The bank, after the execution of the note, declined to discount the paper unless an additional name was procured by Gleason. The latter applied to the appellee, Bennett Young, to sign the paper as surety, and Young did so on the condition and with the agreement that he was binding himself as the surety only of Gleason and Chepeze. The word security followed the signature of Young to the note. The note was renewed from time to time, Young affixing his signature to the renewals as he had to the original notice. Chapeze was utterly ignorant of the fact that Young's name was on either the original paper or the renewals until the failure of Gleason to pay, when the bank undertook to coerce payment from Chapeze and Young. Chapeze maintains that Young is liable to contribute to the payment of the note, and, having paid his half, says that Young is alone liable for the balance due and must suffer the loss. The law and facts having been submitted to the court, a judgment was rendered in favor of Young against Chapeze, the former having paid one-half the debt and is seeking, in this proceeding, to recover it back from Chapeze. The argument advanced by counsel for Chapzee, that as the undertaking of Young was unknown to him and not at his request, his voluntary agreement to become bound on the paper at the instance of Gleason made him liable as a cosurety, will not avail. It is a general rule, and one well established, that the relation the parties occupy on the paper, whether as principal or surety, may be shown by parol, and this rule applies also as between those of the obligors who are sureties, the liability of each to be determined by any contract they may have entered into with each other. All who sign the note are jointly or severally bound to the payee, but even in such a case it may be shown, as between the obligee and the obligors, the relation subsisting between them. On a plea of the statute of limitations by the surety, although the note appears, on its face, to be a joint and several undertaking, it is competent to show by parol that one or more of the obligors signed as sureties. The liability to contribution between sureties does not arise from any contract between them to that effect. It is unlike that of joint obligors equally bound as between each other for the debt where the implied promise at once arises. Where the principal becomes insolvent and fails to pay, upon his default being made good by one surety equity says that all should aid in making good the loss. In this case there was no contract between Chapeze and Young and no undertaking by Young that he would contribute to Chapeze if default was made by the principal obligee. The contract was between Young and Gleason, and on the representation by Gleason that Chapeze was solvent Young agreed to bind himself as the surety of both Gleason and Chapeze, and signed his name as surety. As surety for whom is the question? The collateral undertaking to be bound as the surety for both Gleason and Chapeze is not inconsistent with the note or obligation on which their names appear. They are all liable to the obligee, but as between each other their liabilities may be shown by an independent contract. Suppose Young had signed his name as surety, at the instance of Chapeze, with the agreement that he was only the surety for both the other obligees, it must then be conceded that this agreement could be est
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to enable the principal debtor to get the money, by which the parties then primarily bound on the paper were not to look to him for payment.

The case of McNeil v. Sandford, 3 B. M., 11, does not sustain the position assumed by counsel for the appellant. In that case the court below instructed the jury to find for the party (Sandford) whose name appeared last on the note, for the reason that he did not affix his signature until long after the note had been executed by the other parties, this court holding that the legal deduction from the face of the note was that Sandford signed as the cosurety of McNeil, although signed long after McNeil, the other surety, had signed the paper.

In the case of Salter v. Salter's Creditors, 6 Bush, 634, the word, "security," followed the name of Hall Anderson to a note for $5,000, signed by G. I. Salter and Thomas K. Salter. Thomas K. claimed that he was only the surety of G. I. Salter, but this court said it was fairly deducible from all the evidence that, as between themselves, T. K. Salter was principal and Anderson security. In the case of Adams v. Flannagan, 36 Vermont, 400, the plainitff signed the note as surety on the representation by the principal debtor that others would sign as sureties also. They did sign the note, but on the express agreement that they signed as sureties only for the principal debtor and the prior signers to the paper. It was held that they were not cosureties or liable to contribution. (Oldham v. Brown, 25 Ohio St., 41; Brandt on Suretyship, section 230.) In Baylies on Sureties and Guarantors, 323, it is said: "When a person signs a note as surety of another, and then a third person signs his name to the note, adding to signature the words surety to the above, the first surety can not, upon paying the note, compel contribution from the second surety, unless it is made to appear that the second surety intended to place himself in the relation of a cosurety with the first. And whenever it appears that the parties never contemplated that a second surety should be liable except on default of the principal and prior surety, the prior surety can not claim contribution from the second surety. (Harris v. Warner, 13 Wendell, 400; Sayles v. Sims, 73 N. Y., 552; Harrison v. Lane, 5 Leigh, 414; Robertson v. Deathrage, 82 Illinois, 511.) In this case it is insisted that as the principal debtor informed the appellee that appellant was only the surety and nothing more, the contract, if made with Gleason, can not alter the rights of Chapeze. Whilst such is doubtless the case we can not well see in what way the liability of Chapeze has been or was affected by the signature of Young, and it must be recollected that the law and facts having been submitted to the court the appellee testified that when the note was presented to him he said to Gleason that he was under no obligation to become his surety, and asked Gleason if Chapeze was solvent, and being informed that he was perfectly good for the debt, said to Gleason that he would sign the note as the surety of the two and in no other way, and Gleason assenting to this proposition he then signed the paper, with the word security following his name.

If such was the agreement the court below was right in adjudging that Chapeze, as between himself and Young, was liable for the entire debt, and the judgment being sustained by the testimony is now affirmed.

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HALL v. COMMONWEALTH.

(Filed October 20, 1888—Not to be reported.)

Upon the trial of appellant for obtaining money under false pretenses, as it appeared from the evidence that the person from whom he obtained the money was induced by him to believe a plausible story, such as a man of ordinary prudence might believe and act upon, he was not entitled to a peremptory instruction.

Joseph S. Botts for appellant.

P. W. Hardin for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Bennett.

S. T. Young having purchased of P. F. Collier a set of encyclopedia, at the price of $28, payable in monthly installments at the rate of $3 per month, the appellant, A. S. Hall, appeared at the residence of S. T. Young and represented himself as the collecting agent of the said Collier. He described minutely the terms of Young's contract with Collier, and Young, confiding in the appellant's representation, paid him a monthly installment then due, of $3, for which appellant receipted on the back of the contract of purchase. It turned out that the appellant, at the time of said collection, was not the collecting agent of said Collier.

He was indicted in the Fayette Circuit Court, upon the foregoing facts, for obtaining money under false pretenses. He was convicted of said crime and sentenced to the penitentiary for the term of one year. He relies here for a reversal of the judgment upon the grounds, first, that conceding all the facts proven, including that of nonagency, to be true yet the court should have instructed the jury to find for him; second, that there was a total failure of proof that he was not the collecting agent of said Collier at the time he collected said money.

His first contention is based upon a sentence in Young's contract of purchase, as follows: "All other payments may be made to our authorized collector, who will exhibit a badge with the name P. F. Collier engraved thereon." The appellant contends that this writing furnished Young with the means of unerring proof as to the authority of the person presenting himself as Collier's collecting agent to collect said money; and that, as a man of ordinary prudence, he should have required a presentation of the emblem of authority before paying the money, and that his failure to do so caused him to be a victim of his own folly rather than the cunning and rascality of the appellant. Therefore, the appellant was not guilty under the statute. In reply to this position it is enough to say that said writing did not make it obligatory upon Young to pay said installment to an agent only upon the presentation of said badge. He could, as a man of ordinary prudence, have paid it upon other evidences of the person being a collecting agent. Suppose some person in whom he had the utmost confidence had assured him that he knew personally that the appellant was the authorized collecting agent of Collier, and upon the faith of which he paid the money, could it be said, although it turned out that the appellant was not authorized to collect, that Young acted the simpleton in relying upon such in-

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formation? We think not. Here the appellant, with intent to defraud Young out of his money, induced him to believe a plausible and well concocted story, such as a person of ordinary prudence might believe and act upon, and whereby he was defrauded out of his money.

As to the second contention we think the verbal testimony, in connection with the appellant's letter, clearly show that he was not the authorized collecting agent of Collier at the time he received said money.

The judgment of the circuit court is affirmed.

MARTIN, &c. v. RENAKER, &c.

(Filed October 20, 1888—Not to be reported.)

Construction of devise—A testator devised to his three daughters "the remaining two-thirds" of a tract of land "after the allotment of dower therein to my widow, to be divided equally between them." By a subsequent clause of his will he provided: "In the event of the death of any children, leaving no child or children surviving them, the property herein devised to such child or children is to be equally divided between my surviving children or the children of such of them as may be dead." Held—That the devise over was to take effect only in the event of the death of the preceding devisee during the lifetime of the testator, and the daughters surviving the testator took an absolute estate in the land. (Wills v. Wills, 9 Ky. Law Rep., 76.)

The words "after the allotment of dower therein to my widow, to be equally divided between them," were manifestly not intended to postpone the vesting of the estate in the three daughters until after the allotment of dower, but simply to fix the time or event when a division of the residue of the tract of land should be made between the three daughters.

A. H. Ward for appellants.

J. I. Blanton and L. M. Martin for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellants, children and devisees of Jas. H. Martin, who died in 1880, brought this action to recover a tract of land devised to the deceased daughter of the testator, and wife of appellee, Renaker, a life estate in which the latter sold and conveyed to appellee, C. B. Martin.

Whether the surviving husband had any estate in the land of his wife, Mary A. Renaker, after her death, which occurred in the year, 1884, or it passed to appellants, depends upon a proper construction of the second and fifth clauses of the will, which are as follows:

"Item 2d. I give and bequeath to my three daughters, Sarah Jane Milam, Nancy F. Martin and Mary A. Martin the remaining two-thirds of my Carder farm, situated on Mill creek, Harrison county, Kentucky, after the allotment of dower therein to my widow, to be divided equally between them."

"Item 5th. In the event of the death of any children leaving no child or children surviving them then the property herein devised to such child or children is to be equally divided between my surviving children, or the children of such of them as may be dead."

Mary A. Martin married appellee, Renaker, subsequent to the date of the

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will, which was 1879, but before the death of the testator, and had by him four children born alive, but none of them survived her.

As said in Wills v. Wills, 9 Ky. Law Rep., 76: "The rule in this country, when not inconsistent with the intention of the testator, is for the court to prevent the title to real estate from remaining contingent; and in the case of an immediate devise it is generally true that a deivse over in the event of the death of the preceding deivsee refers to that event occurring in the lifetime of the testator, and this construction prevails when there is no other period to which the words can be referred." In that case the testator, after directing his estate equally divided between his four living children, excluding the child of a deceased daughter, provided as follows: "In case of the death of either of my children I will that their said interest shall go to their children, in case they have any; if not, it is to go equally to my four living children, or the fruit of their body, or such as may be living." And this court held the devisees, as they survived the testator, each took an absolute estate, and that it was intended the devise over should take place in case of the death of the devisee before, and not after, the testator's death. We think that case is decisive of the question in this, for there is no substantial difference between the language of the two wills.

The words, "after the allotment of dower therein to my widow, to be equally divided between them," were manifestly not intended, and can not properly be construed, as postponing the vesting of the estate in the three daughters until after the allotment of dower, but simply to fix the time or event when a division of the residue of the tract of land should be made between the three daughters; nor can the word "then," in the fifth clause, be properly made to have a different meaning or significance from the words "in that event." As there is, in our opinion, nothing in the will to indicate an intention to create in either of the daughters surviving the testator any less than an absolute estate, we think upon the death of his wife, appellee, Renaker, had an estate for his own life in the tract of land allotted to her in the division with her two sisters, and his conveyance of that estate to appellee, C. B. Wright, was valid.

Judgment affirmed.

BOYD, &c. v. BETHEL.

(Filed October 20, 1888—Not to be reported.)

1. Exhibits—Jurisdiction—Both in a petition by appellants to recover of appellee a tract of land, and in a petition by appellee to enjoin one of the appellants from entering upon the land, it is averred that the land is situated in Daviess county, but in a patent and a deed, filed as exhibits, the land is described as in Henderson county. Held—That while the rule is that where the pleading and the exhibit filed with it are at variance the latter must govern, yet as the parties agree in averment as to the situs of the land, and it is clear from the record that it in fact lies in Daviess county, the objection, now for the first time urged, to the jurisdiction of the Daviess Circuit Court will not be regarded.

2. Deeds—Presumption of acceptance—The grantee in a deed defectively executed, claimed to have purchased the land, and took and held possession of it as far as its nature would admit. Nearly forty years elapsed from the making of the deed until the bringing of this action. The deed was first in the possession of the grantee and then in that of his heirs. Held—That un-

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der such circumstances the presumption arises that it had been accepted by the grantee, and it was competent as evidence of title, notwithstanding its defective execution and the failure to record it.

8. Ejectment—Islands joined by filling up channels—The appellants, claiming under a patent to an island which, by the lapse of time, has increased in size, claim that the new made land is altogether accretion, and that, therefore, they are entitled to it. Appellee, who is in possession, claims that formerly there was another island separated from that of appellant's by a channel or cut off, and that gradually it filled up, joining the two bodies together, and that, therefore, appellants have no right to the land which was formerly separated by this channel from their patented land. The lower court dismissed appellant's petition to recover the land. Held—That as there is evidence sufficient to sustain the conclusion of the chancellor the judgment can not be disturbed.

Owen & Ellis for appellants.

Weir, Weir & Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

The upper line of the patent to Luce & Galloway, issued in 1845, extended entirely across French island as it then existed; and the five and one-fourth acres granted by it embraced all the island then in existence from this upper line to its lower end. The patentees conveyed the land thus granted to Matthew Boyd in 1845. It was to overflow and not susceptible, therefore, of any possession save such as arises from occasional acts evincing claim and ownership, such as the cutting of timber.

The deed to Boyd was acknowledged before an Indiana justice of the peace on October 3, 1845, but was not recorded in the county in this State where the land was situated until June 2, 1882. The grantee under it claimed the land from the time of its execution until his death in 1871. In the interim he occasionally cut and sold timber from it, and forbid others doing so. His heirs appear to have done the same after his death.

With the lapse of time the island, from certain causes, increased in size. It became both longer and wider. In 1881 the appellee, Union Bethel, claiming some 150 acres of the island, entered upon it and made a clearing or some improvement. His claim includes about fifty-eight acres, which is also claimed by the Boyd heirs; and in May, 1884, they brought one of these actions, seeking to recover the land thus in dispute, and to enjoin Bethel from entering upon it. The latter, in 1885, brought a counter suit, enjoining one of the Boyd claimants and a party acting under him from entering upon the disputed land; and by agreement of parties this latter suit was to abide the result of that instituted by the Boyd heirs. The petitions in each case aver that the land is situated in Daviess county. The patent to Luce & Galloway and the deed from them to Matthew Boyd describe it as being in Henderson county.

While the rule is that where the pleading and the exhibit filed with it are at variance the latter must govern, yet, as the parties agree in averment as to the situs of the land, and it is clear from the record that it in fact lies in Daviess county, the objection, now for the first time urged, to the jurisdiction of the Daviess Circuit Court will not be regarded.

The petition of the Boyd heirs contains much unnecessary matter. For instance, it was not necessary to set out in detail the derivation of title, or

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the heirship of the plaintiffs, because these matters properly belong to the domain of evidence. It does substantially aver, however, that they are the owners and entitled to the possession of the land; that the defendant unlawfully entered upon it and is wrongfully withholding it from them. It is sufficient to support, and must be treated as an action in the form of, ejectment.

The deed to Matthew Boyd was defective in execution. The evidence shows, however, that he claimed to have purchased the land, and that he took and held possession of it so far as its nature would admit. Nearly forty years elapsed from the making of the deed until the bringing of this action. The deed was first in his possession and then in that of his heirs. The claim under it had been accompanied by possession, and under such circumstances the presumption arises that it had been accepted by the grantee, and it was competent as evidence of title, notwithstanding its defective execution and the failure to record it.

The lower court dismissed the action brought by the Boyd heirs, and perpetuated the injunction obtained by Bethel in the other suit.

The preliminary questions, already noticed, being out of the way, the merits of the case are now to be considered.

It is difficult to reach an entirely satisfactory conclusion as to the respective rights of the parties, owing to the conflicting character of the testimony and the want of certainty as to boundary.

The appellee, Bethel, exhibits no paper title. Possession has not invested him with one, because he has not held the land adversely but a few years. He is, however, in possession; claims that the Boyd heirs are mere trespassers; and if they recover it must be upon the strength of their own right, and not upon the weakness of his claim. Upon their side it is claimed that the new-made land, which now adjoins the five and one-quarter acres, is altogether accretion, and that they are, therefore, entitled to it. Several witnesses so testify.

Upon the other hand it is asserted that the five and one quarter acres was originally but an accretion to the land above it, which was patented to one Durfee in 1832, and which, by the deposit of soil through the action of the water, has widened out so that the lower line is now much longer than the upper line of the five and one-quarter acres. Indeed the new land thus formed appears to be held by other parties than the alienees of Durfee. It is immaterial whether this be so or not; but it is also claimed that as the land above the five and one-fourth acre tract has widened out, that if the new-made land below be indeed accretion that it may as well be said that it belongs to the larger tract above, since it adjoins it, as to the land patented to Luce & Galloway. It is claimed, however, that it is not accretion; but that formerly there was another island below the five and one-fourth acres, and which was separated from it by a channel or cut-off, and that gradually it filled up, joining the two bodies together; and that as each was originally a distinct and independent formation the Boyd heirs have no right to the land, which was formerly separated by this channel from their patented land.

The evidence is conflicting as to whether any such channel ever existed. Three witnesses testify affirmatively, and the same number contradict them. One of these, however, who testify to its former existence, is a pilot, and the other a steamboat captain; and they say that in time past they took boats through the cut-off; and it is difficult to see, if credit for truthfulness is to be given to them, how the conclusion contended for by the appellee is to be avoided.

The evidence is also contradictory as to whether the 58 acres in controversy includes the five and one-fourth acres of patented land. Undoubtedly

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the Boyd heirs are entitled to what is covereed by their grant; but we must presume that the lower court, in reaching its conclusion, found that it was not embraced in the fifty-eight acres, and that the land in contest was not mere accretion to the patented land.

Upon the state of case presented we do not feel at liberty to disturb this conclusion. If correct—and in our opinion there is sufficient evidence to support it—then no such possession of the land in dispute is shown upon the part of the appellants as is necessary to invest them with title.

The judgment is affirmed.

BUSH v. MACKLIN, TRUSTEE.

(Filed October 23, 1888.)

Release of mortgage—Section 12 of chapter 24 of the General Statutes, which provides for the release of a mortgage lien by an entry upon the margin of the records of the county court, is not the only remedy to which the mortgagor is entitled in order to obtain a release of the mortgage lien upon the payment of the mortgage debt. Independent of the statute he is entitled to record proof of the payment of the debt. And whether or not the record of an action to enforce a mortgage lien in which the payment of the mortgage debt has been coerced furnishes sufficient proof where all the land lies in the county where the action was brought, where a part of the land lies in another county the mortgagor is entitled to a written release, duly acknowledged, which the court, having the parties before it, has jurisdiction to compel the plaintiff to execute. But it is the duty of the defendant to draw up the deed of release in proper form and tender the same to the plaintiff, together with the fees for taking the acknowledgment, and thereupon it is the duty of the plaintiff to sign and acknowledge it.

W. P. D. Bush for appellant.

L. Hord for appellee.

Appeal from Franklin Common Pleas Court.

Opinion of the court by Judge Bennett.

The appellee, as the trustee of Mrs. M. A. Murphy, obtained a judgment in the Franklin Common Pleas Court against the appellant, subjecting some landed estate lying in Franklin and Hancock counties, Kentucky, to satisfy a debt secured by a mortgage on said lands, executed to the appellee as trustee by the appellant, which mortgage was recorded in Franklin and Hancock counties. The Misses Gheislin, at the commissioner's sale, bought said land and executed bond for the purchase price, with the appellant as one of their sureties. They also, by a writing signed by themselves, which was filed in the case, stated in substance that the land was purchased for the benefit of the appellant. The appellant, at the maturity of the bond, paid off the same in full; thereupon the Misses Gheislin executed another writing, which was filed in the case, transferring all their right and title in and to said land to the appellant. The sale was confirmed. Afterwards, while said case was still pending, at the instance of the appellant there was an order entered of record in said case reciting the foregoing facts, and ordering the appellee to execute to the appellant a deed of release of said lands from said mortgage, or to show cause at the next term of court why he should not do so. At the next term of court the appellee filed his response,

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admitting the facts set up in the order, but denying that the court had jurisdiction over the matter, or that the appellant had the right to demand a deed of release from him. The appellant also tendered a deed of release, drawn up in due form, for the appellee to sign and acknowledge before the county clerk of Franklin county. He also tendered the clerk's fee for taking the acknowledgment. Upon the hearing of the motion the court dismissed the same upon the ground that it had not jurisdiction of the motion. The appellant has appealed to this court.

Chapter 24, section 12 of the General Statutes provides as follows: "Liens by deed or mortgage may be discharged by an entry acknowledging satisfaction of the same on the margin of the record thereof, signed by the person entitled to the same, or his personal representative, and attested by the clerk or his deputy, which, in case of a mortgage or deed of trust, shall have the effect to reinvest the title in the mortgagor or grantor, or person entitled thereto. This provision shall not be held to change the existing law if no such entry be made."

The foregoing section is simply declaratory of an equitable principle, and is, therefore, not the only and exclusive remedy to which the mortgagor is entitled in order to obtain a release of the mortgage lien upon the payment of the mortgage debt.

It is a well-settled principle that the payment of a mortgage debt, without a release or even receipt, extinguishes the mortgage lien as against the mortgagee and all others claiming through him. But, nevertheless, "the mortgagor may maintain a bill against the mortgagee, or his heirs, for a release or reconveyance after payment." But this is not because the payment is not extinguishment, but only because the fact of payment may not be, at all times, conveniently susceptible of proof without written or record evidence. Such a bill, in such a case, is filed as a precautionary measure. But the fact of payment is sufficient if it can be made to appear without a reconveyance, "particularly if it be manifested by a decree of court." (Breckinridge's Heirs v. Ormsby, 1 J. J. M., 236.)

It may be said that the fact of payment is sufficiently manifested by the record of this case. If all the land embraced in said mortgage lay in Franklin county then there would be a good deal in such an argument, for it then could be said that the fact of payment was "conveniently susceptible of proof" by the court proceedings. But a part of the land mortgaged lies in Hancock county, some two hundred miles distant from the court records of Franklin county. Should the appellant wish to sell the land in Hancock county, and should be able to make an advantageous sale of it provided the title was clear, it is hardly probable that the person proposing to make the purchase would be willing to take the appellant's word that the mortgage debt had been paid; and it is not unreasonable to suppose that he would not put himself to the trouble and expense to come to Frankfort to see whether or not the debt had been paid; nor is it uunreasonable to suppose that he would not incur the expense of having the matter investigated; nor is it unreasonable to suppose that he would prefer not to rely upon the report of strangers in reference to said matter, especially as they might be personal friends of the appellant. Also the mortgage standing upon the county court records as unreleased would probably injure the appellant's credit with the commercial world were he so engaged, or did he propose to so engage. So it seems to us that, independently of the statute, supra, the appellant is entitled to record proof of the payment of said debt, and that such proof ought to be

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such as would afford the appellant the prompt and ready means of showing that said debt was paid, and that a deed of release, duly acknowledged, in order that it may be recorded in the Hancock County Court, furnishes not only satisfactory but convenient evidence of said payment. Besides, taking the statute, supra, as analogy, it would suggest that the chancellor ought to require the mortgagee to execute and acknowledge a deed of release in order that it might be recorded in the county court where the mortgage was recorded. It was the duty of the appellant to draw up the deed of release in proper form and tender the same to the appellee, together with the fees for taking the acknowledgment, for him to sign and acknowledge; thereupon it was the duty of the appellee to sign and acknowledge the same.

But the appellee contends that the court had no jurisdiction to require him, under the circumstances above stated, to sign and acknowledge said deed of release. In answer to this contention it is sufficient to say that the case was still on the docket, and the parties were all before the court for the purpose of any proper order to be made in the case; and the appellee stood before the court acknowledging that the appellant had, by the coercive power of the court which he had invoked, paid in full the mortgage debt, and that his entire claim had been satisfied; therefore it would seem to follow, as a legal sequence, that the court, upon the motion of the appellant, had jurisdiction to compel the appellee to furnish the appellant with written evidence by way of a release, duly acknowledged, that the latter had paid the debt in full. As just said, the court compelled the appellant to pay the debt, the appellee stood before the court acknowledging the payment; thereupon it would seem but just that the court should have the incidental inherent power to require the appellee to furnish the appellant with satisfactory and convenient evidence that the debt had been paid and the mortgage lien thereby discharged.

The judgment of the lower court is reversed, with directions for further proceedings consistent with this opinion.

TALBOTT, &c. v. LANCASTER, ASS'EE, &c.

(Filed October 23, 1888—Not to be reported.)

Subrogation—Assignment for creditors—When a security is given with the intention that it shall be applied to the payment of the debt for the relief of the surety, or to enable the creditor to make his debt, equity will substitute him to the rights of the surety; and he may maintain an action in his own name to have the property applied to the payment of his debt.

To indemnify his sureties in certain notes a debtor assigned to them two notes secured by a mortgage on land. The sureties made an assignment for the benefit of creditors, and the mortgaged land being about to be sold under decree the assignee, by consent of creditors, bid it in for $5,000. Out of the general fund in his hands belonging to the trust estate the assignee paid taxes and other charges on the land, amounting to $2,254.53. Thereafter the holder of the debt for which the sureties were bound filed a pleading in the action which had been brought to settle the assigned estate, asking to be subrogated to the benefit of the mortgage debt assigned to the sureties, and asking that the assignee be required to account for the sum at which he had bid in the property. Thereafter, on motion of the assignee, and without objection, the property was again sold and brought but $2,000, and the report of sale was confirmed without exceptions. Held—That the

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creditor having so long delayed the assertion of his right to substitution it is equitable that what was finally realized from the land should be first applied in payment of what had been expended by the assignee in the interim, out of the general trust fund, in relieving the land from claims which the creditor would have been compelled to pay before he could, by substitution, have realized any thing from it upon his debts.

John D. Wickliffe for appellants.

C. T. Atkinson for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Holt.

June 9, 1876, J. L. Spalding assigned to J. M. and S. P. Lancaster two notes upon the Johnsons, secured by mortgage upon a Louisiana plantation, as indemnity to them as his sureties upon certain notes, among which were two executed respectively to the guardian of the appellants, Benjamin and Margaret Talbott. In February, 1879, the Lancasters, both as partners and individually, assigned their property for the payment of their debts. Spalding, as well as one Smith, at the same time made a like assignment. During the same year actions were brought in the lower court by the assignee to settle the estates, and, because of the mutual indorsements by the assignors probably, the suits were heard together.

In the Lancaster suit issues were formed between the partnership and individual creditors as to their rights as to the partnership and individual property of the debtors. The lower court placed the firm creditor, and the creditor of both the individuals in the firm, upon the same footing. This action was reversed by this court.

While the case was pending upon appeal the assignee procured a judgment upon the Johnson notes in the Louisiana Federal Court, enforcing the mortgage upon the plantation; and, it being about to be sold under the decree, an order was entered on November 3, 1881, in the suit pending in this State to settle the trusts, which, inter alia, provides as follows: "It is further ordered, by consent of parties, that said assignee do, at said sale, bid in said property in his discretion, his maximum bid, however, not to exceed the aggregate of said debt (mortgage), interest and costs." When this order was made the Talbott claims had been proven and allowed in these suits to settle the insolvent estates. All parties to them appear to have been acting upon the idea that the Johnson debt belonged to the trust estate as general assets.

The assignee, under the authority thus given him, bid in the land at the Louisiana sale at $5,000. This action was within his authority.

The land appears, from the tax assessments, to have subsequently decreased greatly in value. For instance, in 1883 the taxes upon it did not equal one-tenth of the assessment five years before. Whether this resulted from damage by floods in the Mississippi river, which was contiguous to the land, is conjectural. Taxes to a large amount were owing upon it, and the assignee, out of the general fund in his hands belonging to the trust estate, expended, in payment of them and the costs and fees connected with the Louisiana suit and a prior lien upon the land, the sum of $2,254.53.

February 12, 1885, the appellants, Benjamin Talbott and Margaret Smith, nee Talbott, filed an answer and cross petition, averring that the Louisiana land debt had been assigned by Spalding to the Lancasters to secure them in their liability for the Talbott debts, which had never been paid; that they

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were entitled to be subrogated to the benefit of it; that the land had been sold and purchased by the assignee on behalf of the creditors of the Lancasters at $5,000, and asking that he be required to account to them for this sum. George M. Talbott united in this pleading, but the debt owing to him by Spalding was not named in the assignment of the Johnson notes to the Lancasters. The creditors responded that the assignee, under the order of the court, supra, had bid in the land for the benefit of the Lancaster estate, and as a part of its assets and to prevent its sacrifice; and that, if the appellants were entitled to be substituted to the rights of the Lancasters as to the Johnson notes and lien upon the land, the general estate of the Lancasters was equitably entitled to be first paid, out of what might be realized from the land, the $2,254.53 that the assignee had paid out as taxes, etc., upon it.

October 29, 1885, the appellants, save George M. Talbott, made a motion to compel the assignee to pay over to them said $5,000, less $803, which they claimed was the costs attending the Louisiana suit. This motion was overruled. October 30, 1885, upon the motion of certain creditors of the Lancasters and the assignee, he was ordered to sell the Louisiana plantation. No objection or exception was entered to this order. The property was sold January 25, 1886. It brought but $2,005, or less than the assignee had paid out on account of it. No exceptions were filed to the report of the sale, and it was confirmed.

The court below recognized the right of substitution contended for, but allowed the creditors of the Lancasters a lien upon the proceeds to the extent of the $2,254.53, which consumes same; and of this complain is now made.

It is well settled that when a security is given with the intention that it shall be applied to the payment of the debt for the relief of the surety, or to enable the creditor to make his debt, equity will substitute him to the rights of the surety. He may maintain an action in his own name to have the property applied in payment of his debt. (Bank of the United States v. Stewart, &c., 4 Dana, 29; Shackleford v. Stockton, &c., 6 B. M., 390; Macklin v. Northern Bank, 83 Ky., 314.)

It is manifest from this record, however, that the object in empowering the assignee to bid in the land in a certain event was to prevent its sale at a sacrifice. It had not then been finally determined how the Lancaster estate should be distributed, and all parties to the suits to settle the trust estates were acting upon the idea that whatever might be realized from the sale of the land would go into the general fund, and abide the ruling of this court as to its distribution. They, therefore, agreed to the order authorizing the assignee to bid in the property in a certain event. All of the parties to the actions, including the appellants, or at least their guardian, if they were not then sui juris (which does not clearly appear from the record) were parties to this consent order. They thereby made the assignee their agent; and by the purchase he took the land in lieu of the notes, and for the benefit of such of them as might be entitled to distribution of whatever might be finally realized from it.

The change of assets from notes to land was by the consent of all the interested parties; and to now allow the appellants to require the assignee to bring into court for their benefit a sum equal to that at which the land was bid in by him would not only sanction them in an act of bad faith, but give them an inequitable advantage. They were silent from June 9, 1876, when the Johnson notes were assigned by Spalding to the Lancasters, until February 12, 1885, as to the assertion of their right of substitution. They failed to assert it from November 3, 1881, when the agreed order was made to the

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purchase by the assignee, until 1885, and in the interim the assignee, in good faith, had relieved the land from claims which the appellants would have been compelled to pay before they could, by substitution, have realized anything from it upon their debts.

The general fund of the trust estates having been thus used, it is equitable that what was finally realized from the land should be applied first in payment of what has been so expended. The cost of realizing on the collaterals must be first paid. The land having, by the agreement of all parties, taken their place, the necessary expense of converting it into proceeds, and which the assignee bona fide advanced out of the general fund of the trust estates, must be first returned. The appellants recognized this equity by their motion to compel the assignee to bring the $5,000 into court, less the $803 of costs attending the Louisiana suit. The expenses of realizing upon the collateral exceeding the proceeds, the indemnity failed.

It is true the agreement on file recites that "the assignee purchased said property for the partnership creditors of S. P. & J. M. Lancaster at his bid of $5,000;" but construing this in the light of the record, it, in our opinion, merely means that he bid in the property for their estate.

The judgment below is equitable and is affirmed.

HOWARD v. HOWARD, NEXT FRIEND, &c.

(Filed October 23, 1888.)

1. Persons of unsound mind—Action by next friend—Under subsection 3 of section 35 of the Civil Code a person of unsound mind having no committee may sue by his next friend; and the expression, "person of unsound mind," as used in that section embraces not only lunatics, but persons whose minds have become so impaired by disease or other cause as to be unable to take care of their own interests.

2. Same—Prejudicial errors—When an action has been thus brought by one styling himself as next friend of an adult person alleged to be of unsound mind, and the person in whose behalf the action purports to be brought appears in court and protests that he is not of weak or unsound mind, and that the suit was instituted and is prosecuted without his authority and against his will, the chancellor should direct an inquiry as to whether his mind is so impaired as to render him incapable of understanding and appreciating his property rights to such an extent as to render him unable to protect himself against designing persons; and if the verdict of the jury be in the affirmative the chancellor should appoint a committee for the person and allow the person thus appointed to prosecute the suit in his name; but if the verdict should be in the negative then the suit should be dismissed, unless the court, from the evidence before the jury, should deem it proper to take other steps in the matter.

The chancellor erred in this case in not directing an inquiry by a jury, as above indicated, but as the person alleged to be of unsound mind has died since the appeal was taken, and the case has been revived in the name of his heirs, to whose interest it is to have the judgment affirmed, the court will not reverse for an error entirely personal to the decedent, and which could in no manner affect the rights of the defendant, the surviving appellant.

3. Deeds—Mental capacity of grantor—As the deed sought to be set aside in this case was executed by the grantor without any adequate consideration, and when his mind from age, disease and excessive use of whisky had become so impaired as to render him incapable of understanding the value of his property and of disposing of it by sale or otherwise, the judgment of the chancellor granting the relief sought must be affirmed.

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Emmet M. Dickson for appellant.

Russell Mann and McMillan & Talbott for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, Matt. Howard, claiming to sue as the next friend of Elijah Howard, filed his petition in the Bourbon Circuit Court against John Howard, in which he sought to annul or set aside a deed executed by Elijah Howard to John Howard, by which the former conveyed to the latter about one hundred and fifteen acres of land. The appellee sought to set aside said conveyance upon the ground that Elijah Howard, at the time of making it, was, from age and disease, too weak in mind to understand the nature of said contract and to resist the arts and wiles of the appellant, who exercised them for the purpose of defrauding said Elijah, and did defraud him into making said contract.

Elijah Howard filed an affidavit in the case, in which he alleged that he was not of weak or unsound mind; that he understood the nature and scope of said contract; that it was for a valuable consideration, and he wished it to stand; that the suit was brought without authority and against his will, and he wished it dismissed; he, accordingly, moved the court to dismiss it, but the court overruled his motion. He thereafter tendered, and requested permission to file, an answer, in which he set up substantially the facts stated in his affidavit; but the court overruled his motion to file it.

The appellant, John Howard, by his answer put in issue the appellee's allegations of fraud, want of consideration, and the weakness or unsoundness of Elijah Howard's mind.

The chancellor upon final hearing set aside said contract, and John and Elijah Howard have appealed to this court. Since the appeal Elijah Howard has departed this life, and the case has been revived in the name of his brothers and sisters—his next of kin—who, owing to their interests being on the side of the judgment of the lower court, must be regarded as appellees, and seeking to affirm the judgment of the lower court.

The appellant contends that the chancellor, upon the affidavit and motion of Elijah Howard to dismiss the case, had no jurisdiction to proceed with the case to a hearing and judgment upon its merits, but he should have issued a writ of inquisition out of chancery for the purpose of having a jury try the issue whether or not Elijah Howard was an imbecile; if yea, to appoint a committee to prosecute said suit; if nay, to dismiss it.

By the English chancery practice the court had no inherent and general jurisdiction over idiots and lunatics as it did of infants. The king, as parens patriæ, exercised essential power over idiots and lunatics, which power he "delegated to the chancellor as a personal representative of the crown by means of an official instrument called the 'Sign Manual,' signed by the King's own signature, and sealed with his own privy seal." The power thus conferred was exercised by the chancellor alone, and not by the court. This special jurisdiction of the chancellor was exercised as follows: Some friend of the alleged lunatic or idiot would address a petition to the chancellor personally, setting forth the fact that such person was a lunatic or idiot. Thereupon the chancellor would issue a special commission, directing a judicial inquisition of the alleged idiocy or lunacy, which was always

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tried by a jury; so long as their finding stood unimpeached it was conclusive. Upon the return of the commission and inquisition, if the party was found to be a lunatic or idiot, the chancellor appointed a committee, whose duty it was to take charge of the person and property of the lunatic or idiot. This committee, in his character as trustee for the lunatic or idiot, became subject to the jurisdiction of the court of chancery, that is to say, as the court of chancery had inherent and general jurisdiction over trusts and trustees, it acquired jurisdiction of the person and property of the idiot or lunatic through his committee, whose office was in the nature of that of a trustee.

This court, in the cases of Nailor v. Nailor, 4 Dana, 339, and Shaw v. Dixon, 6 Bush, 644, decided that a court of equity had no jurisdiction to hear and determine upon its merits a case brought by persons to set aside a sale of another person's property upon the ground that such person was of unsound mind, and incompetent to make the sale. But where the petition set up facts showing that such person was of unsound mind, and not capable of taking care of his property, the chancellor would not dismiss it, but treat it as an information upon which he would direct an inquisition against such person to be tried by a jury, and if he was found to be of unsound mind, then the court would appoint a committee to take charge of his person and estate, and to prosecute in his name the action instituted by such persons.

In the cases supra the persons filing said petitions did not file them in the name of the alleged imbeciles as their next friend nor did they have such a direct interest in the property as would entitle them to bring suit in their individual names or in conjunction with the alleged imbeciles to set the sale aside. Also, in the cases supra, this court not only recognized and adopted, in substance, the English chancery practice in reference to lunatics and idiots, but extended the practice to such persons who, by reason of age or disease, had become imbeciles or unsound in mind to such an extent as to render them incapable of taking care of their property, etc.

By subsection 3 of section 35 of the Civil Code it is provided as follows: "The action of an infant or of a person of unsound mind, who resides in this State, and who has no guardian, curator or committee residing herein, or whose guardian, curator or committee refuses to sue, or his action against his guardian, curator or committee may be brought by his next friend."

The expression as used in the foregoing section, "person of unsound mind," embraces not only lunatics but persons whose minds have become so impaired or infirm (unsound) by age, disease or other cause, as to be unable to take care of their own interest.

Said section, in respect to allowing a lunatic having no committee to sue by his next friend, make an innovation upon the elementary chancery practice, which, as we have seen, did not allow a lunatic to sue by his next friend; but in reference to persons of weak or unsound mind said section, by allowing them to sue by a next friend, simply declared a rule of chancery practice. For, as said in Promeroy's Equity Jurisprudence, volume, 3 section 1314, "the special jurisdiction above described is confined to persons who may be and are adjudicated or found to be lunatics, idiots or non compos mentis. The very first step, in order that the court may, through a committee, control the person and property of the particular individual, is a proceeding by which he is judicially determined to belong to the status of lunatics or non compos mentis. In addition to this peculiar authority the court of equity may, in appropriate cases, in pursuance of its inherent gen-

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eral powers, protect the property of persons of weak or unsound mind, who have not been, and who even can not be, judicially found non compos mentis. These two jurisdictions are wholly distinct. The former is special; the latter is the general jurisdiction of equity exercised not by reason of the incompetency, but notwithstanding the incompetency. The court can only exercise such equitable jurisdiction as it could, under the same circumstances, have exercised at the suit of the person himself, if he were of sound mind." The author refers, in the above section, to the suit of a person of weak or unsound mind by his next friend.

Having seen that a person, under the section of the Civil Code supra, as well as under the chancery practice, of weak or unsound mind, who has no committee, may sue by his next friend, the further question arises: What is the proper course to pursue in case the person, who is an adult, alleged to be of weak or unsound mind, appears in court and protests that he is not of weak or unsound mind; and that the suit was instituted and is prosecuted without his authority and against his will?

The law presumes an adult person to be of sound mind, and capable of managing his own affairs; and the mere fact that it is alleged in a petition by a person styling himself next friend that a particular individual, who is an adult, is of weak or unsound mind and not capable of taking care of his own affairs, does not destroy that presumption. Such petitions are brought in the name of the person alleged to be of weak or unsound mind by his next friend; and it is to be presumed, in the absence of anything appearing to the contrary, that whatever consent to the bringing of the suit such person is capable of giving has been obtained; and that it is in fact his suit, for it is really in his name; and that he has obtained the consent of a friend as the most competent person by whom he wishes his case to be conducted in order that his rights may be the better protected. But he makes known to the court that it is not his suit; that he is competent to take care of his own affairs; that the supposed friend is in fact an intermeddler. The court, in such a state of case, is presented with the question: What is the proper course to pursue?

The individual liberty of the person is involved. His right to dispose of himself (provided he does not interfere with the rights of others), and of his property, by sale, gift or otherwise, as he pleases, is at once recognized as an absolute right, which he can not be deprived of by any court of the land —not even the highest—unless it be made to appear that he, by age, disease or other cause, has ceased to be a man by so far losing his mind as to be incapable of taking care of his property, and has become the victim of shrewd and designing persons. But when he puts in issue the fact that he has thus ceased to be a man, and has become a mere hulk, how is the fact to be determined? It seems to us that the issue which thus involves his personal liberty should be settled by his peers—a jury of his country; and, for that purpose, the chancellor should issue his writ out of chancery, directing an inquiry by a jury into the fact as to whether the mind of the person was so impaired by age, disease or otherwise, as to render him incapable of understanding and appreciating his property rights to such an extent as to render him unable to protect himself against designing persons; and upon the verdict of the jury, if in the affirmative, the chancellor should appoint a committee for the person, and allow him to prosecute the suit in his name; but if the verdict should be in the negative, then the suit should be dismissed,

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unless the court, from the evidence before the jury, should deem it proper to take other steps in reference to the matter.

It will be readily seen, from what has been said, that the chancellor erred in not, upon the issue raised by Elijah Howard, taking the course above indicated. But since this appeal was taken Elijah Howard has departed this life intestate, and the case has been revived in the name of his heirs; and the judgment of the lower court being in their favor, they stand in this court as asking an affirmance of the judgment notwithstanding the error that was committed to the prejudice of Elijah Howard. The said error was in reference to the rights of Elijah Howard alone, which consisted in the refusal of the chancellor, under the circumstances above named, to have a jury empaneled to pass upon the condition of Howard's mind, and in assuming to pass upon that question himself. The error of the court was entirely personal to Elijah Howard, and could in no manner affect the rights of the appellant for if the proof does not sustain the allegations of the petition, then it should be dismissed, and the appellant would be made secure in his contract of purchase. On the other hand, if the proof sustains the allegations of the petition, then, in equity and good conscience, the contract, as the case now stands, ought to be set aside. Therefore, the question arises: Does the proof sustain the judgment of the lower court?

Without going into the proof in detail, for it would make this opinion too long, it is clearly shown by the proof that Elijah Howard's mind, from age, disease and excessive use of whisky, had become so much impaired as to be incapable of understanding and appreciating the value of his property, and of judiciously disposing of the same by sale or otherwise; and that the appellant knew that such was the fact; and that the appellant had great influence over him; that the appellant did influence him to convey to him (the appellant,) said tract of land, which was worth at least forty dollars per acre, without any adequate consideration therefor; for the proof clearly shows that the work and labor of Elijah Howard's wife for the appellant, from 1871 until her death in 1879, and the property and money that Elijah Howard let the appellant have, were worth the board of Elijah and his wife from 1871 until her death, and his board from that period until the said deed was made in 1883; and that the use of said tract of land, which the appellant had from the time of said conveyance, was worth Elijah's board from and after said period.

The judgment of the lower court is affirmed.

MONARCH v. MATTHEWS, &c.

(Filed October 25, 1888—Not to be reported.)

Sales of personal property—Damages—Appellees sold to appellant their crop of corn, the corn to be delivered in appellant's barge at the farm, and to be taken "by the first of February next, or as soon thereafter as a barge can be loaded on or near the bank as to load said barge from wagons." Appellees, upon the faith of a compliance with the contract by appellant, placed the corn in the bottom convenient for delivery, where it was exposed to the danger of an overflow, made no effort to sell it to any other person or otherwise dispose of it, and was ready, with hands and wagons at the place, to make the delivery. Appellant neglected to use the means which he might, with reasonable diligence, have used, and which the contract required him to use, to receive the corn, and in consequence a portion of it

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was rendered worthless by a flood in the river. In this action by appellees to recover of appellant the damages sustained, Held—That there was a breach of the contract, for which the plaintiffs have a right to recover to the extent they were damaged in consequence of the defendant's neglect. And as the corn was rendered worthless, the court did not err in fixing, as the measure of damages, the price of as much of the corn as the defendant might have saved if he had used such diligence as the contract required of him. It is not necessary to determine whether the title had passed.

Haycraft & Slack and E. W. Hines for appellant.

W. J. & J. J. Sweeney for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellees instituted this action to recover damages for an alleged breach of the following contract:

"Owensboro, Ky., December 10, 1883.

"We have this day sold to R. Monarch our entire crop of corn, except enough to run the farm, say one thousand bushels, more or less. Said corn to be weighed on the farm and delivered in his, Monarch's, barge at the farm, for which he agrees to pay us 40 cents per bushel for all good, sound, merchantable corn at seventy pounds to the bushel. Corn to be taken by the 1st of February next or sooner, at the purchaser's option, or as soon thereafter as a barge can be landed on or near the bank as to load said barge from wagons. MATTHEWS & SMEATHERS."

The action having been submitted to the court for trial and a jury, by agreement, waived, it was adjudged that the plaintiffs recover of the defendant the sum of $303.60, and interest from February 2, 1884. And from that judgment the defendant has appealed, and the plaintiffs have been granted a cross appeal.

The damages sued for are alleged to have resulted from a failure of the defendant to have a barge or barges at the place designated of sufficient capacity to receive and take away the corn within the time agreed, whereby 1,600 bushels were destroyed by an overflow of water upon the bottom land where it was raised.

The law and facts found by the court, upon which the judgment was based, are, in substance, as follows: That it was not the duty of the defendant to receive the corn until after February 1; that it was to be received by that date if the water was over the bar so as the corn could be loaded into the barge from the bank, and as the evidence does not show such was the case before that time, the defendant was not until then bound to begin receiving it; that the defendant should have caused the second barge to be taken to the place for receiving the corn upon the return to his distillery of the first barge loaded, which would have enabled him to have loaded on the 6th, 7th, 8th and 9th of February, 1884; that the plaintiffs, if the barge had been there, could have loaded 800 bushels per day, or 3,200 bushels in the four days. And that the plaintiffs lost 759 bushels by reason of the neglect of the defendant, which was the difference between what was actually loaded and what could have been loaded had the defendant complied with the contract.

The evidence is not full and precise as to the actual number of bushels lost by the plaintiffs. And the manner in which the court arrived at the result announced was by deducting the amount of corn, which was not destroyed by the flood and was afterwards received and accounted for by the

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defendant, from what might have been put on the barge during the four days mentioned first previous to the overflow and while the river was rising. As the evidence does not show the precise number of bushels actually lost, we know of no better criterion for determining the question than that adopted by the court, and hence the appellee is not in a position to complain of that finding of fact, nor has the appellant cause of complaint, for, by a compliance with his contract, 3,200 bushels more might have been received and saved before the flood than was done.

This being an action to recover damages for a breach of a contract by the purchaser it is not necessary to discuss the question whether the title to the corn was, at the time of the flood, in him, and at his risk, or in the seller, for, if the latter was ready and able to comply with his part of the contract, and the defendant, purchaser, with notice of that fact, failed to comply on his part and in consequence thereof the corn, or any of it, was lost and destroyed, there was a breach, for which the plaintiff has a right to recover to the extent he was damaged.

The contract must have been made by the parties with knowledge of the difficulties and contingencies incident to the delivery of corn on the bank of the river at that season of the year. The plaintiffs, upon the faith of a compliance with the contract by the defendant, placed the corn in the bottom convenient for delivery, where it was exposed to the danger of an overflow, made no effort to sell it to any other person or otherwise dispose of it, and was ready, with hands and wagons at the place, to make the delivery; in fact the evidence discloses no failure or neglect on his part to comply with the contract.

On the other hand, the defendant neglected and failed to use the means which he might, with reasonable diligence, and the contract required him to use, to receive the corn, and in consequence thereof a portion of it was lost and destroyed, and to the extent of such loss, as found by the lower court, we think the plaintiff is entitled to recover. Otherwise, the plain rule founded upon justice and fair dealing would have to be reversed, and the party complying, instead of the one violating a contract, be made to suffer the loss resulting from a breach, for the evidence makes it plain that if the defendant had used such diligence as the contract required of him at least the number of bushels found by the court to have been lost in consequence of his neglect might have been saved.

As the evidence shows that all the corn, except what the defendant received after the flood, was rendered worthless, the lower court did not err in fixing the price of the corn as the measure of damages.

Judgment affirmed on appeal and cross appeal.

PORTER, &c. v. GREEN.

(Filed October 25, 1888—Not to be reported.)

Fraudulent conveyances—As it is manifest that the conveyance by a father to his sons which is attacked in this case was executed by the grantor to avoid the liability that he was under by reason of his failure as sheriff, the appellants, who were the sureties in his official bond, and have had to make good his defalcation, are entitled to have the conveyance set aside. The defense that the conveyance was executed in compliance with a verbal con-

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tract for the sale of the land made prior to the time at which appellants became bound as the grantor's sureties will not avail, as both the grantees were then under age and had no estate of any value, and the sales were not consummated until after the grantor's failure.

John E. Cooper for appellants.

Wm. Lindsay and Park & Botts for appellee.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Pryor.

It is plain, from the facts of this record that the conveyance by William Green to his sons was made to avoid the liability that the grantor was under by reason of his failure as sheriff of Elliott county. These appellants are the sureties in his official bond, and have had to make good his defalcation. His sons were both under age when it is pretended he made to them these verbal sales of a part of his land. They had no estate or means of any value with which to make such a purchase; nor does the evidence show that they paid a full and fair consideration for the land they are now claiming. These parol sales were not carried into execution by the father until after his failure, and then they are consummated by the execution of deeds that were made to avoid the payment of liabilities for which these sureties were bound.

It is alleged by way of defense that these appellants, who were sureties on the official bond of the sheriff (who is the grantor in these deeds to his sons) knew when they signed the bond as sureties that this land had been sold by the father to his children, and that, in order to indemnify the sureties against loss, their father made to his sureties a mortgage, in which it is recited that a certain part of the land owned by him had been sold to his sons, and, therefore, not embraced by its terms.

It does appear that a mortgage was executed reciting such a state of fact, and that one of the sureties, who is not a party to this appeal, was present when it was prepared by the attorney; but it further appears that these appellants were not present; that the mortgage was not recorded, but placed in the possession of Wm. Green, the father, at the time, and has not been heard of since. The appellants knew nothing of its contents or its execution, and were never indemnified in any manner by Green, and are left to discharge his liabilities with his land conveyed to his sons under circumstances conclusively showing a purpose to retain his property at the sacrifice of these sureties on his official bond.

The judgment below is reversed, with directions to ascertain the amount paid by these sureties, and for which they are liable, and subject the land to the payment of the debts.

HOUNSHELL v. SAMS.

(Filed October 25, 1888—Not to be reported.)

1. Deeds—Undue influence—As the petition in this action by the grantor to set aside a conveyance to his wife alleges the want of mind on his part to resist the importunities of his wife and the influence exerted over him in procuring the execution of the deed, it states a cause of action.

2. Same—Estoppel—The grantor's purchase of the interest of one of the heirs of his wife does not preclude him from assailing the conveyance by which he invested his wife with the fee.

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Robert Riddell and J. S. Mahan for appellant.

J. M. Beatty and J. L. Scott for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Pryor.

A demurrer having been sustained to the original petition, the only inquiry is: Did the amended petition present a cause of action?

In it is alleged the want of mind on the part of the grantor to resist the importunities of his wife, and the influence exerted over him in procuring the execution of the deed; besides, the appellant has purchased out the interest of one of the heirs, and was entitled to that much of the land, if no more. His purchase from one of the heirs of his wife does not preclude him from assailing the conveyance by which he invested his wife with the fee. He had the right to purchase or compromise, and at best it could only conduce to show that the original transaction was free from fraud, but is by no means conclusive.

The judgment is reversed and cause remanded, with directions to overrule the demurrer to the amended petition and for proceedings consistent with this opinion.

CASSELL, &c. v. LEXINGTON, HARRODSBURG AND PERRYVILLE T. R. CO.

(Filed October 27, 1888—Not to be reported.)

Turnpikes—Election of officers—Title of act—Repeal of statutes—An act of May 15, 1886, entitled "An act to better protect turnpike roads in which the State is interested," provides that in all annual elections of directors in any turnpike road company in which the State owns stock the individual stockholders may elect the directors, subject to the approval of the commissioners of the sinking fund. Under that act, in March, 1887, directors of the Lexington, Harrodsburg and Perryville Turnpike Road Co., appellee, were duly elected, and again in March, 1888, the same persons were elected directors. April 12, 1888, an act was passed, entitled "An act to amend the charter of the Lexington, Harrodsburg and Perryville Turnpike Co.," which provided that the charter of that company "be, and the same is hereby, repealed as follows, to wit," it being then provided that the appellee should not be subject to the provisions of the act of May 15, 1886, and that "said act is hereby repealed so far as it applies to this company." It was further provided that the annual election of directors should be held "on the first Tuesday in May next, and on the same date annually thereafter;" and further, that the president and directors elected in March, 1888, should hold their offices until their successors should be elected on the first Tuesday in May. On that day an election was held, at which appellants received all the votes cast. After qualifying they endeavored to take possession and control of the road, and thereupon the directors in control instituted this action to enjoin appellants from interfering with the business. Held—

1. The election held in March, 1888, did not give the directors then elected the right to take the offices as their own successors, as they have never been approved by the commissioners, as required by the act of May 15, 1886, but they are still in office by virtue of their election in March, 1887, unless appellants were legally elected.

2. The subject of the act of April 12, 1888, is sufficiently expressed in the title. The act of May 15, 1886, became a part of appellee's charter, although

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made to apply in the same manner to other companies, and the act of April 12, 1888, repealing that act in so far as it applied to appellee, was an amendment of appellee's charter according to legislative intendment.

3. The act of May 15, 1886, was not a contract obligatory upon the State, but merely a waiver, during its pleasure and no longer, of the exercise of its rights as a stockholder, secured by the original charter, to cast its votes by proxy at elections for officers, which might be resumed at any time. But even if of the nature of a contract, still, being without consideration, it is not binding. Therefore, the act of April 12, 1888, does not impair the obligation of a contract, and an acceptance by the other stockholders was not necessary in order that it should take effect.

4. Section 22 of chapter 21 of the General Statutes, which provides that "when a law which may have repealed another shall be repealed, the previous law shall not be revived unless the law repealing it be passed during the same session of the general assembly," has no application to this case, for the act of May 15, 1886, did not repeal that part of the original charter giving the right to the State to vote at the election of officers, but simply suspended the exercise of that right, and consequently when the corporation ceased to be subject to the provisions of that act the right was revived.

5. As it would not have been reasonable to require or expect all the stockholders to take notice of the passage of the act of April 12, 1888, in time to be present at the election of officers directed to be held on the first Tuesday in May following, and no place was designated, nor special authority given by this act to any person to call a meeting of stockholders, the president and directors of the company were alone empowered to fix the place and make the call, and an election attempted to be held under a call by others was illegal, and conferred no rights upon appellants.

R. P. Jacobs and Thos. C. Bell for appellants.

Bronaugh & Bronaugh, J. D. Hunt and P. B. Thompson for appellees.

Appeal from Jessamine Circuit Court.

Opinion of the court by Chief Justice Lewis.

The question involved in this case is whether Cassell and others, appellants, or Bryan and others, appellees, are legally the president and directors of the Lexington, Harrodsburg and Perryville Turnpike Road Co.

May 15, 1886, an act, entitled "An act to better protect turnpike roads in which the State is interested," was passed and approved, the provisions of which are as follows:

"In all annual elections of directors in any turnpike road company in which the State owns stock the individual stockholders may elect the directors, subject to the approval of the commissioners of the sinking fund. The names of the directors shall be certified to the commissioners of the sinking fund for their approval or rejection by the officers of election. The commissioners of the sinking fund may approve or disapprove of the directors in whole or in part. If all the directors are approved, * * * they shall be directors; if part are approved, those approved shall be directors. The commissioners * * * shall certify their approval to the officers of election. If the commissioners * * * disapprove any director elected as above provided, they shall certify their disapproval to the officers of election; the approved directors shall elect other directors in the place of the disapproved directors. The parties elected as above shall constitute a full board of directors; no disapproved director shall be re-elected."

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Under that act, which was formally accepted by the stockholders of the company, Bryan and others were, March 23, 1887, duly elected directors, and June 16, 1887, the commissioners of the sinking fund certified to the officers of the election their approval of each of them. March 23, 1888, being the time appointed by law, another election was duly held, and Bryan and his associates were again elected. But April 12, 1888, an act, entitled "An act to amend the charter of the Lexington, Harrodsburg and Perryville Turnpike Co.," was passed by the legislature, which is as follows: "That the charter of the Lexington, Harrodsburg and Perryville Turnpike Co. be, and the same is hereby, repealed as follows, to wit: That this corporation shall not be subject to the provisions of an act, entitled 'An act to better protect turnpike roads in which the State is interested,' approved May 15, 1886, and said act is hereby repealed so far as it applies to this company.

"That hereafter the annual election of a president and directors of this company shall be held on the first Tuesday in May next, and on the same date annually thereafter; and the president and directors so elected shall hold their respective offices for one year from the date of their election, and until their successors are elected.

"The president and directors of this company elected in March, 1888, shall hold their offices until their successors shall be elected on the first Tuesday in May, 1888, as hereinbefore provided, and no longer.

"This act shall take effect and be in force from and after its passage."

On the first Tuesday in May, 1888, an election was held in the courthouse at Harrodsburg, and, according to the return made by the officers of that election, Cassell and his associates received all the votes then cast for directors, and after qualifying as such, and electing one of their number president, endeavored to take possession of the road and control of gate keepers and other employes, and to collect the money received for tolls. Thereupon Bryan and his associates instituted this action, alleging they were the only legal president and directors of the company, and obtained an injunction restraining Cassell and his associates from controlling or interfering with the employes or business of the company; and upon final trial the lower court adjudged the plaintiffs to be the legal president and directors, entitled to hold the offices until their successors are duly elected and qualified, and that the defendants turn over to them all the books, papers and money in their possession belonging to the company.

There being no question of the right of Bryan and his associates to the offices in virtue of the election held March 23, 1887, and the approval thereof by the commissioners of the sinking fund, they are still in office, unless there has been a legal election and qualification of their successors. The election held March 23, 1888, did not, nor could, alone give them the right to take the offices as their own successors, because they have not been approved by the commissioners, which the act of May 12, 1886, under which they were elected, required to be done as a prerequisite of their right to qualify and act as such.

The decisive question in this case then is whether Cassell and his associates were, on the first Tuesday in May, 1888, legally elected, and we will now consider the grounds upon which it is disputed:

1st. It is contended the act of April 12, 1888, under which that election was held, violates section 37, article 2 of the Constitution, which provides that "no law enacted by the general assembly shall relate to more than one

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subject, and that shall b· expressed in the title." This court has not construed that section strictl , but uniformly decided that any provision having a natural or necessary connection with the subject expressed in the title may be properly incorporated in the act. Before the act of May 15, 1886, the State, by proxy, cast the votes it was entitled to as a stockholder at each annual election for officers of the several turnpike companies in which it was interested. But that act gave to the other stockholders, composed of individuals and municipal corporations, the power to choose the officers without direct participation by the State in the election, although the validity of such election was made to depend upon the approval of the commissioners of the sinking fund. The effect and intention of it was, therefore, to amend, and it in fact became part of the charter of that company, although it was made to apply, at the same time and in the same manner, to the charters of other companies. So, even if it had not been expressly provided in the act of April 12, 1888, that the charter of the company was to be amended in that respect, the word repeal being used by mistake, the provision contained therein repealing the former act should be regarded an amendment of the charter of the company as it then existed, and properly embraced by the title, for it was an amendment according to legislative intendment.

2d. It is also argued the act is invalid because it impairs the obligation of a contract. We do not consider the act of May 15, 1886, a contract obligatory upon the State, but merely a waiver, during its pleasure and no longer, of the exercise of its right as a stockholder, secured by the original charter, to cast its votes by proxy at elections for officers, which might be resumed at any time just as an individual stockholder could unquestionably do in the same condition. But conceding it to be of the nature of a contract, still, being without consideration, it is not binding. For, as the State owns a majority of the stock, and can, in any case, actually control the election of officers of the company, no advantage accrued to it by the passage of the act, nor have the rights or interests of the other stockholders been prejudiced by the repeal of it. If we are correct in this view it follows that an acceptance by the other stockholders was not necessary for the act of April 12, 1888, to take effect.

3d. The argument of counsel that the last mentioned act did not operate to restore to the State the right to vote at the elections, because its construction must be controlled by section 22, chapter 21, General Statutes, we think is also unsound. That section is as follows: "When a law which may have repealed another shall be repealed, the previous law shall not be revived, unless the law repealing it be passed during the same session of the general assembly." That provision, we think, has no application to this case, for the act of May 15, 1886, as has been before said, did not, nor was intended to, repeal that part of the original charter giving the right to the State to vote at the election of officers, but simply to suspend the exercise of that right, and, consequently, when the corporation ceased, in the language of the repealing act, "to be subject to the provisions of the act" of May 15, 1886, eo instanti the right was revived. Moreover, the intention of the legislature to have the elections held in the same manner as they were previous to that act being clearly shown, the right of the State to cast its votes at such elections necessarily follows.

4th. As it would not have been reasonable to require or expect all the stockholders to take notice of the passage of the act of April 12, 1888, in time to be present at the election of officers directed to be held on the first

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Tuesday in May following, and no place was designated, nor special authority given by the act to any person to call a meeting of stockholders, we think the president and directors of the company were alone empowered to fix the place and make the call. But they failed to do so, and the only call made and notice given was by a person claiming to be the State's proxy and the secretary of the company, neither of whom had any authority whatever.

The election attempted to be held under that call must, therefore, be regarded as illegal, and Cassell and his associates acquired no right in virtue thereof to the offices of president and directors of the company.

Wherefore, the judgment is affirmed.

Chief Justice Lewis delivered the following response to petition for rehearing:

While, for the reasons stated in the opinion, the act of April 12, 1888, was valid with or without a formal acceptance by the stockholders, it does not necessarily follow the election therein provided to be held on the first Tuesday in May could be legally held without notice, by persons authorized to give it, of the place it would be held; for as no place to hold the election was fixed in the act, the stockholders can not be presumed to have had the due notice, and that the legislature can not dispense with.

The provision in the act, that the president and directors should hold their offices until the first Tuesday in May, and no longer, was made in view of a valid election to be held on that day, but it was not intended the offices should become vacant in any event. And as there was no valid election then held, it necessarily follows those then in office are yet and will continue to hold the offices until their successors are legally elected and qualified.

KENTUCKY SUPERIOR COURT.

COMMONWEALTH v. WARREN.

(Filed October 31, 1888.)

Prohibitory liquor laws—Sale by druggists—The act of May 5, 1880, which regulates the sale of liquor by druggists, and termed for convenience the "Druggist Act," applies to localities where local statutes prohibit the sale of liquor, as well as where the general local option law is in force. Nor is it restricted in its application to localities where the sale of liquor was prohibited by law when it was enacted; it applies to all localities where, by statute, whether enacted prior or subsequent to its enactment, the sale of liquor is prohibited, unless the prohibitory statute, either by express terms or necessary implication, excludes the operation of the "Druggist Act."

An act of April 22, 1886, which provides a penalty for the sale of liquor in the Somerset magisterial district, but excepts from its operation druggists who sell upon the prescription of a physician, does not indicate that it was the purpose of the legislature that the "Druggist Act" should not apply to that district. That act being applicable, the indictment in this case was sufficient.

Wm. Herndon for appellant.

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W. A. Morrow and O. H. Waddle for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Barbour.

It is admitted by the demurrer to the indictment that the act of the general assembly, approved March 22, 1886, was in full force and effect in the Somerset magisterial district, in Pulaski county, at the time it is alleged the spirituous, vinous and malt liquors were sold. This act provides that it shall be unlawful for any person to sell any spirituous, vinous or malt liquors in the district named. And that any persons violating its provisions shall, upon conviction thereof, be fined in any sum not less than $25, nor more than $100 for each offense. The act excepts from its operation any manufacturer, wholesale dealer, who, in good faith, and in the usual course of trade, sells by wholesale, and druggists who sell for medicinal purposes on a prescription of a regular practicing physician.

The act of May 5, 1880, which, for convenience, we will term the "Druggist Statute," makes it unlawful for any druggist to sell in any district in which the retail traffic in spirituous, vinous and malt liquors is prohibited by law, any such liquors, unless he shall first obtain from the county court of the county a license to do business as a druggist in such district. The act, after prescribing the penalty for selling liquors without having obtained the license, provides that any person licensed under this act who shall sell any of the liquors mentioned, except upon the prescription of a regular practicing physician, shall, upon conviction, be fined not less than $20, nor more than $100 for each offense. The indictment in this case is unquestionably a good indictment under the statute last referred to if the statute is in force in the Somerset district. Whether the statute is applicable to that district is the only question necessary for us to determine on this appeal. Prior to the enactment of the "Druggist Statute," the general local option laws, and other prohibitory laws which were in force in certain localities, were, to a great extent, evaded by the promiscuous selling of liquors by persons who, as druggists, claimed the right to sell them as medicines. To remedy this evil the "Druggist Statute" was enacted, and it should be construed by the courts with a view to carry out the intention of the legislature, and should be held to include cases clearly within the mischief it was intended to remedy, unless such construction does violence to the language used. (Commonwealth v. Helm, 9 Ky. Law Rep., 539; Lyon v. Hodgen & Miller, 10 Ky. Law Rep., 271.) To hold that the statute was intended to apply only to those localities where the general local option law, which was adopted in 1874, was or might become in force, would be to give to the statute a restricted construction that its language does not require, for, by its terms, it applies to any county, town, district or place in which the retail traffic in spirituous, vinous and malt liquors is prohibited by law. This provision is clearly broad enough to include localities where local statutes as well as where the general local option law is in force. Nor do we think it can be held to apply only to localities where the law as it existed when the "Druggist Statute" was enacted prohibited the sale of liquors. On the other hand, we think that the rational construction to give to the statute is to hold it applicable to localities where, by statute, whether enacted prior or subsequent to the enactment of the "Druggist Statute," the sale of liquor is

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prohibited unless the prohibitory statute, either by express terms or necessary implication, exclude the operation of the "Druggist Act."

The local act of April 22, 1886, subjects any person who sells spirituous, vinous or malt liquors in the Somerset magisterial district to a penalty of not less than $25, nor more than $100, and excepts from its operation druggists who sell upon the prescription of a physician. There is certainly nothing in these provisions which indicate that it was the purpose of the legislature that the "Druggist Statute" should not apply to that district. The local act, in so far as it renders the sale of spirituous, vinous or malt liquors unlawful, and imposes a penalty upon persons violating it, and as to the persons excepted from its operation is identical with the general local option law. That the "Druggist Statute" applies in all localities where the general local option law is in force must be conceded. The two laws being alike, we can not assume that the legislature intended that in the one case druggists might sell without a license, and in the other cases should be required to obtain a license before selling. Had the local act designated who should be regarded as druggists for the purpose of selling liquors, or had especially provided a penalty to be imposed upon druggists who should sell liquor without the prescription of a physician, we would have no difficulty in holding that the "Druggist Statute" had no application. But as the act is silent upon these points, and in terms excludes druggists who sell upon prescription, we think it but a fair construction to hold that the legislature did not intend, by the local act, to regulate the sale of liquor by druggists, but intended that they should be governed by the general law on the subject then in force, which defined who should be deemed as druggists, for the purpose of selling liquors in all localities where the sale of liquors was prohibited by law, and imposed penalties for its violation, and which, by its terms, would come into operation in the district in question upon the adoption of the local law prohibiting the sale of liquors in that district. The general statute and the local statute are thus both upheld and construed as forming one consistent whole. Therefore, the "Druggist Statute" being applicable to the Somerset magisterial district, and the indictment being a good indictment under that statute, the demurrer should have been overruled.

The judgment is reversed and the cause remanded for further proceedings.

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SUPERIOR COURT ABSTRACTS.

DAVIS, &c. v. DAVIS.

Filed November 14, 1888. Appeal from Calloway Circuit Court. Opinion of the court by Judge Bowden, affirming in part and reversing in part.

1. Husband and wife—Fraudulent transfer—The mere fact that husband and wife have separated does not disable the former from disposing of his personal estate, and the purchase from the husband by a creditor who had no other purpose than that of securing his debt, and who had no reason to suspect that the wife would sue for divorce or alimony, was not fraudulent.

2. Divorce and alimony—A decree for the sale of the husband's land for the purpose of paying the sum adjudged to the wife for maintenance and alimony is in no sense a decree divesting the husband of the title to his land. The statutes which prohibit the divestiture of title to land mean that the court shall not order a conveyance; they do not mean that the real estate of a husband shall not be subjected to the payment of alimony allowed the wife, if the late husband does not otherwise pay it.

Thomas P. Cook and G. A. C. Holt for appellants.

JOYES v. SHADBURN, &c.

Filed November 14, 1888. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, reversing.

1. Street improvements—The charter of the city of Louisville apportions the cost of curbing to the front foot as owned by the parties respectively fronting said improvement; such cost is no part of the cost of the improvement to be apportioned against the owners of lots in each fourth of a square.

2. Same—Pleading—The majority of the court hold that as it is necessary in an action to subject property to the payment of the costs of improving an alley for the plaintiff to aver that the alley is a public way, a traverse of the allegation as made is good. It is the opinion of the writer (Judge Barbour), however, that as the alley was improved under an ordinance of the general council, it must be regarded as prima facie a public way; and that this presumption can only be rebutted by the allegation of such facts as show that it is not a public way, as, for example, that the alley is the property of some person or persons.

3. Same—The city council alone has the power to fix the grade of the streets and alleys to be improved, and it is, therefore, necessary in an action like this to allege facts which show that this was done. Therefore, the denial in this case that any city engineer, at any time, made, reported or submitted to the general council a map of or for the grade of the alley is a clear and specific denial of a fact material to the plaintiff's cause of action.

4 Same—The allegations of the answer that the ordinance and contract required a strip of two and one-half feet on each side of the alley to be left for sidewalks, and that the contractor had left on the north side a strip ranging only from ten to twenty-three inches in width, presents a valid defense. As the ordinance does not recite that the alley is twenty feet wide, and as it directs paving except two and one-half feet each side, it is not apparent, from the ordinance, that a paving fifteen feet wide was intended. If in fact the alley was less than twenty feet, then less than fifteen feet was ordered to be paved, and consequently the paving was more expensive than that ordered.

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5. Same—The engineer's reception of the work is conclusive that it was done in the manner contracted for, but it is not conclusive that the improvement was made on the ground directed by the ordinance.

Pat Joyes for appellant; Lane and Burnett for appellees.

DUNN v. CARPENTER'S EX'ORS.

Filed November 14, 1888. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Barbour, affirming.

Descent and distribution—Set-off—Counterclaim—Cross petition—This action was brought by appellees as executors upon a note executed by appellant as part of the purchase price of a house and lot sold to her by them as executors. In the first paragraph of her answer appellant alleges that she is one of the devisees under the will of the testatrix, and as such is entitled to one-fourth of the estate left for distribution after the payment of debts and costs of administration. Whatever this one-fourth may be she asks to have credited upon the note sued on. In the second paragraph she avers that the testator was, at the time of his death, indebted to her for services rendered in a named sum, much larger than the debt sued upon. She makes her answer a counterclaim against plaintiffs in their executorial capacity, and a cross petition against them in their individual capacity (one being a devisee), and also against the other two devisees, and asks that the case be transferred to equity, etc. The court disregarded the answer and rendered judgment for the appellees. Held—1. The answer is not good as a set-off because a debt due by a testator or intestate can not be pleaded as a set-off to a note given to the executor or administrator. And the fact that the debtor in this case happens to be a devisee is no reason why the rule should not be applied.

2. It is not good as a counterclaim because the cause of action which it sets up does not arise out of the contract stated in the petition, and is in nowise connected with the subject of the action. Besides, it does not affect, and is not affected by, the cause of action set up in the petition.

3. It is not good as a cross petition as to the plaintiffs because no cross petition can be prosecuted by the defendant against the plaintiffs; as to the other devisees, because no cause of action is set up against them.

4. The first paragraph does not present a defense first, because it does not appear that the defendant's share of the estate as devisee, after the payment of testator's debts and the costs of administration, would amount to as much as the note sued on; second, because to grant defendant the relief therein prayed for would in effect enable her to receive her distributable share of the estate before the other devisees would be entitled to their share, the answer having been filed within eight months after testator's death, and seven months after the qualification of the executors.

Welch & Saufley for appellant; Hill & McRoberts for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. JONES.

Filed November 13, 1888. Appeal from Laurel Circuit Court. Opinion of the court by Judge Barbour, affirming.

Railroads—Loss of goods—A railroad company which receives goods for transportation is liable as a common carrier until the goods are ready to be delivered to the consignee at the place of destination, and until he has had a reasonable opportunity of receiving and removing them. After this the company is only responsible for loss occasioned by its negligence.

In this case, in which the evidence is clear that the goods had reached their destination, and that the plaintiff had had a reasonable opportunity for receiving them before they were stolen from the depot, the instructions properly presented the question whether the loss was occasioned by the company's negligence.

Hill & Alcorn and Craft for appellant; R. L. Ewell for appellee.

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McMURTRY v. VOWELLS.

Filed November 13, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

Weight given judgment of chancellor—As the only questions presented are questions of fact as to the value of rents and improvements, and the judgment of the chancellor is not against the weight of the evidence, it must be affirmed.

Little & Slack for appellant; Sweeney & Son for appellee.

COCHRAN'S EX'TX v. WHITTAKER & DURRETT.

Filed November 13, 1888. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bowden, reversing.

1. Revivor—Verification and demand—While no demand of the personal representatives is necessary where the defendant dies before judgment is rendered, and the action is revived against his representatives, yet the plaintiff must make the expurgatory affidavit required by section 35 of chapter 39 of the General Statutes. And the personal representatives can not be required to lay a foundation for a rule against the plaintiff by their own affidavit, as is done when the original action is against them.

The court erred in this case in overruling the motion of the personal representatives, against whom the action was revived, to require the plaintiff to file such an affidavit.

2. Same—Costs—The original answer had been held bad on demurrer; the defendant filed an amended answer, and pending a demurrer to the answer as amended she died. That demurrer had not been disposed of when the case was submitted, nor had the answer been withdrawn. Held—That the plaintiffs were not liable for costs incurred, as they would have been if there had been no objection other than the absence of the affidavit required by the statute, except as to costs incurred by the representatives in their effort to have the affidavit made, which the plaintiffs should pay.

R. C. Gray for appellant; H. P. Whitaker for appellees.

FARLANE, &c. v. BURTON'S ADM'R.

Filed November 13, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Judge Bowden, affirming.

Bills of exceptions—Special judge—A special judge presided at the trial, and, having overruled a motion for a new trial, extended the time to present a bill of exceptions till a day in the next term. On that day appellants tendered a bill to the regular judge, who made an order reciting the tender and the absence of the special judge, and laid the motion over. At the second term thereafter the special judge made an order reciting that a bill of exceptions was tendered, and ordered that it be filed. Held—That appellants had no right to ask the regular judge to certify the bill, and the tender to him was of no avail. In the absence of the special judge they should have had the bill certified by bystanders. Besides, it does not appear from the order that the bill filed was the same bill previously tendered.

It is not free from doubt that the special judge retained his judicial function with respect to the particular case so as to certify, as judge, a bill tendered after the term at which he was elected.

George W. Williams & Son and W. N. Sweeney & Son for appellants; Little & Slack for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. REED.

Filed November 14, 1888. Appeal from Bullitt Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Railroads—Presumption of negligence overcome—In this action against a railroad company to recover for the killing of stock by an engine and cars on the line of the company's road the evidence of the engineer and fireman showed that there was a lookout and no danger or obstruction seen until the injury was inflicted, thus supporting the theory of the defendant that

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the animals suddenly came upon the track and were suddenly knocked off; and as the circumstances proved by the plaintiff did not contradict this evidence the presumption of negligence was overcome. (Ky. Cen. R. R. Co. v. Talbott, &c., 78 Ky., 621.)

2. Bills of exceptions—Nunc pro tunc order—On the last day of the term at which judgment was rendered a bill of exceptions was made up, signed by the judge and handed to the clerk, who endorsed it "filed in court," with the date of filing, but failed to enter an order showing the filing. At the next term, upon motion made, after notice, a nunc pro tunc order was made curing the omissions. Held—That the facts within the knowledge of the judge and the endorsement made by the clerk upon the bill of exceptions signed by the judge were sufficient to amend the record by, and that the curative order was proper.

Charles Carroll for appellant; Fairleigh & Straus for appellee.

GIBBS, &c. v. COLLINS, &c.

Filed November 13, 1888. Appeal from Clay Circuit Court. Opinion of the court by Judge Bowden, affirming.

Guardian and ward—Where a guardian, in a settlement with the county court, obtains a credit for a sum which, as guardian, he owes, the person to whom the debt is owing can not recover upon a mere statement of the fact that the guardian obtained a credit for the debt sued for. If a cause of action exists it must be by virtue of some contract between the plaintiff and the guardian, and upon that contract the plaintiff must sue, the allowance of the credit being no more than evidence of an admission by the guardian that he owed the sum.

Hill & Rawlings and J. L. Scott for appellants; L. A. Byron for appellees.

HILL & HILL v. BOSENFIELD & CO.

Filed November 13, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Fixtures—As between vendor and vendee all articles or chattels will pass to the vendee, which are either actually or constructively annexed to the realty. Whether the controlling annexation exists is a mixed question of law and fact. If the facts are agreed, it is a question of law. The important facts to be considered are the appropriation or adaptation of the article in question to the use or purpose of the realty in connection with which it has been used; and the intention of the party connecting the article with the realty, and as evidencing this intention, the nature of the article, the situation of the party making the annexation, and the purpose and use of the articles may all be considered.

Appellants were the owners of a tract of land on which was a distillery, and all the appliances necessary to the manufacture of whisky, all of which were so used by appellants. This property was sold under decree of court and purchased by appellees. In this action by appellants to recover of appellees the value of certain articles which they claim did not pass to appellees under their purchase, and which they allege appellees have converted to their own use, the court, applying the rules heretofore stated, holds that certain-named articles were fixtures and passed to appellees, and that certain other articles were not fixtures and remained the property of appellants.

2. Conversion—Demand—There was a conversion of such property as the defendants used and asserted claim to as their property, which authorized the plaintiffs to sue for it or its value without previous demand, if it was in fact their property. For property which had not been converted, and for which there had been no demand, the plaintiffs had no right to sue.

G. W. Williams & Son for appellants; Weir, Weir & Walker for appellees.

DWELLING HOUSE INSURANCE CO. v. FREEMAN.

Filed November 13, 1888. Appeal from Washington Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

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1. Insurance—Proofs of loss—An insurance company, by denying its liability for any sum, waived its right to preliminary proofs of loss; and a subsequent offer by the company to compromise was no retraction of its claim that there was no legal liability.

2. Same—Overvaluation—Before a policy of insurance can be held void because of overvaluation by the insured the company must show that the overvaluation was made with the purpose of defrauding the company.

3. Same—Evidence—Any evidence which tended to show that the statements of the assured as to the condition, character and value of his property were false, and so known by him to be, was competent.

4. Same—Presumption—The court will presume that a remark of the judge that the plaintiff had the right to recover the full amount of the insurance, without regard to the value of the property, was not addressed to or heard by the jury in the absence of a clear statement that such was the fact.

5. Same—Amount of recovery—Where, as in this case, each of several classes or kinds of property covered by the policy sued on is insured for a separate and distinct amount, each class of property, in estimating the amount of recovery, should be considered as a separate class, and the jury restricted in its findings on account of the destruction of property in that class to tht value of the property so destroyed, not exceeding the sum insured thereon.

6. Same—The insured can only recover the value of property belonging to him or his family. Therefore, the insured in this case had no right to recover under the head of "Wearing Apparel" for the wearing apparel of his hired housekeeper and her children.

W. C. McCord for appellant; J. W. S. Clements for appellee.

SINGLETON v. McQUERRY.

Filed November 13, 1888. Appeal from Garrard Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Vendor and vendee—Payments by widow of vendee—The widow of a vendee made a payment to the vendor on the purchase notes held by him against her deceased husband. The vendor afterwards enforced his lien for the balance due on the land notes, and bought the entire tract of land in payment of said balance. It is now insisted that the widow of the vendee is entitled to have restored to her the amount which she paid. Held—That she has no equitable claim to be placed in statu quo, since the court can not so restore both parties. If, instead of making a payment on the notes, she had taken an assignment to the extent of the value furnished by her, she would have been entitled, upon an enforcement of the lien, to have shared therein.

Anderson & Herndon for appellant; H. C. Kauffman for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. SMITH.

Filed November 14, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Railroads—Rights of passengers—It is the duty of a railroad company, as a carrier of passengers, to furnish first-class accommodations to an extent sufficient to accommodate the usual demands upon it to that end; and having done so, it may establish and enforce rules and regulations in the assignment of passengers, so as to meet the habits and necessities of different classes, and thereby contribute to the comfort of all. A passenger free from personal objection, which will deprive him of the right of selection, has the right to travel in the car best adapted to his or her comfort, provided all the seats in that car are not occupied in advance; if they are, then he must accept a seat in another car, though not as comfortable in all respects, or he may wait until another train arrives.

In this action by appellee, a woman, against appellant she alleges that she purchased a ticket which entitled her to passage on appellant's train from Lebanon to Louisville; that she applied for passage at the proper time and place, which was denied her, she being treated in a rude and insulting manner, for which she claims damages, both compensatory and punitive.

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The evidence shows that the train on which she wished to be carried had two passenger coaches, in one of which smoking was allowed, in the other not; that smoking being disagreeable to plaintiff, at times making her sick, she demanded the right to ride in the rear car, the one in which smoking was not allowed. There is evidence tending to show that the seats in that car were all occupied, and that for that reason the right to ride in that car was denied plaintiff. Held—That if the seats in the rear car were all taken when the plaintiff demanded the right to enter, and she was so informed and requested to take a seat in another car, which was safe and secure, and as comfortable as it could be with reasonable respect to the habits and comfort of the traveling public generally, then it was her duty to have taken a seat therein, or awaited another train. It was, therefore, error to instruct the jury that the defendant could not excuse the refusal to allow plaintiff to enter the car unless it "offered plaintiff a seat in a car as comfortable and convenient and suitable for a woman to occupy as those in the car she tried to enter."

2. Same—Evidence—The plaintiff having been allowed to prove, for the purpose of enhancing damages, that the brakeman received a message from the conductor directing him to allow the plaintiff to enter the car, and that he still refused to do so, the defendant should have been allowed to prove that the message sent by the conductor to the brakeman was: "Tell her to go into the front coach, and as soon as the passengers settle down, if there is room in the rear car she can go in there," and that the brakeman communicated this message to plaintiff. This evidence was competent, not only because it tended to contradict the plaintiff's evidence, but because it tended to show that the conduct of the brakeman was not wanton or wilful.

W. J. Lisle for appellant; W. E. & S. A. Russell for appellee.

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The Kentucky Law Reporter

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KENTUCKY COURT OF APPEALS.

TEMPLETON v. SHARPE, &c.

(Filed November 3, 1888—Not to be reported.)

1. Plea of "non est factum"—In this action upon a promissory note the answer avers that the note sued on is "non est factum as to defendant, it not being a legal promissory note against defendant," and further avers that, owing to a spell of sickness, the defendant "was in no condition to execute a legal promissory note." Held—That these are but legal conclusions, and both averments do not state facts or matter in proper form sufficient to constitute a good plea of non est factum.

2. Limitation—Pleading—Defect cured—The defendant's plea of the California statute of limitation was defective in that it did not aver what length of time had elapsed since the accrual of the cause of action, or any facts to enable the court to determine from it whether a bar did or did not exist; but as the reply admitted the law to be as stated in the answer, and in avoidance relied upon another provision of the statute containing a saving in case of absence from the State, it cured the defect in the answer.

3. Limitation—Lex fori—At the time of the execution of the note sued on both the maker and payee resided in the State of California. Before the maturity of the note the maker removed to this State, and has resided here ever since. Held—That the statute of limitation of this State, where the action was brought, and not the California statute, applies.

4. California limitation law—But even if the California law is applicable, the action is not barred by reason of a saving in that statute in case of absence.

5. Interest—Lex loci contractus—As the note sued on was executed in California, and there was no agreement that the contract was to be performed elsewhere, the rate of interest is governed by the law of that State, but to this end the law of that State relative to interest must be properly pleaded.

6. Same—Pleading—Where the law of another State is relied on in the courts of this State it must be pleaded as any other fact.

The averment of the petition in this case, that at the time the note sued on was executed the legal rate of interest, according to the law of California, was 10 per cent. per annum on all such obligations, was a mere legal conclusion, and did not authorize a recovery under the law of that State, although there was no objection to the pleading by demurrer or otherwise.

7. Any indebtedness incurred out of the State is presumed, unless the contrary be shown, to carry like interest as if it had been created here. (General Statutes, chapter 60, section 7.)

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Wm. S. Templeton for appellant.

Landes & Clark for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Holt.

This is an action upon a note purporting to have been executed by William S. Templeton to Solomon A. Sharp, in the State of California, on August 31, 1871, for $1,920, due three years thereafter and bearing 10 per cent. interest from date.

The petition was filed and summons executed within less than fifteen years from the maturity of the note. When it purports to have been executed both the maker and payee resided in California. The latter continued to do so until his death, and his widow and children, whose right to bring this action is not disputed, have so resided ever since.

The appellant left that State and came to Kentucky before the maturity of the note. He has never returned, and has resided in this State ever since. The answer attempted to present two defenses, one being non est factum and the other a plea of limitation by virtue of the California statute upon that subject. Both are defectively stated, and the general demurrer to the answer, which the lower court overruled, should have been sustained.

The first paragraph avers "that said promissory note sued on by plaintiff in this action is non est factum as to defendant, it not being a legal promissory note against defendant in this action."

The qualification in the latter part of it makes all of it a statement of a legal conclusion only of the pleader. Another portion of the answer shows upon what it was based. It is also averred that, owing to a spell of sickness, the appellant "was in no condition to execute a legal promissory note." This is also but a conclusion, and both averments do not state facts or matter in proper form sufficient to constitute a good plea of non est factum.

The second paragraph is as follows: "Defendant also pleads, in bar of this action by plaintiff, the statute of limitation of plaintiff's native State, California, its legally appointed time for actions on promissory notes having elapsed before the commencement of this action." The defect in this plea is that it does not aver what length of time had elapsed, or any facts to enable the court to determine from it whether a statutory bar did or did not exist.

The amended answer was not curative. It added nothing material. It merely set forth in hæc verba the California statute of limitation. The reply, however, cured the defeat in the answer. It admits the law to be as stated, and in avoidance of it relies upon another provision of the California statute, which, in substance, provides that if, when the cause of action accrues against a person, he be absent from the State, it may be commenced within the time limited after his return; or if after its accrual he leaves the State, the time of his absence is not part of the time limited for the commencement of the action.

The question is presented, therefore, whether the California statute, which limits the time within which to bring an action upon a note to four years from its maturity, is applicable to this case, and if so, whether by it this action is barred?

Before proceeding to consider this question it may be proper to say that the evidence does not sustain the attempted plea of non est factum. The appellant does not, in his own testimony, deny the execution of the note.

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Upon the contrary it, in substance, proves it. He says that he left California "soon after the note was executed." Moreover, it is proven that when a third party presented it to him for payment shortly before suit was brought he said "he would have settled it long before if the plaintiff had treated him right."

It is clear the finding of the lower court upon the evidence that the appellant executed the note was correct. It is the rule of the common law that the lex fori, and not the lex loci contractus, regulates the remedy.

The nature and construction of contracts and the rights and obligations growing out of them are controlled by the law of the place where they may be made; but it is equally well settled that the law of the place where it is sought to enforce them governs the remedy. This is the general rule, and is so because the statute of limitation relates to the remedy.

The right to a particular remedy is not a vested one. In general, each State has entire control over the remedies it will afford to litigants. (McArthur v. Goddin, &c., 12 Bush, 274; Labatt, &c. v. Smith, &c., 83 Ky., 599.)

Section 19, article 4, chapter 71 of the General Statutes provides, however, as follows: "When a cause of action has arisen in another State or country, between residents of such State or country, or between them and residents of another State or country, and by the laws of the State or country where the cause of action accrued an action can not be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this State."

This statute, as was held in the case of Labatt, &c. v. Smith, &c., supra, has no reference to residents of this State. It was enacted for the relief of those who are not residents, but who, having come within the jurisdiction of our State courts, are sought to be made liable by residents of some other State or country upon a cause of action arising in another jurisdiction than that of Kentucky. A cause of action upon a note accrues at its maturity. (Bennett, &c. v. Devlin, &c., 17 B. M., 353.) When it accrued in this instance the appellant was a resident of this State. We are inclined, therefore, to the opinion that the statutory provision just cited does not apply to this case; but that it is controlled by the lex fori or limitation law of this State, which allows a party to sue upon a note at any time within fifteen years from its maturity. The Kentucky statute is not relied upon, and if it were it would not be available, as the time allowed under it had not elapsed when this action was brought; and even if the above view be incorrect, and conceding that the limitation law of California is applicable to this case, yet under it the appellees have a right to maintain their action.

The appellant has never been in California since the maturity of the note. If he could properly claim to have been a resident of that State when the cause of action accrued, yet it would not be barred by reason of the saving in the California statute already alluded to in the case of absence. If no action had ever been brought upon the note, and he were now to return to that State and be sued upon it, he could not defeat it upon a plea of limitation. This defense is, therefore, unavailing, whether the law of the one State or the other controls.

The appellees claim that the judgment should have allowed them ten instead of 6 per cent. interest upon their debt, and their attorneys now present this question in argument. It can not be considered, however, as there is no cross appeal.

Judgment affirmed.

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(Extension of opinion—Filed November 24, 1888.)

It now appears that a cross appeal had in fact been granted in this case, and entered upon the record books; but by the omission of the clerk to make a note of it upon the transcript of the record it was overlooked when the original appeal was determined.

The note sued upon was executed in California. There was no agreement that it was to be paid or the contract performed elsewhere. The rate of interest allowable upon it is, therefore, governed by the lex loci contractus. To this end, however, the law of that State, relative to interest, must be properly pleaded, and then, if put in issue, must be proven. The law of another State is unknown to the courts of this State. It must be pleaded and proven like any fact.

This is the averment of the petition:

"The defendant, William S. Templeton, by his promissory note, bearing date and executed on the 31st day of August, 1871, promised and agreed to pay to the said Solomon A. Sharp, or order, the sum of $1,920 three years after date of said note, with interest thereon, at the rate of 10 per centum per annum from the date thereof until paid; that at the time said note was executed, to wit, the 31st day of August, 1871, the said defendant resided in the State of California, and the legal rate of interest at that time in said State, according to the law of said State, was 10 per centum per annum on all such obligations, and that the contract to pay interest on said sum at the rate of 10 per centum, as stipulated in said note, was lawful in said State, and enforcible under the laws thereof."

This, so far as the law of California is concerned, is but the statement of a legal conclusion. It merely gives the opinion of the pleader. He says the then legal rate, according to the law of that State upon such obligations, was 10 per cent.; and that the agreement in the note to pay interest at that rate was lawful and enforcible there. There is no reference to the particular statute of that State, if there be one upon the subject. There is no statement of it to enable this court to form an opinion as to its effect. To hold the plea good the opinion or conclusion of the pleader must be accepted as a fact.

If the law of another State be relied upon by a party in a court of this State it must be regarded as a fact, which, like any other fact, must be so pleaded that the court may judge of its legal effect.

The averment was insufficient to authorize any evidence as to the law of California. It is true there was no objection, by demurrer or otherwise, to it. It was not merely defective, however. It failed to set forth any fact or ground whatever authorizing a recovery under the law of that State. (Roots v. Meriwether, 8 Bush. 347.)

The evidence upon this subject can not, therefore, be considered, as it, in the absence of pleading, can not avail. Our statute provides that any indebtedness incurred out of the State shall be presumed, unless the contrary be shown, to carry like interest as if it had been created here. (General Statutes, chapter 60, section 7.)

The indebtedness in contest was created prior to the existence of any conventional interest law in this State, and when 6 per cent. was the only rate of interest.

The lower court, therefore, properly allowed but this rate and correctly refused to render judgment for the 10 per cent. interest claimed.

The judgment is also affirmed upon the cross appeal.

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ROUQUETTE v. RYAN, &c.

(Filed June 12, 1888—Not to be reported.)

Writing signed with understanding that it was not to be enforced—Appellant purchased one-fourth interest in the "Mud River Coal Mines," the consideration recited in the deed being $10,000. The other joint owners of the property, with whom he formed a partnership, executed to him a writing, bearing the same date as the deed, whereby they agreed to pay him $500 per annum interest on $10,000 for three years, being together $1,500, "which sum we reserve to ourselves the right to liquidate at any and all times before their maturity, as specified herein," this writing reciting that the agreement is in consideration of appellant having advanced the sum of $10,000 "for the purpose of enlarging the Mud River Coal Co. business." Appellant seeks to recover the $1,500 mentioned and the $10,000, less $2,500, the real value of his one-fourth interest, alleging that the last-named writing, and not the deed, expressed the real consideration for his purchase, and that the $10,000 was not expended as agreed. Held—That the evidence shows that the deed expresses the real contract, and that the other writing was signed under protest and with the understanding that it was not to be enforced, therefore, appellant is not entitled to recover anything.

Weir, Weir & Walker and W. N. & J. J. Sweeney for appellant.

Andrew J. Keller and Wilbur F. Browder for appellees.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Judge Bennett.

Under a judgment rendered in the Muhlenburg Circuit Court, in the case of M. T. Reno v. E. D. Payne, &c., for the sale of the property described in the pleadings in this case as the Mud River Coal Mines, consisting of about 2,600 acres of land, said land was, on the 15th of July, 1878, sold by the court's commissioner, and the appellee, J. B. Ryan, purchased it at the price of $7,350. He executed bond for the purchase price, with A. B. Boswell and J. W. Jewell as his sureties thereon. There was a verbal agreement at the time of said purchase that Ryan, Jewell and Boswell were to be partners in said purchase, in proportion of one-half to Ryan and one-fourth each to Jewell and Boswell, and each was to pay the purchase money in proportion to his interest in the land. By reason of some litigation that sprang up about the time of the sale the sale was not confirmed until 1880, when the sale was confirmed and a deed made to Ryan. The deed was made to Ryan without requiring the payment of the purchase money in full. By a deed bearing date the 10th of December, 1880, the appellee, Ryan, conveyed to appellant, Rouquette, Jewell and Boswell, one-fourth each of said land, the appellant agreeing to pay for his fourth interest the sum of $10,000; $4,856.77 was paid in discharging balance of the purchase money that Ryan yet owed on the land, and $5,144.23 was paid in a short time thereafter. On the following day, the 11th of December, 1880, the appellant, appellee, Jewell and Boswell entered into a written contract of copartnership, under the firm name of the "Mud River Coal Co.," by the terms of which each member contributed his fourth interest in the property as an equal part of the capital stock paid in. Also, Jewell being indebted in the sum of $7,500 to C. & G. Green & Co., of New Orleans, for whom the appellant was the agent, and had in charge the collection of this debt, he, on the 11th day of December, 1880, induced Ryan, Jewell and Boswell to join with him in exe-

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cuting a mortgage to C. & G. Green & Co. on the entire tract of land to secure said firm in the payment of said debt. On the 6th of March, 1882, the appellant executed to C. & G. Green & Co. a mortgage on his one-fourth interest in said land to secure them in a debt of $4,900, bearing interest from the 11th day of December, 1880.

The Jewell note for $7,500 and the Rouquette note for $4,900 having fallen due, C. & G. Green & Co. instituted proceedings in the Muhlenburg Circuit Court for the purpose of subjecting said land to the payment of these debts. At the decretal sale the appellee, Ryan, purchased the interest of Jewell and Boswell in said land, they being jointly bound as principals for said debt, at a price sufficient to discharge said debt, interest and costs; he also purchased the appellant's interest in said land at a price sufficient to pay his debt, interest and costs, whereby he became the owner of the entire tract of land. After this purchase he formed a partnership with some parties in Nashville, Tennessee, by the terms of which they were to, and did, pay off the purchase price of said interests, etc. The sale was confirmed, and the entire property is now owned and controlled by the new firm. These Nashville parties agreed to give the appellee, Ryan, the sum of $25,000 for three-fourths interest in said land.

After the new partnership was formed the appellant instituted this action in equity against the appellee, Ryan, and the other members of the firm, in which he alleges that his purchase was not upon the consideration expressed in the deed, to wit, that he gave $10,000 for one fourth interest in the land; that on the 10th day of December, 1880, the day of the date of the deed, he took from Ryan, Jewell and Boswell the following writing:

"Greenville, December 10.

"Louis T. Rouquette, New Orleans:

"Dear Sir: In consideration of your having advanced the sum of $10,000 for the purpose of enlarging the Mud River Coal Co. business, we, the undersigned, agree to pay you $500 per annum, interest on same for three years from date, being together $1,500, which sum we reserve to ourselves the right to liquidate at any and all times before their maturity, as specified herein, said maturity being 10-13 December, 1883.

"We remain, yours respectfully,

"J. W. JEWELL,
"J. B. RYAN,
"A. B. BOSWELL."

The appellant alleges that the foregoing writing expresses the true consideration of his purchase, and that said sum of $10,000 was never applied by Ryan to the enlarging of said mines; that Ryan was personally bound to pay off the mortgage debt of $7,500; that he failed to do so, and suffered said property to be sold and pass into his own and other hands; that Ryan's purchase redounded to the benefit of the old firm, etc. He claims that he is entitled to the $1,500 mentioned in said writing; also, that by reason of the failure of Ryan to expend said $10,000 in enlarging said mines he has been damaged, and that he is entitled to recover said sum, together with interest thereon, less $2,500—the real value of his one-fourth interest; that he is entitled to recover his proportion of the $25,000 that Ryan received for three-fourths of said land.

The circuit court rendered judgment for the appellant for said $1,500 and interest thereon, and one-fourth of the interest on the $5,144.23. The appel-

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lant, claiming that he is entitled to more than he recovered judgment for, has appealed to this court. The appellee, Ryan, has taken a cross appeal.

The appellee, Ryan, contends that the $10,000 paid by the appellant was a payment for the one-fourth of the land sold to him, and not as an advancement to be used in enlarging the mines, and that the writing sued on was not executed with the understanding that the money was received and used as an advancement for the purpose of enlarging the mines; but it was understood and agreed that said writing was not to be enforced.

The facts established by the record are that the contract for the sale of one-fourth of the property to the appellant was made about the 7th or 8th of December, and the deed was actually made on the 10th of the same month. Judge Eaves, who drew up the deed, swears that all the parties came to his office, in the town of Greenville, and requested him to draw up the deed. He says that he drew the deed in exact conformity with instructions. The deed expresses that the appellant was to pay $10,000 as the price of the land. He says that he, at the instance of the appellant, ascertained the amount of the original purchase money that Ryan owed on the land, and, at the instance of the appellant, inserted said sum in the deed as the cash payment; that on the next day he, at the instance of the appellant and others, drew up the articles of copartnership, in which $8,000—$2,000 each—was agreed on as a working capital; that, on the same day, he drew up the mortgage to C. & G. Green & Co. to secure the payment of the $7,500. He says that not a word was said to the effect that the money that the appellant was to pay was to be used for the purpose of enlarging the mines; but that the deed expresses precisely what the parties agreed on. Judge Eaves' evidence is fully sustained by that of Ryan, Jewell and Boswell. Also it is well established that the verbal agreement, made in the country just a few days before, did not embrace any agreement or understanding that said purchase money was to be used for the purpose of enlarging the mines; on the contrary the same was agreed on as the price of the land. Also the fact that $8,000 was agreed on as the money capital—each member putting in his share—is a strong circumstance against the contention of the appellant. Also the fact that $4,856.77 of the $10,000 was, by the direction of the appellant, applied to the payment of the purchase money then due on the land by Ryan, put it out of the power, as the appellant knew, of Ryan, Jewell and Boswell to apply the same to the enlargement of the mines. He was also bound to know that they had not the means with which to supply the place of the money for such a purpose. Also it is clearly established that said writing does not bear its true date. The proof clearly shows that it was written and signed at South Carrollton on the 14th or 15th of December after the deed, articles of partnership and mortgage had been written and signed. It also appears, by a decided preponderance of evidence, that said writing was suddenly sprung upon the appellees, Jewell and Boswell; that they protested against signing it for the reason that it was not in accordance with the agreement; that they were then assured that it was not to have any effect upon the agreement already made, and that its only effect was to show a rebate of $1,500, which would never be insisted on, and with that understanding they signed it. Sometime after this, as we are informed by the record, the appellant told several persons that he had bought one-fourth interest in the mines at the price of $10,000, and had paid for it. He told this to one of the firm of C. & G. Green & Co. after his return to New Orleans. Had it been true, as now contended by him, that he ad-

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vanced $10,000 to Ryan, Jewell and Boswell, it would have been much easier to reconcile his conduct consistently with his duty to them.

There are other facts that materially aid in the solution of this case. They are, that the appellant came to Kentucky as the agent of C. & G. Green & Co. for the purpose of securing a debt of $7,500 that Jewell owed said firm. His power was plenary. On the 10th of December the day the deed was executed to him, he telegraphed to said firm to send him a draft for $4,900 to be advanced to Jewell for the purpose of being used in the stone business. The firm, supposing that this sum was to be advanced in the interest of securing the $7,500, sent the draft, but this draft was used by the appellant for the purpose of paying the first installment on the land that he purchased from Ryan. The appellant then induced the execution of the mortgage to said firm for the purpose of securing the payment of the $7,500 that Jewell owed it. There was yet $4,900 unaccounted for, so he induced Jewell to execute to the firm his note for $4,900 upon the assurance that the note would be returned to him as soon as he, the appellant, arrived at New Orleans. By and by the firm was apprised of the appellant's conduct; they then returned to Jewell his note and took a mortgage on the appellant's interest in the land to secure the payment of said sum. It may be inferred that the appellant's object in obtaining said writing from Ryan, Jewell and Boswell was to aid him, in some way, in explaining his conduct to said firm. Be this, however, as it may, the facts are clearly against the appellant's theory of the case.

In the case of C. & G. Green & Co. against the appellant the circuit court decreed a sale of his one-fourth interest in said land for the purpose of satisfying his mortgage debt to said firm. This was right. In the case of said firm against the appellant, Ryan, &c., the circuit court decreed that inasmuch as Jewell and Boswell were principals in said debt, their interest in said land should be first offered for sale. We see no objection to this.

As the respective interests of appellants, Jewell and Boswell, in said land were offered for sale to satisfy the debts that they owed as principals, the appellee's purchase of the same did not inure to the benefit of said firm.

The judgment of the circuit court is affirmed on the original and reversed on the cross appeal and the cause is remanded, with directions to dismiss the appellant's action.

THE FRANKLIN COUNTY COURT, &c. v. DEPOSIT BANK OF FRANKFORT.

SAME v. BANK OF KENTUCKY.

SAME v. FARMERS BANK OF KENTUCKY.

CITY OF FRANKFORT v. BANK OF KENTUCKY.

SAME v. FARMERS BANK OF KENTUCKY.

(Filed June 5, 1888.)

1. Laws impairing obligation of contracts—The State possesses the power to make, for a valuable consideration, a binding contract, and with respect to her own contract she stands upon precisely the same footing that she does

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with respect to contracts made between individuals, in so far that she can not pass any law impairing their obligation.

2. Taxation of corporations—Contract by State with corporation—The charter of a corporation, created by an act of the legislature, providing that the corporation, in consideration of paying to the State a specific tax or bonus, is to be released from the payment of all other taxes, constitutes a binding contract, from which the State can not recede without the consent of the corporation unless the State, in making the contract, expressly reserves the power to alter or amend it, or unless there is a general law in force, at the time, which authorizes the State, by subsequent legislation, to alter or amend it, and nothing appearing in the charter showing that the general law is not to govern.

3. Same—Such a contract exempts the corporation from the payment of city and county taxes, as well as from the payment of any other tax to the State, the city and county being parts of the State, and having no power to levy and collect taxes without authority from the State.

4. Same—Extension of charter—An act of the legislature continuing the charter privileges and rights of a corporation beyond the time fixed by the original act of incorporation for their existence does not have the effect of creating a new charter, but merely extends the life of the one already in existence, and, therefore, the act of February 14, 1856, by which the legislature reserved the right to alter and amend, at pleasure, charters thereafter granted, does not apply to acts extending charters granted prior to the act of 1856.

5. Same—Taxation of banks—Even if the acts extending the charters of the Bank of Kentucky and the Farmers Bank of Kentucky, which acts of extension were passed since the act of 1856, can be regarded as creating new charters, it is manifest, from the obligations imposed by the acts of extension and from the nature of the business of these corporations, although not expressed in so many words, that it was the intention, by each of these acts, to continue in force an irrevocable contract, and that the first section of the act of 1856 should not apply.

6. Same—The Deposit Bank of Frankfort was chartered in 1863, no specific tax being agreed on in the charter, thus subjecting that bank to the tax of 50 cents on each $100 of its stock fixed by the general law then in force. By an act passed in 1871 it was provided that the tax then paid by that bank should be "in full of all taxation." By an act of 1882 the charter, together with the amendment, was continued in force for twenty years. Held—That the act of 1871 exempts the Deposit Bank from the payment of any other tax, whether county or State, and even if an act passed in 1876, in the light of the act of 1856, could ordinarily be regarded as repealing this exemption, the act of 1882 continuing the act of 1871 in force shows that it was the intention of the legislature that the act of 1876 should not apply to that bank.

7. Same—The capital stock of a bank and the shares of capital are distinct things and both may be taxed. So also the franchise, the surplus earnings and the real estate are things distinct from the capital stock and from each other, and the State may tax the bank under each of these heads without being guilty of imposing double taxation.

John W. Rodman, Ira Julian, W. H. Julian and Hugh Rodman for appellants.

Wm. Lindsay for City of Frankfort.

D. W. Lindsey for Bank of Kentucky.

Wm. Lindsay and Frank Chinn for Deposit Bank.

A. Duvall for Farmers Bank of Kentucky.

Appeal from Franklin Court of Common Pleas.

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Opinion of the court by Judge Bennett.

The Franklin County Court, appellant, having assessed for county taxation all the corporate property in Franklin county of the appellees, including their notes, bonds, bills, money and choses in action, the appellees brought their separate actions of injunction against the appellant for the purpose of enjoining the collection of said tax.

The city of Frankfort, appellant, having assessed the real estate of the appellees within the corporate limits of Frankfort for the purpose of taxation, the appellees brought separate actions of injunction against the appellant for the purpose of enjoining the collection of said tax.

The lower court having perpetuated the appellees' injunction in each action, the appellants have separately appealed to this court. It is agreed that the cases may be heard together. They will be noticed in the order in which they stand.

FRANKLIN COUNTY COURT v. THE BANK OF KENTUCKY.

The appellee, the Bank of Kentucky, was chartered in 1834 by an act of the legislature of this State. This incorporating act provides that the appellee shall have and keep its principal office of discount and deposit in the city of Louisville, and it shall be the appellee's duty to establish not less than four, nor more than six branches, and one branch shall be located at the seat of government, "to aid in the management of the fiscal affairs of the State." The act authorizes the appellee to have "a capital stock of $5,000,000, divided into shares of $100 each;" that the amount of capital that "shall be employed at the principal bank, and at the several branches, shall be under the control of the president and directors of the principal bank;" that the appellee shall have "full power and authority to acquire, hold and enjoy such real estate as shall be convenient for the transaction of its business, or which may be received in discharge of any debt, or purchased in satisfaction of any judgment or decree in favor of the bank, or in the purchase of any property on which the said bank may have a lien." The 15th section provides: "That it shall be the duty of the cashier of the principal bank on the 1st day of July, 1836, and on the 1st day of July in each succeeding year, during the continuance of this charter, to pay to the treasury of this Commonwealth 25 cents on each $100 of stock held and paid for in said bank, which shall be in full of all tax or bonus: Provided, That the legislature may increase or diminish the same, but at no time shall the tax exceed 50 cents on each $100 of stock paid for in said bank."

In 1837 the legislature fixed 50 cents as the sum that the appellee should pay into the treasury on each $100 of its capital stock, "which shall be in full of tax or bonus." By the act of 1834 the appellee's charter was to continue in force until the 1st day of October, 1864.

The legislature, by an act approved February 15, 1858, enacted that the chartered privileges and rights of the appellee should continue in force for twenty years from the 1st day of October, 1864. "But said extension of the charter of said bank shall be subject to the following restrictions and provisions:"

1. It shall be subject to all the limitations, conditions and duties imposed upon it by the act of incorporation. * * * 3. After this act of extension akes effect the amount of circulation shall not be greater than the amount

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of capital actually paid in. * * * 4. The appellee shall establish a branch at the town of Columbus, Ky., with a capital of $150,000. * * * 5. The appellee shall, within a year from the 10th day of May, 1858, by a vote of a majority of its stockholders, determine whether it will accept the "proposed extension;" and if it determines to accept it, it shall notify the governor of the Commonwealth of the acceptance by the certificate of its president and directors, and this act shall be in force from that date.

The 6th section provides that the appellee "shall pay annually to the commissioners of the sinking fund 50 cents upon each $100 of the contingent fund now held, or may hereafter accrue, to said bank over and above the amount now required to be retained by its charter."

By an act of the legislature, approved February 1, 1872, the appellee was authorized to purchase from the Commonwealth the stock which she owned in its bank. But the "bank shall annually, on the 1st day of January, pay into the treasury a tax of 50 cents on each share of $100 of its increased capital stock, which shall be in full of all tax or bonus on such increased capital stock."

The 5th section provides: "That the charter of the Bank of Kentucky be, and the same is hereby, extended twenty-five years."

The appellant's first contention is that the legislature had no constitutional power to exempt the appellee from the common burden of taxation except "in consideration of public services." It contends that the exemption of the appellee from all taxation, except 50 cents on each $100 of its capital stock, was not "in consideration of public services," and, therefore, void.

At the time the appellee was chartered, and for years afterwards, the Federal government issued no paper currency. Banks and banking were creatures of the respective States. It was the policy of this Commonwealth to charter banks, with authority to issue paper currency, based upon a gold and silver redemption upon the demand of the holder. The issue of these banks constituted, in the main, the circulating medium in the Commonwealth for individual, commercial and public uses. While the aggregation of capital for banking purposes was, on the part of the projectors, for the purpose of individual gain, yet the Commonwealth accepted the overture as auspicious to the purpose of furnishing a currency as stable as in the nature of things it could be made, for the private, commercial and public benefit of her citizens, also to aid her in the management of her fiscal affairs, which not only consisted in the providing of means to meet the ordinary administration of State affairs, but sometimes extended, at least might extend, to the borrowing of money to meet any extraordinary or unforeseen emergency. Therefore, we should hesitate to decide, were it material to decide the question, that the granting of the charter to the appellee, and the fixing of a specific tax of 50 cents on each share of its capital stock was not in consideration of public services. But the right of the State to grant the charter to the appellee and exempt it from the payment of all taxes, except 50 cents on each share of its capital stock, rests upon the power of the State to make, for a valuable consideration, a valid and irrevocable contract.

The State of Kentucky, in the management and control of her affairs, in her relation to the other States, in her relation to the Federal government, except in so far as certain powers are delegated by the Constitution of the United States to the Federal government, or one denied to the States, is sovereign by right. It is, by virtue of her sovereignty, that she has the

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power to contract. No binding contract can be entered into except by virtue of sovereign power. It is by this power that the State makes contracts with individuals; that she borrows money and gives her obligation for its payment. To deny a State the power to make binding contracts is a denial of its power as a sovereign. Possessing the sovereign power to contract, she exercises the right just as an individual exercises his. The individual, in exercising the right of contract, does not barter away his sovereignty; he, for a valuable consideration, simply exercises it; for a valuable consideration, coming to him from the other party to the contract, he surrenders something and reserves something in its stead, which he deems as an equivalent. Whether the one or the other has in fact received an intrinsic equivalent for that with which he has parted is not the question. The fact that it is of more or less value, and deemed by him to be an equivalent, is all that is required to make the contract irrevocably binding. In thus contracting he does not surrender his sovereign power, he merely exercises it. Upon precisely the same principle the Commonwealth contracts. If her contract is without any valuable consideration it is a nudum factum, so is that of the citizen, but if there is a valuable consideration to support it, she is bound by it, not upon the idea that she has surrendered or bartered away her sovereignty, but that she has exercised it in accordance with what she deems to be for the best interest of her citizens. The State possessing the power to make, for a valuable consideration, a binding contract, she falls within that provision of the Federal Constitution that declares that she shall pass no law impairing its obligation. In respect to her contracts she stands upon precisely the same footing that she does in reference to the contracts made between individuals—she shall pass no law impairing their obligation. In accordance with the foregoing views the Supreme Court of the United States, ever since the Dartmouth College case, 4 Wheaton, 518, have consistently held that the creation of a corporation, especially banks, by the legislature of a State, whereby it was agreed that the corporation, in consideration of paying to the State a specific tax or bonus, was to be released from the payment of all other taxes, constituted a binding contract from which the State could not recede without the consent of the corporation, unless the State, in making the contract, expressly reserved the power to alter or amend it, or unless there was a general law in force at the time of making the contract which authorized the State, by subsequent legislation, to alter or amend it, and that there was nothing appearing in the legislative act of the contracting parties showing that the general law should not govern it. (State Bank of Ohio v. Knoop, 16 Howard, 369; New Jersey v. Yard, 95 U. S., 104; Farrington v. Tennessee, 95 U. S., 679.) This doctrine is so firmly rooted in the decisions of the Supreme Court of the United States, and so universally recognized by the courts of last resort of all the States, that a decision by us, holding the contrary, would be regarded as eminently sporadic.

Does the provision in the appellee's charter and amendments, declaring that the payment of fifty cents on each $100 of its capital stock "shall be in full of all tax or bonus," exempt the appellee from the payment of county or city taxes? The appellant contends that it does not.

It may be regarded as settled by the current of authority, and for the purpose of this investigation we will concede that it is so settled, that the ap-

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pellee's capital stock and the shares of its stock are distinct things. That the capital stock is the money authorized to be paid in, and actually paid in, as the basis of the business of the bank and the means of conducting its operations. The bank can not increase or diminish this capital stock without express authority to do so; for the reason that it constitutes a trust fund which is held by the appellee as trustee, first, for the purpose of meeting and making good its liabilities; second, after discharging its obligations for the benefit of its stockholders. The shares of the capital stock are represented by certificates. Each holder is a beneficiary to the extent of his ownership, but he can not control or withdraw a dollar of the principal: that must remain as the basis of the appellee's business operations. The shareholder is entitled only to share in the profits. So the capital stock and the shares of the capital stock are distinct things, and both may be taxed. So, also, the franchise—the right of the bank to exercise its powers in the prosecution of its business as a distinct right from its capital stock—may be taxed. So, also, its surplus earnings, being distinct from its capital stock, may be taxed. So, also, its real estate, if it does not represent its capital stock, but only its earnings which are not a part of its capital stock, may be taxed. (Angell & Ames on Corporations, sections 576, 577; Tinsley v. The People, 4 Wall. 459; National Bank v. Commonwealth, 9 Wall. 353.)

If when the State granted to the appellee its charter, she had been silent as to her right to tax it, she would have the absolute right to tax it under the foregoing heads, without being amenable to the objection of being guilty of imposing double taxation. Nor could it be successfully maintained that the appellee would not be liable to be taxed by the appellant, the county court, under the act of the 17th of March, 1876, and by the appellant, the city of Frankfort, under its charter. But the State did not choose to be silent. It did speak. It said that, in consideration of the appellee's paying into the treasury fifty cents on each $100 of its capital stock paid in, without reference to its real value, such payment should be "in full of all tax or bonus." To say that this language has reference to the capital stock of the appellee, and not to the shares of its stockholders, or vice versa, or that it has no reference to the real estate of the appellee, acquired or used in its legitimate business, would be to torture the meaning of language. The State agrees that, in consideration of receiving fifty cents on each $100 of the appellee's capital stock paid in, the same shall be in full of all tax or bonus. It is conceded that this language binds the State to make no other assessment; and well may the concession be made because, regarding the fifty cents in the light of a payment on the stock as capital stock proper or as the stockholders' shares, yet the contract says that the payment "shall be in full of all tax or bonus." Also regarding the appellee's real estate as a separate subject of taxation (and so is the capital stock and the shares), yet the contract says that the payment of the fifty cents shall be in full of all taxation. If any part of the appellee's property, its franchise, its capital stock, or the shares of its capital stock, or its real property, used in the operation of its business, is to be taxed in addition to the fifty cents, then it can not be truthfully said that the payment of the fifty cents is "in full of all tax or bonus." As before said, it is conceded that the terms of the contract bar the State from imposing any additional taxation; but it is contended that its terms do not bar the county and city from levying and collecting taxes for county and city purposes. In this position council clearly overlook the fact that the county and city are integrant parts of the State, and that they can not levy and collect taxes without the authority of

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the State conferring that right upon them; so the absurdity is presented, that the State contracts with the appellee, in consideration of its paying fifty cents on each $100 of its capital stock, to release it of "all tax or bonus" —this is the meaning of the language—and at the same time authorizes its local subdivision to levy and collect other taxes off of the appellee, that is to say, that the State, by its contract with the appellee, deprives itself of the right to levy and collect other taxes off of the appellee, but may, notwithstanding, authorize all of its subdivisions, if the appellee's property and business were distributed in all of them, to levy and collect other or additional taxes off of it. It seems that it would occur to one at first blush that such a procedure would be a palpable violation of the contract "Under such a contract between individuals a doubt could not exist." The State, when she makes a contract, based upon a valuable consideration, stands upon precisely the same footing.

In the Bank of Cape Fear v. Edwards, 5 Ired, 516, where the charter provided that the bank should pay annually into the treasury of the State twenty-five cents on each share of its stock owned by individuals, and that the bank should not be liable to any further tax, it was held that the bank was liable to no other tax, State or county. (Also, Farrington v. Tennessee, 95 U. S., 679, and New Jersey v. Yard, 95 U. S., 104, and the authorities cited.) Also in the case of the Farmers Bank (one of the present appellees) v. Commonwealth and Greenup County, 6 Bush, 127, where the bank's charter provided that the annual payment into the State treasury of fifty cents on each $100 of the bank's capital stock "shall be in full of all tax or bonus," it was held that said provision exempted the bank from the payment of all other tax, whether State or county, including the bank's real estate purchased for debt.

The appellant's next contention is that, if the appellee's charter exempted it from all taxation except that therein provided for, the same expired on the 1st day of October, 1864, and the act of the 15th of February, 1858, extending the charter for twenty years, created a new corporation, which the legislature, under the act of February 14, 1856, reserved the right to amend at pleasure; and that the act of the 17th of February, 1876, authorizing counties that levied and collected ad valorem taxes, to assess banks and other corporations within said counties, operated as a valid amendment of the appellee's charter to the extent of authorizing the collection of said taxes.

The act of the 14th of February, 1856, provides:

"Sec. 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

"Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter."

There is a broad distinction between the extension of a charter and the grant of a new one. An act which continues the life of a charter to a period beyond the time fixed in the charter for its expiration, and reserves the corporate organization, privileges, powers, duties and rights, is an extension of the charter. Thus extended, it is the same charter with a continued lease of life, under which the organization must be kept up; to which the company must look for its powers, privileges and rights; by which it is to be governed and controlled. The act of extension relates back to the date of

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the charter. The legislature and the company are presumed to contract for the extension with reference to that event, by which the respective rights of the contracting parties were agreed on, which agreement, in consideration of the continuous discharge of the obligations therein expressed, is to be continued beyond the time first agreed on. (Angell & Ames on Corporations, section 780; Temple v. Marshall, 1 Gilman, Ill., 672; Exeter Bank v. Rogers, &c., 7 New Hampshire, 32; Lincoln and Kennebec Bank v. Richardson, 1 Greenleaf, 72.)

Here the legislature, by the act of 15th of February, 1858, continued the chartered privileges and rights of the appellee twenty years from the 1st day of October, 1864. This extension did not have the effect of creating a new charter, but merely extended the life of the one which was already in existence, therefore, the act of the 14th of February, 1856, does not apply, for the third section expressly provides that the act shall only apply "to charters and acts of incorporations to be granted" thereafter.

Conceding, however, that the act of 15th of February, 1858, creates a new charter, was it not the intention of the legislature, "plainly expressed," not in so many words, it is true, that the first section of the act of 1856 should not apply to it? Let us see. The act of 1858, as an additional consideration for the extension, provides that the appellee should establish a bank at Columbus, Ky.; that the amount of its circulation should not be greater than the amount of its capital stock actually paid in; that it should, in addition to the fifty cents per share on its capital stock, pay annually fifty cents upon each $100 of its contingent fund; that it should be subject to all the limitations, conditions and duties imposed upon it by the act of incorporation; that it should formally accept the terms of extension. In addition to this the act of the 1st of March, 1872, authorized the appellee to purchase the stock that the State held in its bank, upon which it was to pay annually fifty cents on each $100, which was to "be in full of all tax or bonus" on such increased stock; also her charter was "extended twenty-five years;" that the appellee, in addition to its former obligation, agreed to pay annually fifty cents on each $100 of its contingent fund and increased capital stock for the period of twenty-five years; that it was to be exempted from all other taxation thereon during that period; that it was to establish another branch at Columbus, Ky.; that it was to restrict its circulation; that its business involved a large capital, the profits of which were limited to 6 per cent. interest; that well-defined and permanent rules were essential to its successful management; that changes in its chartered privileges might hazard its success and safety, and render uncertain and precarious a business whose success depended upon a steady adherence on the part of the State to its plighted faith. These considerations induce the belief that the acts of 1858 and 1872 were intended to continue in force an irrevocable contract.

FRANKLIN COUNTY COURT v. FARMERS BANK.

The appellee was chartered in 1850, which was to continue in force until the —— day of ———, 1880. By the fifteenth section of said charter the appellee was required to pay annually into the State treasury fifty cents on each $100 of its capital stock, "which," according to said section, "shall be in full of all tax or bonus." By an act of the legislature, approved March 10 1876, the appellee's charter was extended for the period of twenty-five years from and after the expiration of the time fixed in said charter. The

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principles announced in the Bank of Kentucky case, supra, apply to this case.

FRANKLIN COUNTY COURT v. DEPOSIT BANK OF FRANKFORT.

The appellee was chartered March 3, 1863, to continue twenty years. There was no specific tax agreed on in the charter; but by the general law then in force the appellee was required to pay annually into the State treasury fifty cents on each $100 of its stock. It may be conceded that, as the appellee and the State, by the terms of the charter, made no contract in reference to taxation, the State would have the power to subject the appellee to the payment of such taxes as are imposed upon persons generally; and that the appellant would have the right to tax the appellee under the law of 1876. But the legislature, by an act approved March 18, 1871, declared "that the tax or bonus now paid by said bank in future shall be in full of all taxation; but this shall not be construed to apply to city tax upon real estate owned by it." By an act approved February 23, 1882, the appellee's charter, together with the foregoing amendment, was extended and continued in force for twenty years from the 3d of March, 1883.

The language of the amendment of 1871, "in full of all taxation," not only exempts the appellee from the payment of any other tax, whether county or State, but its meaning is made doubly clear by the succeeding clause that excepts from the exemption city taxes on its real estate. Also if the act of 1876, in the light of the act of 1856, should ordinarily be construed as repealing the exemption from taxation, so far as the appellant is concerned, the act of 1882 puts that matter at rest; for, by said act, the act of 1871 is expressly continued in force, thereby showing that it was the intention of the legislature that the act of 1876 should not apply to the appellee.

THE CITY OF FRANKFORT v. THE FARMERS BANK OF KENTUCKY.

From what has been said in the case of the Franklin County Court v. The Bank of Kentucky, it follows that the appellant, the city of Frankfort, has no authority to tax the real estate belonging to either of the appellees.

The judgment of the lower court in each case is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. SMITH'S ADM'R.

(Filed October 27, 1888.)

1. Limitation—Summons—An action is commenced, and the statute of limitation ceases to run, upon the filing of the petition and the issuing of summons, although the summons be made returnable to a term of court commencing within ten days from its date, the provision of the Code fixing the term to which a summons shall be made returnable being directory merely.

2. Willful neglect—Pleading—In an action against a railroad company, under section 3 of chapter 57 of the General Statutes, to recover for the death of one whose life is alleged to have been lost by the willful neglect of the defendant, the plaintiff may recover under section 1 of that chapter upon proof of ordinary neglect, provided the deceased was not an employe of the defendant, and it is not necessary to that end that the petition should allege that the deceased was not in the employment of the defendant; that fact may be developed by the proof so as to control the right of recovery.

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Wm. Lindsay, Chas. Carroll and W. R. Thompson for appellant.

E. E. McKay and F. P. Straus for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, as the administrator of Warren Smith, sought, by his petition filed in the Bullitt Circuit Court, to recover of the appellant damages for injuries that his intestate received, which caused his death, by falling from the appellant's passenger platform, which falling was caused by the "willful and careless negligence" of the appellant to keep said platform in a reasonably safe condition.

The petition was filed and summons was issued thereon and served on the appellant within a year from the accrual of the cause of action. But the summons cited the appellant to appear at the next term of court, which commenced within ten days from the date of the summons. At said term of court no order was made in the case, except that of a continuance; at the following term of court the summons, upon the appellant's motion, was quashed upon the ground that it was made returnable to a term of court commencing within ten days from its date. Thereafter an alias summons having been issued and served, the appellant, by its answer, put in issue the material allegations of the petition; and more than a year having elapsed from the accrual of the cause of action to the issual of the alias summons the appellant pleaded the statute of one year's limitation as a bar to the appellee's right to maintain the action.

The appellant contends that the first summons, having been made returnable to a term of court commencing within ten days from its date, was void, and in consequence thereof the appellee's action was not commenced within a year from its accrual.

Section 39 of the Civil Code of Practice provides: "An action is commenced by filing, in the office of the clerk of the proper court, a petition stating the plaintiff's cause of action; * * * and by causing a summons to be issued or a warning order to be made thereon."

Section 40 prescribes the requisites of a summons, and among other things provides that it must fix a time for the defendant to answer.

Section 44 provides: "The summons shall be returnable to the first day of the next term of the court, which does not begin within ten days from the date of the summons."

So, by section 41, the summons must fix a day for the defendant to answer, and by section 44 the day fixed must not be less than ten days from the next term of court, and if the next term of court commences within ten days from the date of the summons the defendant must be cited to answer at the next term thereafter. The law is that the defendant shall have at least ten days in which to answer. It is not the summons that gives him this right, but it is the law. No judgment can be rendered against him until at least ten days after he is notified by summons that an action has been filed against him. It is not the summons that teaches him this, but it is the law. The object of the summons is to apprise him that a petition has been filed against him, by whom and for what. If at the date of the issual of the summons it is ten days or more until the next term of court, then he must

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be cited to appear at that term. And the return upon the summons shows when it was served, which fact is noted upon the judge's docket book in order that he may see and know whether the defendant has been served at least ten days before the commencement of that term of court. If he has been served that length of time, then the court has acquired jurisdiction of him at that term. If he has not been served for said length of time, then the court has no jurisdiction of him at that term, and the case must be continued until the next term. The reason of this is, that the defendant, by virtue of the law and not merely the summons, has at least ten days before the commencement of the term of court to prepare his defense, and the summons is merely required to harmonize with the rule of law, which is mandatory that no judgment shall be rendered against the defendant until he has been allowed ten days in which to make his defense, if any he has. The law instructs him as to the time thus allowed him, and not the summons. He knows that if the summons is served upon him within ten days before the next term of court, and that fact will appear upon the judge's docket, by which the judge will see that he has no jurisdiction at that term of court, and the case will be continued until the next term of court, at which time the court will have jurisdiction of him. So if the summons, being dated within ten days of the next term of court, cites him to appear at said term, and is served upon him before the commencement of said term, he nevertheless knows that the law allows him at least ten days in which to prepare his defense, and that the fact that the summons was not issued and served in time will appear, and the case will be continued until the next term; he also knows that he has been sued, by whom and for what.. He also knows that, notwithstanding the error of the clerk, the case will be continued until the next term of court, in the same manner as if the summons had been issued in time, but not served in time for that term of court. He knows that, notwithstanding the error of the clerk, no judgment will be rendered against him at the next term of court, nor additional burden imposed upon him; that the case will be continued to the following term, where it would have gone had the summons cited him to answer at that term.

So it will be readily seen from what has been said that the provision of the Code, supra, in reference to citing the defendant in the summons to appear at a term of court commencing not less than ten days after the date of the summons, is not mandatory but merely directory; for the reason, as above intimated, that the section of the Code, supra, gives to the clerk directions which he ought to follow in issuing the summons, in order for it to repeat to the defendant a rule of law; but the directions so given are not essential to the ascertainment of the defendant's legal rights; they are merely directions contained in the summons to accomplish a given end, but the given end, by the plain rules of law, is understood and accomplished without the directions being contained in the summons, for it is the duty of the judge not to render judgment against him unless is affirmatively appears that he has been summoned at least ten days before the commencement of the term of court, and if not, to continue the case to the succeeding term; it is the duty of the court to do this, notwithstanding the misdirection or nondirection of the clerk in issuing the summons. So the end that the law has in view for the protection of the defendant, that is, that he shall be allowed at least ten days in which to prepare his defense, and if the summons has been returned to court, executed on him within that time, the court must, of its own motion, continue the case until the next term, is

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accomplished notwithstanding the fact that the clerk gave a wrong direction in the summons. Also, when the plaintiff has filed his petition setting forth his cause of action, and has caused a summons to issue thereon in time to save his right of action, he has done all that the law requires him to do, for it is the official duty of the clerk to issue the summons in accordance to law, and it is not incumbent upon the plaintiff to see that he issues it in acordance to law; on the ocntrary he has the right to repose entire confidence in the clerk's not only knowing his duty but doing his duty, therefore, the plaintiff is not guilty of the laches that is contemplated by the statute of limitation in order to deprive him of his remedy, as it was caused by the act of the clerk who was officially bound to act according to law in the interest of both appellant and appellee, and in so far he may be treated as an agent, he was equally the agent of both, as in issuing the summons it was his official duty to protect the rights of both. If these reasons are not sufficient in themselves to prevent the statute of limitation from running, they at least furnish strong reaons why the duty of the clerk, in the particular above mentioned, should be construed as merely directory. His duty being merely directory, it follows that the appellee's action was kept alive, and, therefore, was not barred by time.

The jury passed upon the question of neglect and found the appellant guilty of ordinary neglect, and the deceased not being an employe of the appellant, the appellee, as his administrator, had the right, under section 1, chapter 57 of the General Statutes, to recover for the injury and consequent death of deceased by ordinary neglect.

The fact that the petition fails to state that the deceased was not an employe of the appellant dos not render the petition defective for the reason that the appellee had the right to recover for either wilful or ordinary neglect, the deceased not being an employe of the appellant, and as ordinary neglect is but a lower degree of wilful neglect, the appellee had the right to sue for the higher degree, and if the proof failed to establish that degree, but established the lower degree, to recover for the same. And whether or not the deceased was an employe of the appellant could be developed by the proof so as to control the right of recovery, or the fact, if it existed, could have been made known by the answer.

The judgment of the circuit court is affirmed.

PEOPLES v. COMMONWEALTH.

(Filed October 27, 1888.)

1. Murder—Abortion—Where the means used to procure an abortion result in the death of the mother, the person using the means is guilty of either murder or manslaughter, and not merely of involuntary manslaughter. Where the act is done with no intent to inflict serious injury, and in such a way that it is not, per se, likely to so result, but through negligence in the operation death does ensue, the offense is but manslaughter.

2. Same—Section 2 of article 4, chapter 29, General Statutes, was not intended to meet such a case, and does not repeal the common law relating to it.

3. Same—Indictment—The indictment in such a case being for the death of the mother, it is not necessary to allege that she was "quick" with child.

4. Same—Evidence—A conviction may be had in such a case upon the statements of the deceased alone, as she is not an accomplice within the meaning of section 241 of the Criminal Code.

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5. Dying declarations — Prejudicial errors — Statements made by the deceased five or six days before her death, detailing the circumstances of the injury, were admissible in evidence as her dying declaration, as it appears they were made by her under a sense of impending death. The fact that, subsequently to making those statements, she said to one of her physicians, after being told that her case was a grave one, that "if she was not going to live she wanted the truth known, but so long as there was a prospect of her getting well she wanted it suppressed," does not show that she had any hope or expectation of surviving the injury.

But even if these statements were incompetent they were not prejudicial, as she subsequently made a statement, which was in evidene, and which was unquestionably competent, to the effect that the accused performed the operation, from the effect of which it is certain the death resulted, and while so much of that statement as did not relate to the circumstances attending the injury was incompetent, it was not prejudicial.

6. Instructions—Prejudicial errors—While it was error to instruct the jury that they were "the sole judges of the credibility of the witnesses and of the weight to be given the testimony," such an instruction was not prejudicial.

Baker, Kinney & Kinney and S. M. Bernard for appellant.

Frank Parsons for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Mary A. Peoples, complains of her conviction for manslaughter upon the charge of committing an abortion upon Emma Wendelkin, resulting in her death.

The unfortunate girl was seen near the house of the accused, and when going and returning from that locality in the night time, when, as is claimed, the crime was committed. Unless this circumstance may be said to cast some suspicion upon the appellant as the perpetrator of it, there is nothing pointing to her in the least degree as the guilty offender save the statements made by the deceased to various persons during the week that she survived the operation.

It is claimed there could be no conviction upon them, as section 241 of our Criminal Code provides: "A conviction can not be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show that the offense was committed and the cirumstances thereof."

True the deceased, if not an actor, was, at least, a consenting party to the deed. The law does not, however, regard her as an accomplice. She could not have been indicted for it. She is looked upon rather as the victim than as a co-offender. (Dunn v. The People, 29 N. Y., 523; Commonwealth v. Wood, 11 Gray, 85; Same v. Brown, 121 Mass., 69; State v. Owens, 22 Minn., 238; Same v. Heyer, 39 N. J. L., 598.) The indictment is not defective in failing to aver that the deceased was "quick" with child when the injury was inflicted. The authorities are somewhat divided upon the question whether, at common law, it is an offense at all to procure an abortion, with the consent of the woman, when she is not "quick" with child. If the charge were for abortion merely, authority might be cited in support of this objection to the indictment. Indeed the current of authority is in this direction. (Mitchell v. Commonwealth, 78 Ky., 204; State v. Cooper, 2 Zaler, 53; Abrams v. Foshee, 66 Am. Dec., 77; Commonwealth v. Parker, 9 Met., 263; Smith v. State, 33 Me., 48.)

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There is some difference of opinion, however, upon this question. (Mills v. Commonwealth, 13 Pa. St., 633.) It does not arise in this case, however. Here the charge is for the death of the mother as the result of means used to procure an abortion. The distinction between the two cases must be observed. Nor is this properly a case of involuntary homicide. The act was not only immoral; violative of the law of nature, and deliberate in character, but reckless of life and wrongful per se. The death of the woman may not have been intended; there may have been no express malice against her. Neither is there in the case of one who, knowing that people are passing upon the street, throws a stone from a housetop, resulting in death: but yet a killing, under such circumstances, is not involuntary manslaughter, or a killing per infortunium. If this were but an involuntary homicide, then, at common law and in this State, the punishment could be but a fine and jail imprisonment, or one entirely inadequate to deter evil disposed persons from its commission. The recklessness of the act forbids its being so regarded. Offenses and punishments must be so graded as to remedy the mischief. It has, however, never been held to be less than voluntary manslaughter. It is perhaps questionable whether, even in mercy or out of regard to the frailty of human nature, it should, under any circumstances, be so reduced as to one whose act is deliberately done, and known to the doer to be reckless of life and the interests of good society.

By at least the earlier common law it appears to have been nothing less than murder, although there may have been no intention to kill the woman. In 1 Russell on Crimes, page 539, it is said: "So where a person gave medicine to a woman to procure an abortion, and where a person put skewers into the womb of a woman for the same purpose, by which, in both cases, the women were killed, these acts were held clearly to be murder; for though the death of the woman was not intended, the acts were of a nature deliberate and malicious and necessarily attended with great danger to the persons on whom they were practiced."

Blackstone says: "So also, if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it." (4 Black. Com., page 201.)

The language of another eminent writer is: "If one administers a drug to a pregnant woman, or does to her any criminal act, the object of which is merely to produce an abortion, yet, if in consequence of this act, dangerous in its tendency, the mother dies, or the child is prematurely born and dies from the too early exposure to the external world, he is guilty of murder." (2 Bishop on Criminal Law, section 691.)

This doctrine should not be based upon the rule of law that whenever an unlawful act, one malum in se, is done in the prosecution of a felonious intention or the perpetration of a collateral felony and death ensues, it is murder; because, as we have already seen, the weight of authority is that it is no offense to procure an abortion unless the woman be quick with child, but upon the fact that it is a deliberate act endangering her life.

It was said in Smith v. State, supra: "If medicine is given to a female to procure an abortion, which kills her, the party administering it will be guilty of her murder. This is upon the ground that the party making such an attempt, with or without the consent of the female, is guilty of murder, the act being done without lawful purpose and dangerous to life, and malice will be imputed.

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"Where, however, it is done with no intent to inflict serious injury upon her, and in such a way that it is not per se likely to so result, but through negligence in the operation death does ensue, we incline to the opinion, but with some hesitation, that it is but manslaughter."

Mr. Wharton says: "Production of Abortion—Supposing this is done in a way not to inflict serious injury on the mother, and the mother dies from negligence in the operation, there being no intent to kill or to inflict serious injury, and no likelihood of such result, the offense, on the reasoning above given, is but manslaughter. It is otherwise when the intent is to seriously injure the mother, or the act is likely seriously to injure her. In this case her killing is murder." (Wharton on Homicide, section 66.)

Section 318 of the same work reads thus: "A woman desires to miscarry of a child with which she is pregnant, and assents to an operation being performed on her for this purpose, and she dies from the operation, her assent, as we have already seen, is no defense to an indictment against the person performing the operation. If the intent was to kill or grieviously injure her, the offense is murder. It is manslaughter if the intent was only to produce the miscarriage, the agency not being one from which death or great injury would be likely to result."

Conceding it to be the common law rule that one is not indictable for the commission of an abortion unless the child has quickened, yet all the authorities agree that if, from the means used, the death of the woman results, it is either murder or manslaughter.

It is earnestly urged that the statements made by the deceased, connecting the accused with the crime, were not admissible as dying declarations.

It is essential to their competency that they be made in extremis and under a sense of impending death. If any expectation or hope of recovery exists, however slight, in the mind of the injured person they are inadmissible.

Greenleaf says: "It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued an hour afterwards, the declaration is inadmissible.

"On the other hand, a belief that he will not recover is not, in itself, sufficient unless there be also the prospect of almost immediate dissolution." (1 Greenleaf on Evidence, section 158.)

These rules have been strictly adhered to by the courts. The declarations are admitted as evidence ex necessitate. Often there are no eye witnesses to the commission of crime, and especially of a character like that now under investigation, save the injured party and the offender. The law has, therefore, made the statements of the deceased relative to the circumstances of the injury competent evidence, where his death is the subject of the charge, provided they are brought clearly within the rules governing their admission. This condition is imposed, among other reasons, because they are altogether ex parte, and yet of peculiar force and effectiveness a testimony. There is no cross-examination, and the conscience of the injured party alone prompts to truth. It should, therefore, act under a sense of impending dissolution.

In this case the deceased, upon the third day after the injury, detailed the circumstances of its commission to her physician. What she then said was

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admitted as testimony. It is not clear whether he then, or not until the sixth day, informed her that she could not live. His evidence is confused in this respect. He certainly did so upon the last-named day, after consulting with another physician; and she then requested the presence of her family and a priest, but at this time made no statement as to the manner of her injury. She, however, told the lady of the house, before she made the statement to her physician, that she knew she would die from the injury, and then detailed to her the circumstances of its commission; and this statement, corresponding in substance to that made to the physician, was also allowed to go to the jury as evidence. From the time when she did this until her death, five or six days thereafter, she constantly grew worse. Upon the fourth day after the injury she said to her nurse that she knew she was going to die, and had so known from the time the injury was inflicted. To this witness she then made the same statement, in substance, as to the manner of the injury, and it was admitted in evidence. Upon the fifth day, however, she said to one of her physicians, after being told by him that her case was a grave one, that "if she was not going to live, she wanted the truth known; but so long as there was a prospect of getting well she wanted it suppressed; but if we thought she was going to die, she wanted the truth made known."

It is contended that this statement shows she had not relinquished all hope of recovery, and that her previous declarations, indicating the accused as the offender, were, therefore, inadmissible as evidence.

Upon either the sixth day, and after she had been informed that she must die, or the next day (the day of her death), the physician wrote out the substance, but not the detail, of what she had previously told him as to the injury to her, and upon its being read to her she said it was correct. It was also introduced in evidence, and it states that the accused performed the operation upon her. The physician also testifies that when this was read to her she again detailed the circumstances of the injury; and the fair inference from his testimony is that her statement, then made, corresponded with that previously made to him, and to which he had already testified.

In our opinion, however, all of her statements above alluded to were made by her under a sense of impending death. If this were doubtful they should be rejected.

The statement made to her physician upon the fifth day, and above quoted, does not, in our opinion, in the light of all the other circumstances proven, show she in fact had any hope or expectation that she would survive the injury, but that, upon the contrary, she felt from the time when it was inflicted until her death that it must result fatally. Whether this was so or not may be gathered from her conduct, her evident danger, the opinions of her physicians stated to her, her declarations and all the attending circumstances. The law does not require, as a condition to the competency of the statement as a dying declaration, that the injured party shall, in express words, declare that he knows he is about to die, or that he shall make use of equivalent language. His recognition of impending dissolution may be shown in this way, but the law does not limit to this mode alone.

We do not see, however, how the accused could have been prejudiced by the evidence relative to the statements made by the deceased prior to the written one. It was unquestionably competent, and it states that the accused performed the operation, from the effects of which it is certain the death resulted. It is true the deceased was a party to the deed. She, how-

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ever, acted from a sense of shame, and, however censurable her conduct may have been, it can not shield the accused, who, from a purely sordid motive, caused her death and outraged a law vital to the existence of good society.

Judgment affirmed.

(Response to petition for rehearing—Filed December 4, 1888.)

The offense charged against the appellant is well calculated to create prejudice, instead of sympathy. She can not rely upon the latter for an acquittal. She must look to the law in its justice and wisdom to afford her a fair trial. It is highly important in such a case that it should be properly administered. It affords a much safer criterion of justice and fairness of trial than excited public opinion. She is as much entitled to stand beneath the ægis of the law, and claim the protection of its safeguards and presumptions in behalf of life and liberty, as one charged with a lesser crime. The same law is to be meted out to all. Justice is sightless when she balances her scales.

Prompted by these considerations, and with a view to certainty in determining whether the trial below was a fair one, we have carefully considered the petition for a rehearing.

Counsel insist that the demurrer to the indictment was well taken, upon the ground that the accusatory part of it is for murder, while the facts stated as constituting the offense make it a statutory one, not embraced by the accusation: and that this court, in considering it, has looked to the common law alone, and improperly disregarded the statute.

It reads thus: "Any person, who shall wilfully strike, stab, thrust or shoot another, not designing thereby to produce or cause his death, and which is not done in self-defense, or in an attempt to keep and preserve the peace, or in the lawful arrest, or attempt to arrest, a person charged with felony or misdemeanor, or in doing any other legal act, so that the person struck, stabbed, thrust or shot shall die thereof within six months next thereafter, shall be confined in the penitentiary not less than one, nor more than six years." (General Statutes, chapter 29, article 4, section 2.)

It was held, in the case of Trimble v. The Commonwealth, 78 Ky., 176, that an indictment for murder did not embrace the offense created by this statute; and that, therefore, upon the trial of one for the first-named crime no instruction could be given to the jury relative to the latter.

It is now contended that this statute repealed the common law in a case like that now under consideration, and that the offense set forth in the indictment is not murder.

It is true the indictment does not charge that the act was done with the intent to kill the deceased, but avers that the purpose was to produce an abortion. It does, however, charge that the accused "did wilfully, maliciously, unlawfully, feloniously and of her malice aforethought, kill" her; but, aside from this, we do not think the statute takes a case of this character out of the common law rule relating to murder and manslaughter, or makes it a different offense from what it is under the common law. In short, the statute does not apply to it. It is manifest that the law-making power did not so intend. As already stated, by the common law if life be destroyed in the commission of an abortion, whether the woman be quick with child or not, it is murder, or at least manslaughter in the destroyer. This statute applies to cases where the injury is done without the consent of the injured party, and with an intent upon the part of the doer to so do it.

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This is manifest, from the fact that the doer is not liable to punishment under it, if the act be done "in self-defense, or in an attempt to keep and preserve the peace, or in the lawful arrest or attempt to arrest a person charged with felony or misdemeanor, or in doing any other legal act."

In a case like that of the accused the party is liable, although the death of the victim may not have been intended, and the act done with her consent, because it is in its character wrongful per se, reckless of life, and calculated to destroy it. The statute was not intended to meet such a case, and does not repeal the common law relating to it.

A dying declaration must relate to the circumstances attending the injury. Only so much of it is competent as details the manner of it. So much of the statement of the deceased as relates to the interview with the accused preceding that when the operation was performed was incompetent as evidence. This is true also of that portion of the written declaration of the deceased relative to her pregnancy. But the one merely detailed an interview with the accused, and the making of the contract to perform the operation, and the other to a fact which was indisputably proven by the physician who attended the deceased; and the accused could not well have been prejudiced by the testimony. Its nonintroduction could not have tended to produce a different result.

The jury were told that they were "the sole judges of the credibility of the witnesses and of the weight or consideration to be given the testimony of each witness."

Such an instruction has been repeatedly condemned by this court. Abstractly it is correct. Yet there is no reason for giving it. It is the province of the jury to give to the evidence of each witness such weight as it is entitled to in their judgment. This they will do without such an instruction; and it in some cases, where the circumstances are peculiar, may unduly influence them. It is better in all cases to leave them to consider the evidence without any suggestion from the court as to the manner of consideration. This court would, however, hesitate to reverse a case upon this ground alone; and in our opinion the circumstances of this one do not fairly authorize an inference even that the accused may have been prejudiced by the erroneous instruction, or that if it had not been given the verdict might have been different.

The petition for a rehearing is overruled.

STIVERS v. BAKER, &c.

(Filed October 30, 1888.)

Pleading—Assault—In an action to recover damages for an assault the petition must allege the facts which constitute the assault: it is not sufficient to allege that the defendant unlawfully "assaulted" the plaintiff, what constitutes an assault being a question of law for the court.

In this case the averment of the petition that the defendants did "unlawfully and without right or cause, with force and arms, set upon and assault" the plaintiff, amounts to no more than a statement that the defendants unlawfully assaulted the plaintiff, and, therefore, a demurrer to the petition was properly sustained.

Jas. Montgomery for appellant.

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J. P. Hobson for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Holt.

The petition avers that the appellees did "unlawfully and without right or cause, with force and arms, set upon and assault him (the appellant) while under arrest, and did thereby put him in great fear, and heap upon him great shame and indignity, and other injuries then and there did him, whereby he was damaged in the sum of $50,000." This amounts to nothing more than a statement that they unlawfully assaulted him.

Is the petition sufficient? Section 90 of the Civil Code provides that it "must state facts which constitute a cause of action." The Code has swept away mere form, but the common law rules of legal procedure remain, and every averment necessary to a good declaration at common law must be made in the petition. (Lou. & Port. Canal Co. v. Murphy's Adm'r. &c., 9 Bush, 522.) The pleader must state the facts constituting the cause of action. This is the common law rule, and it is not only necessary to enable the opposite party to form an issue, and to inform him of what his adversary intends to prove, but to enable the court to declare the law upon the facts stated. It can not do so if a mere legal conclusion is stated. The term "assault" has a legal meaning, as much so as the word "trespass." It has been defined to be "an inchoate violence to the person of another, with the present means of carrying the intent into effect," or "an unlawful setting upon one's person," or "an unlawful offer or attempt, with force or violence, to do a corporal hurt to another." It may be committed in very many ways, as to present a gun or other weapon in a threatening manner within harming distance; to ride after one, compelling him to flee to avoid injury; to throw a harmful missile at another with intent to injure, even if it misses him, or advance in a threatening manner to strike one so that the blow will be received in a few seconds, if the assaulting party be not stopped. Instances almost without number might be given.

The petition in this instance does not state what the party did upon which the appellant bases his charge of assault; he merely avers that he was unlawfully assaulted.

The term, as used in a pleading, has its legal meaning; it is actionable in its legal sense only; and how is a court to determine, upon a demurrer to the petition, whether the complainant has been assaulted unless he states the facts? The ipse dixit of the pleader to this effect will not answer because this would make him the judge of the law instead of the court.

Whether the acts of a party authorize the legal conclusion that he has committed an assault is to be determined by the court, and it can not do so unless they are stated. As well might it be said that a petition for trespass is sufficient, although it merely avers that the defendant trespassed upon the plaintiff's premises, or that an indictment is good if it merely charges A with murdering B.

If it can be fairly claimed that the word "assaulted," when used in pleading, amounts to a statement of both a fact and a legal conclusion, yet it is not such a statement of facts as will enable the court to determine whether the party charged has, by his acts, committed what is in law an assault.

In 1 Hilliard on Torts, page 179, it is said: "The question what constitutes an assault is a question of law, to be determined by the court." This it can not do upon a demurrer to the petition unless the acts done are stated.

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If they are set forth it is not indispensable that the pleader should use the legal term "assault," although it is usual to do so in this form of action.

The judgment sustaining the demurrer to the petition and dismissing the action upon failure to plead further is affirmed.

STIVERS v. BAKER.

(Filed October 30, 1888—Not to be reported.)

Pleading—Assault—In an action to recover damages for an assault the petition must allege the facts constituting the assault; it is not sufficient to allege that the defendant "unlawfully assaulted" the plaintiff.

Jas. Montgomery for appellant.

J. P. Hobson for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Holt.

This court has, at the present term, in the case of J. B. Stivers v. Thomas Baker, &c. (ante, page 523), where the petition charged the appellees with unlawfully assaulting the appellant, held that this was but the statement of a legal conclusion and not an averment of the facts, as required by section 90 of the Civil Code, constituting the cause of action. This case is similar to that one.

The demurrer to the petition was properly sustained; and the judgment dismissing the action upon a failure to plead further is affirmed.

HAMMOND v. WILLIAMS, &c.

(Filed October 30, 1888.)

Limitation—Adverse possession—As the defendant in this action for the recovery of land had been in possession under a deed claiming to the extent of his boundary for more than fifteen years before the commencement of the action the plaintiff is barred by limitation.

J. B. White for appellant.

W. W. Holt, Robert Riddell and H. C. Lilly & Son for appellees.

Appeal from Powell Circuit Court.

Opinion of the court by Chief Justice Lewis.

It seems to us the conduct of the parties and the circumstances of this case fully sustain the statement of the answer that when many years ago the road from Red river to the town of Stanton was opened it was, for the convenience of both, agreed between appellant and the vendor of appellee that it should thereafter be the division line between them. For while the small parcel bounded by the Apperson line, the river and road, was cut off from the residue of appellant's tract, and was, at the time, of no value to him, the surveyor's report shows more than a due proportion of the land of

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appellee's vendor was occupied by the road, and perhaps some of it was cut off from the residue of his tract.

There is no other way to account for the acquiescence and assent of appellant for years to the claim, possession and use by appellee and his vendors of the narrow strip between the Apperson line and the river, a part of which was inclosed by the latter with the knowledge of and without objection from the former.

Being thus recognized owner of the strip, Bowling, March 4, 1868, sold and conveyed his land to appellee, and one of the corners called for in the deed is a stake on the bank of the river where the Stanton road strikes the same corner to S. M. Hammond, appellant, the two lines, therefore, running respectively with the river and with his line, the center of the road. By that deed the narrow strip between the Apperson line and the river, a part only of which appellant sues for in this action, was conveyed to appellee, and as he has ever since, and for more than fifteen years before the commencement of this action, been in possession claiming to the extent of such boundary, we think appellant is barred by limitation.

Judgment affirmed.

Judge Holt not sitting.

BRICE v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed September 29, 1888—Not to be reported.)

1. Master and servant—Peremptory instruction—In this action by appellant to recover of appellee damages for an injury received in coupling cars while acting as brakeman, the ground of recovery, as alleged, was that one of the cars was so improperly loaded as to make it perilous to go between them for the purpose of making the coupling, and that this fact was known to the conductor, under whose orders he acted, and that by reason of the fact that the cars were improperly loaded he was injured. All the facts essential to a recovery were proved, except the fact that the plaintiff went between the cars by order of the conductor, as to which there was an entire failure of proof. Held—That a peremptory instruction for defendant was proper.

2. Pleading—The fact that the plaintiff alleged, in his first amended petition, that he acted under order of his superiors, and that the defendant, in its answer thereto, failed to deny that fact, is immaterial, as the plaintiff alleged, in his second amended petition, that he was ordered by the conductor to make the coupling, which was specifically denied by defendant.

E. P. Campbell, R. W. Henry, J. W. McPherson and H. Ferguson for appellant.

The Felands and Wm. Lindsay for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Bennett.

J. J. Brice, husband of the appellant, was brakeman on the appellee's freight train of cars, and while he was acting as such brakeman he received an injury by the wheels of one of the cars passing over his leg, which injury caused his death.

The appellant, as the widow of said Brice, instituted suit in the Christian Circuit Court against the appellee to recover damages for said injury, on

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the ground that said injury was caused by the gross and willful neglect of the appellee's employes having said train of cars in charge.

The specific ground of recovery, as alleged by the appellant, is that one of the cars was loaded with lumber, and that the lumber extended so far over the end of the car as to make it perilous to Brice's life when he went between said car and another for the purpose of coupling them together, and that in going between said cars for the purpose of coupling them together, by order of the conductor of the train, he was compelled to stoop in order to avoid being struck by the ends of said lumber, and in stooping he stumbled and fell; that at the time the conductor gave said order he knew, or, by the use of ordinary care, could have known, that the car was so improperly loaded as to imperil the life of Brice.

Upon the conclusion of the appellant's testimony the circuit court, at the instance of the appellee, gave the jury a peremptory instruction to find for the appellee. The question to be determined is, was said instruction rightfully given?

If the appellant offered any evidence tending to prove her case as a whole, and not merely a part of it, then the court should have allowed the case to go to the jury.

The evidence introduced by the appellant established two facts: First, that the car was so improperly loaded with lumber as to imperil the life of the brakeman if he went between it and the other car for the purpose of coupling them together; second, that Brice did go between said cars for the purpose of coupling them together; and that he was compelled to stoop in order to avoid the projecting lumber, and in doing so he stumbled and fell; third, it might have been inferred by the jury from said facts, that the conductor knew, or could have known by the use of ordinary care, that the car was so improperly loaded as to imperil the life of Brice if he went between said car and the other for the purpose of making a coupling. The foregoing facts were essential to the appellant's right to recover Also, under the circumstances of this case, it was essential for the appellant to prove that said Brice went between said cars for the purpose of coupling them together by the order of the conductor; but there was a total failure of proof in reference to that matter; and no fact was proven from which the jury would have been authorized to infer that such order was given.

According to the appellant's allegations and the proof in the case it was a patent fact that the car was so improperly loaded as to imperil the life of Brice if he went between the cars for the purpose of making the coupling, and he was right at the place of danger, and could see for himself that it was perilous to his life to go between said cars for the purpose of making the coupling, and it was his right, without violating his duty to his employer, to refuse to go between said cars. But if the conductor knew, or could have known by the use of ordinary care, that the car was so improperly loaded as to imperil Brice's life, and notwithstanding ordered him to go between the cars and couple them together, then Brice had the right to rely upon the conductor for protection, and that the appellee would be responsible for any damage that might befall him by reason of his obeying said order. But in such a case it devolved upon the appellant to show that Brice acted in obedience to the order of the conductor.

The appellant contends that the proof that such order was given was dispensed with, by reason of the fact that it was alleged in her first amended petition, and not denied in the answer thereto, that Brice did make said coupling by order of his superiors. It is true that said allegation in said

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petition was not denied in the answer thereto. But in the appellant's second amended petition she specifically alleges that Brice was ordered to make said coupling by the conductor; this allegation is positively denied, which we deem sufficient to cure the omission in the answer to the first amended petition, and to put the burden of proof upon the appellant.

As before intimated, under the circumstances of this case, the failure of the appellant to prove that Brice made said coupling by the order of the conductor was fatal to her right to recover, and the court did right in instructing the jury to find for the appellee.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. ROBERTS

(Filed May 24, 1888—Not to be reported.)

Railroads—Negligence—Damages—At the time appellee received the injuries for which he seeks to recover damages in this case he was crossing appellant's track at a public crossing in the village of Sparta, between 10 and 11 o'clock on a dark night. The train, the engine of which struck appellee, was moving on a down grade towards the depot platform and crossing, near the depot. The engineer could not see a person on the track beyond sixty-five or seventy yards from the engine. The jury found the engineer was negligent in releasing the air-brakes just before reaching the crossing, thereby increasing the rate of speed to seventeen or eighteen miles an hour, and in taking his eyes off the track; that but for such negligence he could have seen the appellee in time, with the air-brakes in condition for immediate service, to check the speed of the train, so as to give the appellee time to cross the track in safety, and that but for the increased speed of the train at that point the appellee could have crossed the track in safety. The jury also found that the appellee used ordinary care and prudence by looking and listening to ascertain whether a train was approaching. They fixed the actual damages sustained at $7,000, and punitive damages, for willful neglect, at $3,500, for both of which sums the court rendered judgment. Held—That the facts establish a case of only ordinary negligence, and not a case of gross or willful negligence, therefore, so much of the judgment as is for punitive damages is reversed, while so much as is for actual damages is affirmed.

Wm. Lindsay, H. W. Bruce, Winslow & Winslow and L. L. Tiller for appellant.

O. B. Hallam, T. F. Hallam, Montgomery & Perry and Montgomery, Lindsay & Botts for appellee.

Appeal from Gallatin Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, W. B. Roberts, by this action, claims that between 10 and 11 o'clock at night on the 22d of March, 1884, he was crossing the appellant's railroad track at a place where the public highway crosses the same at Sparta station, in the village of Sparta, Gallatin county, Kentucky; that while crossing the appellant's road at said place the appellant's employes, in charge of its passenger train of cars, grossly, willfully and negligently ran the engine drawing said train against him, thereby inflicting upon him serious and permanent injuries.

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The appellant denies that the appellee was injured by the gross or willful negligence, or any negligence whatever, of its employes. It claims that the appellee was not injured while on the public crossing; that whatever injuries he received occurred while he was a trespasser upon the appellant's track, and without any negligence on its part.

The case was submitted to the jury for special findings; and upon their findings the circuit court gave judgment for the appellee for $7,000 actual damages, and $3,500 punitive damages.

The case is here for review. The jury found, first, that between 10 and 11 o'clock at night the appellee was struck by the appellant's engine while crossing the appellant's track where the public road leading from Owenton to Warsaw crosses the same: second, that the appellee, in attempting to cross the track, exercised ordinary care and diligence by looking and listening to ascertain the approach of the train.

The only positive proof as to the place where the appellee was when he was struck is furnished by his own evidence. He says that he was on the crossing. The circumstances relied on by the appellant to disprove his statements are that when attention was directed to him by his calling for help, he was lying partially on the end of the platform, about eighty feet from the crossing, and his hat was found some distance from the crossing, near the rail, with the brim cut, as though the wheels of the car had passed over it; also that the shock of the collision rendered him unconscious for a time, and the further fact that he was unable to move himself when found. To counteract these circumstances the jury had his positive statement that he was on the crossing at the time he was struck; and as none of his bones were broken, and as the shock did not immediately overcome his power to move himself, for he did move himself before he was discovered, said circumstances do not conclusively establish the fact that he did not move himself, although in an unconscious or dazed condition, from the crossing to the end of the platform. The jury doubtless concluded that he did, and we are not prepared to say that their finding is against the weight of evidence. Although the appellee was crossing the appellant's track on a dark night, yet, his purpose being lawful, he was not guilty of negligence in attempting to cross the track, provided he used that degree of care and prudence to prevent a collision with any train that might be passing that men of ordinary care and prudence would commonly use under similar circumstances. The jury found that he did use such care and prudence.

On the other hand, the appellant's engineer in charge of the train testifies that the train approached the crossing on a down grade; that the air-brakes, which had been put on for the purpose of decreasing the speed of the train and stopping it in case the stop signal was displayed at the depot, were released, there being no signal displayed within sixty-five or one hundred yards of the crossing, whereby the speed of the train was gradually increased; that when in about fifty yards of the platform, which was about sixty feet from the crossing, he took his eyes from the track and looked into the cab for the purpose of putting the injector, an instrument used to supply the boiler with water, to work; that when he again put his eyes upon the track he saw that something, which he took to be a dog, was being struck; that he could have seen a man on the track at a distance of sixty or seventy yards. From this and other evidence the jury found that the engineer was negligent in releasing the air-brakes, thereby increasing the rate of speed to seventeen or eighteen miles an hour, and taking his eyes off the track,

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whereby the appellee was struck; that but for such negligence he could have seen the appellee in time, with the air-brakes in condition for immediate service, to check the speed of the train so as to give the appellee time to cross the track in safety; that but for the increased speed of the train the appellee could have crossed the track in safety.

It is clear from the evidence that one more step would have brought off the appellee harmless; it is clear that he could have taken that step with safety but for the increased speed of the train; it is also clear that had the air-brakes remained on, the speed of the train would not have been increased, and, if the engineer had not taken his eyes off the track, he could have seen the appellee in time, with the aid of the brakes on, to check the speed of the train so as to enable the appellee to cross the track in safety.

But appellee and appellant had an equal right to cross the track at the place of crossing. It was the duty of the appellee to use such care and caution, in order to prevent injury to himself as well as the appellant and its passengers, as persons of ordinary prudence would commonly use under similar circumstances. A similar duty rested upon the appellant, not only for the protection of the appellee, but for the protection of its passengers. As the crossing was in the village of Sparta and within a few feet of the depot, and as residences were on each side of the track, and as the train was moving down grade towards the depot platform and crossing, and as travelers, on foot and with teams, were likely to be traveling on the highway at the crossing at that time of night, and as the engineer could not see a person beyond sixty-five or seventy yards from the engine, it was but ordinary duty on the part of the appellant to use such care, for the protection of persons crossing at the crossing, as was reasonably commensurate to the foregoing surroundings. Therefore, as the appellant's engineer failed to keep the train under his control by releasing the air-brakes while the train was moving on a down grade, and as such release was at a point from which the engineer could not see whether the crossing was clear, it was proper for the court to submit the question as to whether such conduct was negligent to the jury. Also it was proper for the court to submit the question to the jury as to whether or not it was negligent in the engineer to take his eyes from the track under the circumstances, for, as the appellant was engaged in a business that involved danger, and as the danger was such as to imperil human safety, especially at said crossing at that particular time, its care should have been such as was reasonably enough to prevent the possibility of mischief, so that its occurrence might be rightfully treated as accidental and not negligent. And the jury having found that the engineer's releasing the air-brakes and taking his eyes off the track constituted negligence, we think that, under the circumstances of this case, it was actionable negligence. We think, however, that the facts establish a case of only ordinary negligence, and not a case of gross or willful negligence.

The action of the circuit court, in so far as judgment was rendered on the separate finding of the jury fixing punitive damages at $3,500 for willful neglect, must be reversed, with directions to dismiss said claim; but the judgment of the court on the other separate finding of the jury for $7,000, the actual damages that the appellee sustained by reason of his injuries, is affirmed.

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WOODS v. JAMES, &c.

(Filed November 1, 1888.)

1. Deeds of married women—Certificate—When the deed of a married woman is acknowledged before a deputy clerk, and the memorandum of the deputy sets forth the fact that the deed was acknowledged by the feme covert, and when, and is signed by the deputy, thus amounting in fact to a certificate of acknowledgment, it is not necessary that the clerk, if he certifies the deed, should incorporate in his certificate the deputy's indorsement in order to make the deed valid. Nor is it necessary that the deputy's indorsement, in order to amount to a certificate, should state that the deed was acknowledged "before me" as that will be presumed; or that it was acknowledged by the feme covert "as her act and deed," as the mere statement of the acknowledgment by her conclusively shows that fact.

The indorsement held to be sufficient to amount to a certificate in this case is as follows: "Acknowledged by Willia C. Woods, this May 5, 1873.

"J. H. LAPSLEY, D. C. M. C. C."

2. Limitation—Fraud—Where an action for relief on the ground of fraud is sought to be maintained after the expiration of five years from the commission of the fraud, the plaintiff must allege and prove, if denied, not only that he did not discover the fraud until within five years before the commencement of the action, but that he could not, by ordinary diligence, have discovered it until within that time.

As this action to set aside a deed was brought more than five years after the deed was executed, and the only allegation or proof by the plaintiffs as to the discovery of the fraud is that "said fraud has been discovered by them within the last five years," the action is barred by limitation.

Poston & Jacobs, C. H. Hardin & Son and Ben Lee Hardin for appellant.

Wm. Lindsay and T. C. Bell for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Bennett.

Geo. Woods, son of the appellant, and his wife, in May, 1873, conveyed by deed two small tracts of land belonging to the wife to the appellant. The wife having died in 1874 without issue and leaving, as her next kin, her two half-sisters, the appellees, Miss Sallie Coleman and Mrs. Fanny P. James (formerly Coleman), wife of the appellee, Addison James, they, in January, 1884, brought this action against the appellant for the purpose of setting said conveyance aside, upon the grounds, first, that the deed of conveyance was void, and, therefore, passed no title to the appellant; second, that the appellant and Geo. Wood, the husband, induced the wife to join in said conveyance by fraud. The chancellor, upon the hearing, set the deed aside and awarded the two tracts of land to the appellees, Miss Coleman and Mrs. James. The appellant has appealed from that judgment. There are but two questions necessary to consider in this case: First. Is the deed void? Second. Is not the appellees' action barred by the statute of five years' limitation?

First. It is contended by the appellees that the deed is void, because the clerk's certificate thereto was not made in accordance with the requirement of the act of March 9, 1854, which reads as follows:

"That where the deputy of any county court clerk shall take the acknowledgment of a deed or other instrument of writing, and indorse a memorandum thereof on such deed or instrument of writing, but shall fail from any

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cause to write out and sign a certificate thereof, it shall be lawful for the clerk to write out and sign the certificate, setting forth in such certificate the facts, including the indorsement, and thereupon record such deed or instrument and certificate, and thereupon the deed or instrument and the certificate shall be as good and effectual as if certified and signed by such deputy."

Subsection 1 of section 22, chapter 24 of volume 1 of Stanton's Revised Statutes, which were in force at the time the deed was made and acknowledged, provided: "Where the acknowledgment," meaning that of a married woman, "shall be taken by an officer of the State, he shall simply certify that it was acknowledged before him and when it was done, which shall be evidence."

It is contended that the failure of the clerk to copy into his certificate the indorsement of his deputy, who took the acknowledgment of Mrs. Woods, renders the deed void as to Mrs. Woods. The deputy's indorsement on the deed is as follows:

"Acknowledged by Willia C. Woods this May 5, 1873.

"J. H. LAPSLEY, D. C. M. C. C."

The clerk's certificate is as follows:

"Mercer County, Sct.,

"May 5, 1873.

"This deed was presented to James H. Lapsley, a deputy clerk of the Mercer County Court, on the 5th day of May, 1873, and regularly acknowledged by Willia C. Woods, wife of George Woods, party thereto, to be her act and deed," then follows the acknowledgment of George Woods, "wherefore I have recorded the same. BEN C. ALLIN, Clerk."

Section 38, chapter 24 of the General Statutes, and subsection 1 of section 21 of said chapter, are similar to the act of March 9, 1854, and subsection 1 of section 22, chapter 24 of the Revised Statutes. Said statutes being similar, a construction given to the former by this court applies equally to the latter.

In the case of Gordon, &c. v. Leech, &c., 81 Ky., 229, the deputy's indorsement on the deed was as follows:

"Acknowledged by W. L. Gordon and Cordelia Gordon, his wife, to be their act and deed as the law directs. September 22, 1875.

"C. W. CRABTREE, C. K.

"By ERNEST SPEED, D. C."

It was urged in that case, as in this, that the clerk did not set forth the indorsement of the deputy in his certificate, and the deed was, therefore, void as to the married woman. But this court held that it was immaterial whether the certificate of the clerk was sufficient if the indorsement of the deputy was considered a "memorandum," since the indorsement by the deputy was, in itself, a certificate "in substantial compliance with subsection 1 of section 21, quoted." The court proceeds to say: "If the indorsement by the deputy is a certificate such as is contemplated by subsection 1 of section 24, he having the unquestioned power to make it, it is immaterial that the certificate of the clerk does not, as contended, meet the requirements of section 38 as to certifying 'memoranda' made by deputies. Section 21 requires only that the certificate shall state that the instrument 'was acknowledged before him and when it was done.' Privy examination, explanation of contents of the writing, voluntary acknowledgment and consent to record, are all presumed from such a certificate. The only thing lacking in this certificate is 'before me' after the word 'acknowledged.' But certainly, when the certificate is signed as this, no presumption could arise

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that it was acknowledged before any one else than the officer signing it. When a statute provides the manner in which a feme covert may divest herself of title the statute must be followed substantially in its spirit—not technically, not literally—when such technicality or literality defeats the spirit of the statute. Such statutes are intended to protect the feme from imposition by reason of the marital relation, and when that is accomplished by a substantial compliance with the statute, both law and good morals are satisfied."

By the act of the 9th of March, 1854, the clerk, where his deputy has taken the acknowledgment of a feme covert, and indorsed "a memorandum thereof on such deed," but shall fail, for any cause, to write out and sign the certificate thereof, may "write out and sign the certificate, setting forth in the certificate the facts, including the indorsement," which shall have the same effect "as if certified and signed by the deputy."

According to the reasoning of the case quoted from the clerk is authorized to write out and sign the certificate, employing the deputy's indorsement only in the event that the deputy, having taken the acknowledgment and indorsed a memorandum thereof, has failed to write out and sign a certificate of such acknowledgment. If, however, the memorandum indorsed and signed by the deputy amounts in fact to a certificate of acknowledgment—that is to say, if the memorandum sets forth the fact that the deed was acknowledged by the feme covert, and when, and is signed by the deputy taking the acknowledgment, then the certificate of the clerk setting forth the indorsement is unnecessary. The said act has reference to such memoranda indorsed by the deputy as do not amount to a certifiacte, but which is sufficient to enable the clerk to know that the acknowledgment was taken, and to authorize him to certify the fact. But, as before said, if the memorandum indorsed and signed by the deputy shows that the acknowledgment was made, and when, which is all that the statute requires, then he has made and signed the certificate mentioned in said act; and all that the clerk need do is to certify, as was done in this case, for the purpose of authenticating the recording of the deed.

The memorandum which was signed by the deputy clerk in this case, as in the case supra, shows that the acknowledgment was made, and by whom and when. It is true that the memorandum does not read "acknowledged before me," the word "me" not appearing in the memorandum; nor does the word "me" appear in the memorandum quoted in the case supra. But the court held in that case that the memorandum having been signed by the deputy, "no presumption could arise that it was acknowledged before any one else than the officer signing it." Also in the memorandum in this case the words act and deed are omitted, but the language of the memorandum conclusively shows that the deed was acknowledged as the act and deed of Mrs. Woods.

According to said case the conclusion must be in this case that the memorandum indorsed and signed by the clerk is such a certificate as comes up to the requirements of the statute, and that the deed is not void.

We also conclude that in the case of Franklin v. Becker and Wife, 11 Bush, 595, the fact was overlooked that the deputy's memorandum was such a certificate as complied with the requirements of the statute.

Second. Does the statute of five years' limitation bar the action in reference to setting the deed aside upon the ground of fraud?

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The action was instituted within a month or two of ten years after the deed was made. Section 2, article 3, chapter 71, General Statutes, provides that an action for relief on the ground of fraud or mistake must be commenced within five years next after the cause of action accrued. Section 6 of the same article provides that such actions shall not be deemed to have accrued until the discovery of the fraud or mistake, etc. If the plaintiff has let the five years in which he has the absolute right to bring his action run, and undertakes to bring and maintain it afterwards, upon the ground that he has discovered the fraud within five years last past, he must allege and prove, if denied, not only that he discovered the fraud within the last five years, but that he could not, with the use of ordinary diligence, have discovered the fraud until within the five years before the action was commenced. (Cotton v. Brown, 9 Ky. Law Rep., 115; Fritschler v. Koehler, 7 Ky. Law Rep., 34; Zackay's Adm'r v. Hicks, 7 Ky. Law Rep., 756.)

The appellees' allegations are: "They aver that said fraud was discovered by them within the last five years." etc. The foregoing being the only allegations as to the discovery of the fraud, they are defective because it is not alleged that the appellees, by the use of ordinary diligence, could not have discovered the fraud within five years from the making said deed.

The only evidence in reference to the discovery of the fraud is that given by the appellees, Mrs. James and Miss Coleman, who state that they discovered the fraud within five years next before bringing their action. They state no fact or circumstance indicating that they could not, by the use of ordinary diligence, have discovered the fraud within five years from making of the deed, therefore, the proof was not sufficient to sustain the action.

The judgment of the lower court is reversed, with directions to dismiss the appellees' action.

KENTUCKY SUPERIOR COURT.

JAMES v. HAYDEN'S ADM'R.

(Filed November 21, 1888.)

1. Consideration for note—Pleading—While the law presumes that a note was executed upon a sufficient consideration, and when a defendant pleads that there was no consideration he must overcome the presumption by evidence, yet if the plaintiff unnecessarily alleges a particular consideration, whether in his petition or in his reply, the burden is on him to prove it as alleged, if it is denied.

The plaintiff in this case having alleged that the consideration for the note sued on was a loan of $1,000, made when the note was given, the court properly required him to prove that the alleged consideration existed.

2. Where one sues upon a lost note the evidence which shows that the paper got out of his possession inadvertently, and that he does not know where it is, after diligent search, is all that can be required of him. No presumption of fraud arises out of the mere fact of loss. The statute (Civil Code, section 7) does not declare that the plaintiff shall be presumed to have fraudulently suppressed the note so as to place on him the burden of disproving

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fraud. It was error, therefore, in this case to instruct the jury that they must believe the note was lost "without the fault or fraud of plaintiff" in order to find for him. They should have been told that if they found that defendant's intestate executed the note for $1,000 then lent him, and that the note had been lost, they should find for the plaintiff unless they further found that the failure to produce the note was fraudulent.

3. Evidence—The loan alleged as the consideration for the note being denied by the defendant, it was competent to show by the bank officers that defendant's intestate then had a considerable deposit lying idle; or by plaintiff to show that he was then in a condition to make the loan; and he was a competent witness to prove what he had.

4. Same—It was improper to let the bank officers testify that from their knowledge of the decedent's habits it was their opinion he would have deposited the money if he had borrowed it, and that no such deposit was made.

5. Same—While plaintiff was not competent to testify that he lost the note executed by the decedent, as this would have been indirectly testifying that the decedent executed it, he should have been allowed to testify that he lost the note which he showed to a witness who had testified that plaintiff had showed him a paper purporting to be the decedent's note for $1,000, and that the signature was that of the decedent.

J. W. Thomas and E. E. McKay for appellant.

John D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Bowden.

The appellant, James, sued Hayden's administrator on a promissory note, dated January 1, 1884, due at twelve months, for $1,000, which he alleged Hayden executed, and which he had lost without fraud on his part. As part of his petition he filed his own affidavit, in which he stated that on the 1st day of January, 1884, he lent Hayden $1,000, for which Hayden, at that time, executed the note, and that he had lost it. It contained the expurgatory matter required by the statute in regard to claims against decedent's estate. The defendant answered: First, denying that Hayden executed the note; second, denying that plaintiff ever lent Hayden $1,000, or any other sum; and, third, averring that there was no consideration. The reply reiterated the execution, and averred that the plaintiff "loaned said R. B. Hayden $1,000, and the same was evidenced by said lost note, and was the consideration of its execution."

His petition having been dismissed by the court on a verdict adverse to him, James has appealed.

As to instructions:

Instruction A, asked by the plaintiff, was properly refused. It entirely ignored the issue as to the consideration, and directed the jury to find for the plaintiff if Hayden executed the note, without regard to that issue, and consequently, though they may have believed there was no consideration. This objection was removed by the words added by the court, requiring the jury to find that the note was executed "for money that day loaned Hayden." The plaintiff excepted to the giving of the instruction as changed, which matter we will consider hereafter.

Instruction No. 1, given at the instance of the defendant, was as follows: "It devolves on plaintiff, in order to recover in this action, to prove by th preponderance of the evidence to the jury that he loaned R. B. Hayden $1,00

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on the 1st day of January, 1884; and that R. B. Hayden, on that day, executed and delivered to plaintiff his note for said sum due twelve months after date, and that said note has been lost without the fault or fraud of plaintiff, and unless all the facts are established by a preponderance of the testimony the jury should find for defendant."

It is clear, and it is conceded, that the burden was on the plaintiff to prove the execution of the note; but his counsel insist that if he succeeded in doing that the burden was on the defendant to prove that there was no consideration.

It is a well-established rule that while the law presumes that a note was executed upon a sufficient consideration, and that, therefore when a defendant pleads there was no consideration he must overcome the presumption by evidence, or fail in his defense; yet if the plaintiff unnecessarily alleges a particular consideration, whether in his petition or in his reply, the burden is on him to prove it as alleged, if it is denied, or he will fail in his action. (Cutter v. Reynolds, 8 B. Mon., 598; Boone v. Shackleford, 4 Bibb., 68; Bullitt v. Ralston, 1 Marsh., 331; Steadman v. Guthrie, 4 Met., 152; Noe v. Keen, 5 Ky. Law Rep., 928; Howard v. Cornelison, Id., 919.)

The plaintiff in this case alleged that the consideration was a loan of $1,000, made when the note was given. He thus excluded every other consideration, not only in kind or value, but any arising at a different time. If, as he alleged, there was no consideration other than $1,000 lent at the time, the instruction properly required him to prove that the alleged consideration existed. For the same reason the amendment to instruction A was proper.

But instruction No. 1 also required the jury to believe from preponderating evidence that the note was lost without the fault or fraud of plaintiff.

Prior to the Code of 1854 there was no statute relevant to this question. By section 6 of that Code it was provided that "an action upon a written obligation which has been lost or destroyed may be prosecuted by ordinary proceedings." By an amendment of December 21, 1863, "judgments, the records of which have been destroyed," were included. The effect of this statute was to confer on courts of law jurisdiction only when the obligation, being negotiable, might be enforcible in the hands of a bona fide taker from the finder, in which cases courts of law refused relief, chiefly because they did not consider themselves capable of requiring such bonds of indemnity as would be necessary to protect the obligor against such contingent liability. But while courts of equity asserted jurisdiction in all cases of lost instruments, law courts afforded relief when such contingent liability could not exist, and when their judgments would be conclusive protection, as where the instrument is not negotiable; or is utterly destroyed; or when, being negotiable, it had been specially indorsed; or when, as in case of a bank bill cut in two for the purpose of transmission, the other and last half can not pass into innocent hands. (2 Parsons on Notes and Bills, chapter 9; Story on Notes, section 451; Daniel on Neg. Inst., sections 1483-1485; 13 Am. Dec., 44 and 480; Commercial Bank v. Benedict, &c., 18 B. Mon., 307.) The statute, therefore, was merely declaratory of the jurisdiction of law courts in all cases of lost or destroyed instruments except the class of negotiable instruments referred to which might have to be paid twice. In regard to these it was the established practice of equity courts to require bonds of indemnity, without the aid of statutes, as will appear from the authorities cited above. The new Code puts the provision in a different

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form, section 7: "An ordinary or equitable action may be brought upon a bill of exchange, or a note, or other obligation, or upon an indorsement or assignment thereof, which, or upon a judgment the record of which, is lost, destroyed, mutilated or defaced, without fraud on the part of the plaintiff, or of those under whom he claims;" and it is further provided that "no action shall be brought upon an instrument transferrable by delivery merely," without a previous tender of a bond of indemnity. It is obvious that this latter clause, limited to instruments which pass by delivery merely, does not include all the cases in which equity courts demand indemnity, and was not meant to limit the established rule, but merely to make a previous tender of a bond in the specified case a preliminary condition of the right to sue, leaving the courts to apply the rule to cases as they arise. Nor was this statute (conferring jurisdiction on common law courts when it had not existed; declaring it, when it had existed; and, it seems, conferring jurisdiction on equity courts which had not existed) intended to declare the rules of law or evidence relating to the subject-matter of the jurisdiction. It is true that no recovery can be had in any court by a person who has, in any way, fraudulently suppressed the instrument fixing his adversary's liability; for, as that is the best evidence, he can not be permitted to resort to secondary evidence if he has fraudulently suppressed the best. The statute purports to regulate jurisdiction over the cases specified—not to declare rules by which they are to be tried; and clearly it was not meant that the courts should have no jurisdiction to try the case if the plaintiff had acted fraudulently. If there is an imputation which the plaintiff must remove when he sues on a mutilated writing it is not because the statute casts it upon him, but because that is the rule independent of the statute. If he sues upon a lost note he must prove that it existed, and that he is unable to produce it, after diligent effort to find it. But the statute does not declare that he shall be presumed to have fraudulently suppressed the note so as to place on him the burden of disproving fraud. The evidence which shows the loss—that is, that the paper got out of his possession inadvertently, and that he does not know where it is, after diligent search—is all that can be required of him; and we are not aware of any case in which it was held that a presumption of fraud arises out of the mere fact of loss. It is indeed a little difficult to predicate fraud of a loss—to lose a thing purposely is to actively suppress it. If such practice is suspected, a denial of the alleged loss will enable the defendant to direct evidence to that point, and he may show that what is claimed as a loss was a suppression, or at least render it doubtful whether it was the one or the other so as to say to the jury that the loss is not proven by weight of evidence.

It is clear that the word "fault" in the instruction bears more heavily on the plaintiff. Nearly every loss is attributable to some negligence.

The jury should have been told that if, from a preponderance of the evidence, they found that Hayden executed the note for $1,000 then lent him, and that the note had been lost, they should find for the plaintiff unless they further find that the failure to produce the note was fraudulent.

As to rulings at the trial concerning evidence: The financial condition of both James and Hayden at the time of the alleged loan are circumstances tending to show the ability or inability of the former to make the loan, and of the independence or necessity of the latter. It was competent, for this

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purpose, to show by the bank officers that Hayden then had a considerable deposit lying idle; or for James to show that he was then in a condition to make the loan, and he a competent witness to prove what he had. It was improper to let the bank officers testify that, from their knowledge of Hayden's habits, it was their opinion he would have deposited the $1,000 if he had borrowed it, and that no such deposit was made. While James was not competent to testify that he lost the note executed by Hayden, since this would be indirectly testifying that Hayden executed it, he should have been permitted to testify that he had lost the paper which he showed to Ortkeiss, the latter having testified that James had showed him a paper purporting to be Hayden's note for $1,000, dated January 1, 1884, and that the signature was Hayden's.

The judgment is reversed and the cause remanded, with directions to grant the appellant a new trial.

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SUPERIOR COURT ABSTRACTS.

CITY OF NEWPORT v. BERRY.

Filed November 21, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Taxation—Situs of steamboats—For the purposes of taxation personal property, if it does not accompany the person, must have an actual situs somewhere; and in the case of steamboats it is the home port, especially where the home port is also the place of the owner's residence.

This action involves the liability of appellee for taxes assessed and levied against him for the years 1885 and 1886 upon a ferry float stationed at the wharf of the city on the Ohio river, and two steam ferry boats which plied the river between that city and the city of Cincinnati. During the year named appellee was the owner of the float and boats, and had his office for the business in relation to the ferry in the city of Newport, which was also the lying-up place or home port of his ferry boats. The charter of the city of Newport provides for a "tax on the real, personal and mixed estate within the limits of said city subject to taxation by the city under the laws of the State." Held—That the float and boats are subject to taxation for city purposes.

2. Same—It is contended that by its charter the city is confined to taxing property which the State taxed at the date of its charter, and as by article 1 of chapter 92, General Statutes—the statute in force both when the charter was adopted and the taxes were levied—steamboats were not specifically taxed, the property in question is not liable to taxation by the city. Held—That all property not specifically mentioned in section 4 of that article, unless expressly exempted, is liable for taxation under section 5, therefore, the property in question in this case is liable for taxation under the latter section.

3. Exemption from taxation—The fact that the owner of the land on which the city of Newport is built, and under whom the appellee claims, in laying out the city reserved the right to operate a ferry from the city to the opposite side of the river, there being no contract for immunity from taxation, did not exempt from taxation the boats engaged in and necessary for the business.

Crawford & Irwin for appellant; C. J. Helm and A. Duvall for appellee.

HERRMAN v. WHITESCOVER'S ADM'R.

Filed November 21, 1888. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

Sales of personal property—Passing of title—Lien—W. and H. entered into a written contract, which recited that W. had sold to H. "the poplar, ash, gum and walnut timbers" on certain land, which W. agreed to cut, haul and deliver to H., at the mouth of Green river, by a named date. The contract contained a description of the lengths, etc., of the various kinds of logs which would be received, and the respective prices governed by the length and kind of logs. It was further provided that should either party, by death or otherwise, fail to comply with the written contract, H. was to have the right to move sufficient amount of timber to cover the amount of money advanced. The logs were cut, and were lying scattered along the banks of a creek, which flowed into Green river, when W. died. Before his death H. had advanced to him fully as much as the logs afterward proved to be worth. After W.'s death the agent of H. gathered up the logs and run them down to Green river, where he had them rafted, when the administra-

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tor of W. took them into his possession, and thereupon H. instituted this action against him for their recovery. It is contended for plaintiff that the title passed; but, if not, that as plaintiff, in the contract, reserved the right to remove sufficient timber to cover the advancements made in the event of W.'s failure to comply with his contract, and the advancements made exceeded the value of the logs in controversy, and he, through his agent, after W.'s death, obtained the peaceable possession of the logs, he should be allowed to retain them. Held—First. The title to the timber did not pass; second, the second contention can not be sustained because, in the first place, the agent's possession was not rightful, and in the second place, under the provision of the contract referred to, plaintiff, at best, had but an incipient lien, which was not enforcible against the intervening rights of the decedent's creditors.

Geo. W. Williams & Son for appellant; Weir, Weir & Walker for appellee.

ADAMS EXPRESS CO. v. SPALDING.

Filed November 21, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Carriers—Contracts against public policy—A common carrier who undertakes to carry goods can not by contract exonerate himself from liability for loss or injury to the goods by his own negligence.

The provision of the contract in this case, that the carrier should not be liable for breakage of or injury to glass or any article of a fragile nature in any of the packages which it undertook to carry, was void as against public policy, being a contract against liability not only for ordinary negligence, but for gross negligence.

2. Same—The carrier having undertaken to deliver goods at Lebanon, Ky., a provision in the contract that it should not be liable in any event, unless claim in writing, with the contract attached, should be presented in its office at St. Louis within thirty days next after it received the goods, is unreasonable and void. It can not be said that, under such a contract, the owner should present his claim through or by mail, and thus deliver to the company the contract, the evidence which he holds of its undertaking.

Whether such a provision would be enforced in a case like this, if it provided that the owner might present the claim where he is to receive the goods, is not determined, but it is suggested that there might be a reason for notice in a case of nondelivery that would not exist where goods are delivered, but in a damaged condition, as in this case.

3. Same—Practice—To the claims of the defendant that it should not be held liable because the fragile nature of the goods was concealed from it, and that it was thereby prevented from exercising the care and caution in handling the goods it would have exercised if their character had been known, it is sufficient to say that, although this issue was made by the pleadings, the court was not requested by the defendant to present it to the jury.

J. D. Fogle and T. F. Hallam for appellant; W. E. & S. A. Russell for appellee.

BAGBY, &c. v. BAGBY.

Filed November 21, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Ward, affirming.

1. The contract of a married woman being absolutely void, her ratification of the contract after she becomes discovert does not make it binding on her. In order to bind herself she must make a new contract, based on some consideration other than the void obligation.

2. Fraud in procuring judgment—The obligee in a note, and one of his creditors, who was seeking to subject a part of the proceeds of the note, represented to the obligor in the note—an ignorant old woman—that she was liable, and that her property could be taken in satisfaction, and she, relying upon their superior knowledge and means of information, the obligee being her son, consented that judgment might be rendered against her on the note, which was done. The note was in fact void, the obligor

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being a married woman when it was executed. In this action to set aside that judgment upon the ground that it was obtained by fraud, Held—That a legal fraud results from the procuring of, and insisting upon the binding efficacy of, the judgment, although the parties claiming the benefit of it may not have had the actual knowledge that their representations were false; they are affected by constructive knowledge, all men being presumed to know the law; therefore, the court properly vacated the judgment.

3. A judgment can not be vacated for fraud in obtaining it unless there is a valid defense to the action.

Collins & Fenley for appellants; D. A. Glenn for appellee.

HILL, &c. v. MUNDY, &c.

Filed November 21, 1888. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Fixtures—Ice—Appellants were the owners of a house and lot used and known as hotel property, which, on the 1st day of April, they exchanged to appellees for another house and lot in the same town, and soon thereafter surrendered possession. On the hotel lot there was an ice house which, prior to the exchange, appellants had filled with ice. In this action by appellants to recover the ice, which appellees refused to allow them to use, Held—That considering the property sued for—ice in an ice house—the time of year and purpose for which it was gathered, the time of year the ice house was sold, the perishable nature of ice if moved at that season, and especially when there is no showing that the claimant had made any provision for its preservation, its want of value if then moved, and its value if used in connection with the real estate, the most reasonable conclusion is that it was gathered and stored to be used and enjoyed only by those who might have the right to use and enjoy the freehold, and that it was, therefore, a part of it by the intention of its use and enjoyment. Besides, it was closely connected with the business conducted upon or in connection with the real estate.

Montgomery, Lindsay & Botts for appellants; E. E. Settle for appellees.

POLK v. BROWN.

Filed November 21, 1888. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Ward, reversing.

1. Merger of one note in another—Evidence—In this action of appellant against appellee upon a promissory note the defendant pleaded payment. His evidence tended to show that the note sued on was merged into another note executed by him to plaintiff, which, it was admitted, had been satisfied by a composition and surrender. Held—There being no plea that defendant had paid all the debts he owed to plaintiff, by a compromise or composition, he was necessarily limited in his evidence to proof of payment of the particular debt sued on; but any evidence tending to show that plaintiff only claimed to have one demand against defendant at the time of the compromise settlement of the note into which it is claimed the note sued on was merged, was competent to show that other demands had been merged into that note.

2. Instructions—The only issue presented by the pleading and evidence was as to the alleged merger of the note sued on in the other note executed by defendant, and instructions which presented other issues were erroneous.

John R. M. Polk and Thomas B. Fairleigh for appellant; M. A. & D. A. Sachs for appellee.

McCORMACK, &c. v. HENDERSON.

Filed November 21, 1888. Appeal from Fleming Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Bond to discharge attachment—A bond whereby the obligors undertake that the defendant in an attachment "will perform the judgment of the court" is the bond provided for by section 221 of the Civil Code to discharge,

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an attachment, and the effect of such a bond is that the attachment is thereby discharged, and property on which it is levied is left as if no levy had been made. It is thereafter immaterial whether the grounds of the attachment were valid or not, or whether the property was or not liable to be taken under it.

2. Same—The collection of such a bond may be enforced by rule. Indeed it seems that the new Code places such bonds on the footing of replevin bonds, and permits execution to be issued without any preliminary proceedings.

3. Same—While the production of the property is not one of the things contemplated by such bond, yet if the defendant, waiving his objection to an order requiring the property to be produced, does produce it, and allows it to be sold as a mode of paying the judgment, the surety in the bond can not complain.

4. Same—The sureties aver that at the time of the levy the sheriff explained the bond to bind them only to have the property forthcoming, and that they signed it for that purpose. Held—That, taken more strongly against them, as the rule requires, this means no more than that they supposed that to be the legal effect of the bond, and that the sheriff was of the same opinion, and, therefore, it is no defense.

Wm. J. Hendrick for appellants; W. A. Sudduth and E. W. Hines for appellee.

STUART v. LOUISVILLE & NASHVILLE R. R. CO.

Filed November 28, 1888. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Limitation—Repeal of statute—The provision of appellee's charter, limiting to six months the right to bring an action against it for injuries inflicted by its engine and cars upon stock straying on its track, is still in force. The "powers, privileges and franchises of any corporation" are expressly excepted by the repealing provision of the General Statutes.

2. Same—Pleading—This statute of limitation can not be relied upon by demurrer, even though the petition shows, as it does in this case, that the injury complained of was inflicted more than six months before the institution of the action, unless the petition further shows the nonexistence of any ground of avoidance of the statute.

J. S. Kelly for appellant; Wm. Johnson for appellee.

BOEHME'S ASS'EE v. DROSTE.

Filed November 21, 1888. Appeal from Campbell Chancery Court. Opinion of the court by Judge Bowden, reversing.

1. Uncertainty in judgment—The judgment appealed from orders the master to sell "all the personal property now in the hands of Edward C. Wendt, as assignee of H. & F. Boehme," but permitting the assignee "to retain only such property as is being actually used by him in the completion of the contracts of the Boehmes for the improvement of streets until said contracts are completed." Held—That the judgment is too uncertain to be executed.

2. Assignments for creditors—In view of the concession made by the judgment, that the assignee was acting properly in completing the street improvement contracts, there is no reason why the administration of the trust should be taken from him, or why he should be deprived of the compensation attending it. The only matter alleged against the assignee was decided for him; there was no pleading with reference to any personalty except that being used by the assignee; yet, being sustained in that use, he is treated as if recusant.

C. J. Helm for appellant; John S. Ducker for appellee.

BRYAN v. INMAN, &c.

Filed November 28, 1888. Appeal from Logan Circuit Court. Opinion of the court by Judge Bowden, affirming.

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Married women—Partnership—Separate estate—P., a married woman, formed a partnership with M. under the firm name of M. & Co. In the course of the partnership business M. executed to appellant a note in the firm name. In this action by appellant to subject the separate estate of P. to the payment of that note upon the ground that the obligations of the firm were an appropriation by her of her separate estate, Held—That if it were conceded that the separate estate of P. would have been affected by a note issued by M. in the firm name, pursuant to an authority orally conferred by her, the appellant's petition was properly dismissed because there was no evidence of any authority. The authority can not be derived from the law of partnership, for there was no partnership. While P. held the actual position of a partner, yet, being a married woman, her legal status was not that of partner.

W. F. Browder for appellant; E. W. Hines for appellees.

HUGHES, &c. v. MERRITT.

Filed November 28, 1888. Appeal from Washington Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Appellate jurisdiction—The Superior Court, and not the Court of Appeals, has jurisdiction of an appeal involving the right to a passway over another's land. Such a right is not a title to the freehold, nor is it a franchise, as that word is used in the act creating the Superior Court.

2. Bills of exceptions—When the appellant prepares and tenders his bill of exceptions in the prescribed time, and the court takes time, the delay of the court does not prejudice.

3. Appeals to circuit courts—It is the duty of the clerk of the county court to transmit to the circuit court, on appeal, all original papers, but he is not required to certify that he has done so. And while there was a motion to dismiss the appeal in this case because the original papers had not been filed in the circuit court, yet as the motion was overruled, and the bill does not state that the papers had not been transmitted, it may be that the motion was overruled because they had been filed.

4. Change of passway—While one may, for his own convenience, have a passway over his own land changed to other ground, yet a change must leave all the passway, and not merely a useless cul de sac And as the change reported and allowed in this case leaves one end of the old route where it is, and removes the other end, with no connection between the two ends, this can not be regarded as a mere change of passway, but a practical destruction of it, which can not be allowed.

W. C. McCord for appellants; John W. Lewis for appellee.

BAILEY, &c. v. THOMAS.

Filed November 28, 1888. Appeal from Kenton Chancery Court. Opinion of the court by Presiding Judge Ward, reversing.

Corporations—Note signed by president and directors construed—The signature of a corporation to a promissory note was followed by the word "by," and then followed the name of the president, followed by the word "president," the name of the vice-president, followed by the words "vice-president," and the names of the directors, followed by the word "directors." The note reads: "We promise to pay," etc. Held—That the note shows upon its face that it is the obligation of the corporation alone, the word "by" being intended to apply to all the names which follow it, and not merely the name of the president, which appears first. The use of the word "we" in the body of the note does not show an intention to bind more than one, as the want of grammatical accuracy can not control the intention of the parties; the intention must be gathered from the entire instrument.

Wm. Goebel for appellants; O'Hara & Bryan and Fisk & Fisk for appellee.

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McCARROLL, GD'N v. CLARK.

Filed November 28, 1888. Appeal from Christian Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Reversal of judgment—Restitution—The appellee had the right to proceed by rule to compel appellant to restore money which he had collected of appellee upon a judgment in his favor as guardian which was subsequently reversed; and the appellant having failed to show that his condition had been altered upon the faith of the validity of the proceedings under which the money was collected, the court properly rendered judgment against him. The statement in his response that since the pendency of the suit his ward had arrived at maturity, and that, relying upon the fact to be as held by the court, he had settled with his ward in full, presented no defense, as it does not appear therefrom that the appellant's condition was altered after the collection of the money under the judgment, nor does the fact that the cause was remanded for further proceedings, and that another judgment may be rendered in favor of appellant, give him the right to retain the money he has collected.

Jo McCarroll for appellant; John Feland for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. CAMBRON.

Filed November 28, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

Railroads—Injury to stock—Third appeal in same case—In this action by appellee against appellant to recover for the killing of stock straying on appellant's track the court gave two instructions. By the first the jury were told that "the law presumes that the killing was negligently done, and the jury should find for the plaintiff such damages, not exceeding $175, as they believe from the evidence he has sustained." By the other instruction they were told how "this" presumption might be overcome, but were not told that, if it was overcome, they could find for defendant." There have been three findings for appellee upon the same evidence, the former two judgments having been reversed for errors of law. Held—1. Even if the court were of opinion that the verdict complained of was against the decided weight of the evidence it would not, on that account, reverse the judgment, there having been three findings in the same way upon the same evidence.

2. A mere semblance of error in the instructions which could not have controlled the verdict ought not to be seized on to disturb the finding of fact in a case where there has been three trials by a jury, and not one of them resulting in favor of the party complaining.

Judge Bowden, dissenting, holds that verdicts should be set aside, not only three times, but indefinitely, if they are the result of misdirection by the court; and that it was error in this case to peremptorily instruct the jury to find for defendant. It is dangerous to all rights to sustain such an instruction by assuming that the jury did not understand the court as meaning what it said.

W. J. Lisle for appellant; J. P. Thompson for appellee.

ANDERSON v. MORRIS.

Filed November 28, 1888. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, reversing.

Partnership—Each member of a partnership has a right to have the effects of the firm appropriated to the payment of the partnership debts, as well as any balance which the other partner on settlement may owe him, and has a lien to secure such appropriation. And where the firm is dissolved by the withdrawal of one member, either has the right to a settlement of the entire partnership business. But if one partner is allowed to withdraw and sell his entire interest to a stranger, who is received by the remaining partner in the place of him who withdraws, and the assets of the firm are then suffi-

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cient to meet its liabilities, the outgoing partner can not be held responsible to his former partner for what the latter may thereafter be required to pay of the old firm's indebtedness.

Petree & Littell for appellant; Landes & Clarke and J. W. McPherson for appellee.

BIRCKLE v. BAUM.

Filed November 28, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Pleading—Defect cured by verdict—The petition in this case upon an account for lumber furnished and labor performed by plaintiff for, and at the special instance of, defendant is confessedly bad in failing to allege either the value of the lumber and services, or an agreement by the defendant to pay the sum charged, but as the defendant, without demurring, answered, traversing the allegations of the petition, and upon a trial before a jury a verdict was rendered for the plaintiff, the defect was cured, as the jury could not have found a verdict for plaintiff without proof as to the value of the lumber and services.

2. Verdict—A verdict finding for the plaintiff "the amount claimed in the petition" was sufficient to authorize a judgment. The amount is rendered sufficiently certain by the record.

3. Acceptance of work—The lumber was furnished and the work done in improving defendant's house. The court instructed the jury that if plaintiff did any of the work and furnished any of the lumber agreed on, defendant must pay the value of all done and furnished if he accepted and held the same. Held—That this was error. The doctrine of acceptance does not apply in such a case, the defendant having the right to keep his house, nor was there any evidence showing an acceptance by defendant, and for that reason the instruction was unauthorized.

Wm. Goebel for appellant; H. P. Whittaker for appellee.

JONES v. BRYANT, &c.

Filed November 28, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Bowden, reversing.

Election of remedies—J. sued B. and D. on an attachment bond given in an action of B. against J., in which the attachment had been discharged. He alleged that the constable having the attachment levied it on a horse and wagon then used by him in his business, whereby the business was interrupted and injured; that he was put to trouble and expense in regaining possession of the horse and wagon, and in employing an attorney to contest the attachment. Soon afterward he sued B. and D., the constable, to recover damages for the seizure of the wagon, alleging that it was exempt, and that this fact was known to D., and that both he and B. acted maliciously. B. moved the court to require J. to elect which action he would prosecute, which the court did, and J. refusing to elect, the court dismissed the action on the bond. Held—1. This was error, because the petition in the action against B. and D. to recover for the seizure of exempt property did not state a cause of action, for the reason that it failed to state that J. was a housekeeper, and it is not possible that damages legally recoverable on the attachment bond could be recovered legally on a petition that stated no cause of action.

2. Even if that petition was sufficient, it was error to require an election because that action does not involve the validity of the attachment, and the redress that may be had in that action does not include the redress that can be had in an action on the attachment bond.

3. But the plaintiff, having sued B. and D. for illegally seizing exempt property, can not recover on the attachment bond for anything done to that property.

Hallam & Myers for appellant; J. F. & C. H. Fisk for appellees.

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KENTUCKY COURT OF APPEALS.

DILS, JR. v. JUSTICE.

(Filed October 2, 1888—Not to be reported.)

1. Forcible entry—To maintain a proceeding of forcible entry the plaintiff must have been, at the time of the alleged forcible entry, in the actual possession of the premises, residing thereon. Neither right of possession nor constructive possession is sufficient.

2. Same—No question of title or of the right of possession can arise upon the trial of the issue. It, therefore, makes no difference whether the defendant had or had not the right to enter. The inquiry is limited to the question whether the complaining party was or was not in the actual possession.

Jas. M. York for appellant.

R. T. Burns, W. M. Connolly and Williamson & Auxier for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is a proceeding of forcible entry, instituted by appellee, in whose favor was the finding of the jury before the justice of the peace, as well as the verdict and judgment upon trial of the traverse.

It appears that about the year 1862 the appellant commenced an action to subject the tract of land in controversy, which was one of five or six tracts, at the time belonging to and in possession of one Atkins; and in 1866, under judgment of court, all the tracts were sold and purchased by appellant, Dils, who soon after took possession. But subsequently other creditors of Atkins commenced actions to have a resale, and about 1883 judgment was rendered, by which it was determined appellant held the land under his purchase in trust for all the creditors of Atkins, and a resale was directed. And at such resale, which took place in November, 1883, Dils again became the purchaser, and the sale having been confirmed, an order was made at the October term, 1886, of the court directing a deed to be made to Dills for all the tracts of land, including the one in controversy, and for a writ of possession to issue

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in his favor. Under that writ the sheriff of the county, February 8, 1887, did go upon the land and deliver possession to appellant by severing from a dwelling house on the land one or two farming implements, all the personal property of any value there was there, and Dils then delivered possession to a tenant of his occupying another tract within the Atkins boundary.

A short time thereafter appellee went upon the land, fastened a door-shutter to the house, placed some fodder therein, and put a few cattle upon the place to graze.

March 13, 1887, appellant went upon the land, broke the lock appellee had fastened the door of the house with, and opened the door, and for that cause the warrant for forcible entry was obtained by appellee. The inquiry on the trial of an issue of forcible entry is limited to the question of whether the complaining party was or was not in the actual possession of the premises at the time of the alleged forcible entry, for, in the language of the Civil Code, section 452, a forcible entry is, first, an entry without the consent of the person having the actual possession; second, as to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent.

No question of title or of the right of possession can arise upon the trial of the issue. It, therefore, makes no difference whether the defendant had or had not the right to enter, whether he had the superior title and right of possession, or was a mere intruder. To maintain this proceeding the plaintiff must be, at the time of the alleged forcible entry, in the actual possession, that is, in the occupancy of the premises—neither right of possession nor constructive possession is sufficient. The record of the actions in which the judgment for sale of the lands, for a deed to Dils, and for a writ of possession in his favor was competent evidence for the purpose of showing the extent of possession, and, for that purpose only, was what purported to be the deed from Atkins to Parsons, dated 1855. But it seems to us, as this record stands, appellant was entitled to a peremptory instruction. For appellee did not show he was in the actual possession of the premises on March 13, 1888, or that he ever had been. On the contrary, he was at the time residing some distance from the land, while appellant was put in possession on the 8th of February, and never thereafter was out of possession, for being, by his tenant, in possession of a portion of the Atkins survey, he was in possession of the whole of it.

Upon a retrial of this proceeding the appellant will be entitled to a verdict in case appellee fails to show he was in the actual possession of the premises, residing thereon, when the alleged forcible entry was made; or, in case there is any question of fact on that subject, he will be entitled to an instruction requiring the jury to believe, before finding for appellee, that he was so in possession.

The judgment is reversed and cause remanded for a new trial consistent with this opinion.

RICHART, &c. v. UTTERBACK, &c.

(Filed October 23, 1888—Not to be reported.)

1. Homestead—Fraudulent conveyance—A conveyance by a debtor, for either a good or valuable consideration, of land to which he is entitled as a homestead, is not fraudulent as to creditors, and as a deed conveying the fee

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simple title of land to the grantor's children, with a reservation to the grantor of the right to occupy and use it during his life, could not have been set aside by creditors while the grantor lived, it can not be done now that he is dead.

2. Same—If the land exceeded in value $1,000 it would perhaps be liable to the extent of such excess to the grantor's debts, but the court is of opinion that the evidence sustains the finding of the lower court that it does not exceed in value that amount.

J. S. Hurt for appellants.

R. Gudgell and W. S. Gudgell for appellees.

Appeal from Bath Court of Common Pleas.

Opinion of the court by Chief Justice Lewis.

September 28, 1885, W. S. Utterback conveyed to Thomas W. Utterback and four others, his children, a tract of about forty-eight acres, reserving to himself the use and occupation thereof during his life, and a support and maintenance out of it as long as he lived, the consideration being recited as follows: "That said party of the first part, for and in consideration of the sum of $1, the receipt of which is hereby acknowledged, and the love and affection said party of the first part bears for the parties of the second part, who are his children, who have been kind to said party of the first part during years of affliction, and the further consideration of a continuance of such kindly service and attention during the balance of his life," etc.

W. S. Utterback died in October, 1886, and in November of that year appellants instituted this action to subject the land to the satisfaction of a judgment recovered against him in 1878, upon which there had been executions issued and returned no property found.

It appears the deceased owned and occupied the land as a bona fide housekeeper, with a family, from the year 1860, which was long before the debts of appellants were created, and so continued to own it to the date of the deed and occupy it to the time of his death.

It is expressly provided by statute that a homestead so owned and occupied is, to the extent in value of $1,000, exempt from coercive sale to pay debts against such owner, created subsequent to the acquisition of it; and consequently, as has been decided by this court, he has the right to convey and pass title of the homestead for either a good or valuable consideration. (Brooks v. Collins, 4 Bush, 622.) For, as said in that case, such conveyance does not affect the rights of creditors, and, therefore, can not be regarded as fraudulent as to them. It is true the grantor in this case retained what may be considered a life estate in the land, but the interest in remainder he irrevocably vested in the grantees; and if he had the right to convey his whole estate in the land, we do not perceive why he could not pass the title to less than the whole, or how, if his creditors could not, while he lived, have set aside the deed on the ground it was fraudulent, they can now do so, for the grantees must be divested of the title before the land can be subjected. They became at the death of the grantor the owners of the entire interest in the land in virtue of the conveyance, and not as his heirs at law, for all the estate or interest he had terminated at his death, and none remained to be either inherited by his children or to be subjected by his creditors.

We have not referred to the fact the agreement on the part of the children to continue their services and attention to their father constituted a val-

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uable consideration, and rendered the transaction a sale instead of gift of the land, because we think the deed would have been valid and effectual in either case.

The only question about which there can be doubt is whether the land was, at the time of the conveyance, of greater value than $1,000, for, to the extent it exceeded that sum, it would perhaps be liable. The evidence on this issue is somewhat conflicting, as is generally the case when opinions as to value of property are given. But we are not satisfied the lower court erred in finding it did not exceed that amount in value; on the contrary the preponderance of the evidence sustains the judgment, which is affirmed.

COMBS v. McQUINN.

(Filed November 8, 1888—Not to be reported.)

1. Ejectment—Champerty—As it appears in this action of ejectment and trespass that, at the time of the execution of the deed under which defendant claims, the plaintiff was in the actual, adverse possession of the land in controversy, the defendant's deed is champertous and void; and the fact that both parties claim through the same vendor, the immediate vendor of the plaintiff being the remote vendor of defendant, does not prevent the champerty statute from applying, as the deeds under which the parties claim do not convey the land to them in common, but each deed conveys the entire interest to the grantee therein, thus creating antagonistic interests.

2. Same—Fraudulent conveyance—The defendant has failed to sustain his claim of title for the further reason that the consideration for the deed to his vendors was a fraudulent one, and they in fact never claimed under said deed. Besides, at the time of plaintiff's purchase, there was no record evidence of said conveyance, and he had no actual notice of same.

John E. Cooper and John L. Scott for appellant.

Sam H. Patrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Bennett.

In July, 1878, the appellee, McQuinn, instituted an action of ejectment and trespass against the appellant, Combs. To the appellee's petition the appellant plead, after a general traverse, that he was the owner of five-sevenths of the ninety-three acre tract of land claimed by the appellee, McQuinn; that said tract of land originally belonged to Charles McQuinn, grandfather of the appellee; that in 1842 he conveyed his land, including the tract claimed by the appellee, to his children, seven in all; that in September, 1878, five of said children conveyed by joint deed their respective interests in said land to him, the appellant. Mrs. Jones, formerly McQuinn, and C. B. McQuinn, owned the other two interests, and he made them defendants by cross petition, and asked that said tract of land be divided between them, therefore, the case was transferred to equity.

The appellee, McQuinn, by his reply, put in issue these allegations, and plead affirmatively that, at the time of the alleged purchase by the appellant, he was in the actual, adverse possession of said land, claiming and holding it under a deed of conveyance from his grandfather, Charles Mc-

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Quinn, in 1873; and that he paid his said vendor the full value of said land. The lower court upon the hearing sustained the appellee's title to said land. The appellant has appealed.

In this opinion it is needless to go into the facts in detail, for the following prominent ones suffice to show that the appellant has no case. The record shows that the appellant, some years before he instituted this suit, brought suit to subject this land, or a part of it, to the payment of McQuinn's debts, alleging that it belonged to him. The appellee was made a party to said action by the appellant, upon the ground that he claimed some interest in said land, or a part of it. Appellee appeared in said action, and set up his title, as he now claims it, to the part of the land then in controversy, and the court sustained his title thereto. Also, in 1875, the appellant instituted an action of ejectment against the appellee for the purpose of recovering a part of the land now in controversy. The appellee again relied upon his title, as he now claims it, to said tract of land; also his actual possession thereof. The issues were tried by a jury, which resulted in a verdict and judgment for the appellee.

It seems that in September, 1878, the appellant procured a conveyance by deed from five of Charles McQuinn's children of their supposed interest in the land derived from their father. Upon the strength of said conveyance the appellant claims five-sevenths of the land in controversy. If the parties joining in said deed really owned the interests (which is not probable) in said land that they proposed to sell, yet their deed passed to the appellant no title whatever, for it is shown conclusively that, at the time of said conveyance, the appellee was in the actual, adverse possession of said land, holding and claiming it by virtue of the deed from his grandfather, therefore, the appellant's conveyance was champertous and void.

But the appellant contends that as Charles McQuinn was his remote vendor, and the immediate vendor of the appellee of the same land, the champerty statute does not apply. Such a proposition can not be entertained for a moment, for the simple reason that the respective deeds under which each party claims do not convey the land in common, but a conveyance of an antagonistic interest to each, and the appellee so held and claimed said land. Also the record shows that there was no valuable consideration—on the contrary, a fraudulent one, for the conveyance by Charles McQuinn to his children, and that they in fact never claimed under said deed. Also that at the time of the appellee's purchase from Charles McQuinn there was no record evidence of said conveyance, and that he had no actual notice of the same. The appellant claims to have purchased some of said interests prior to the date of the joint deed. If it be so, why did he not make use of the fact in his former contests with the appellee about said land? Why did he rely upon a title wholly distinct from the one he now relies on in order to establish his right to the land and to defeat the claim of the appellee?

The judgment of the lower court is affirmed.

NEWCOMB, &c. v. PHILLIPS.

(Filed November 3, 1888—Not to be reported.)

Where an insolvent husband expends his money in improving his wife's land his creditors, whose debts existed prior to the erection of the improvements, may subject the rent of the property to the extent that it has been

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enhanced by such improvements. And it is immaterial in this case that the land improved by the husband was in fact owned by his wife's father and that her possession was merely permissive, the improvements having been made with the knowledge and consent of the father; for, if a debtor uses his means in improving the property of another, with the knowledge and consent of the owner, it is equitable to permit the creditor to look to the enhanced use or rent for the payment of his debt.

J. R. Thomas and J. E. Fogle for appellants.

Sam Avritt for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Harrison Cox, being the owner in fee of the undivided two-thirds of 114 acres of land, and having a life estate in the remaining one-third, with remainder to his daughter, the appellant, M. E. Newcomb, permitted her, together with her husband, the appellant, E. F. Newcomb, to take possession of about thirty-eight acres of it in 1881 as her own; and during that and the following year the husband, with his own means, erected a house and other permanent and valuable improvements thereon, thereby increasing its value to the extent of six or seven hundred dollars. The father contributed a little toward them in the way of material and labor, but it is manifest that no one did so materially save the husband. He was then insolvent, and his own testimony tends strongly to show that this investment of his means was made with a view of preventing his creditors from reaching the same.

The wife and the father-in-law both knew that the improvements were being made by the husband. He was controlling the land with the knowledge and assent of both, and in fact was, at the time, and when the improvements were made, living with his wife at her father's house.

The debts of the appellee herein asserted, amounting to something over $300, were created prior to the erection of the improvements. It is erroneously claimed that this is not so in part. It is conceded to be true as to the $150 note, but denied as to the balance of the indebtedness.

It appears that in 1880 the appellee let E. F. Newcomb have several notes to collect for him. Newcomb applied the money thus realized to his own use. Subsequently he, by way of paying the same, transferred to the appellee a note on some third parties; but upon suit its collection was defeated upon the ground that Newcomb had procured it by fraudulent representations; and the original indebtedness, therefore, remained unsettled, and the appellee, in his amended petition, proceeds upon it.

It matters not that the father had only relinquished his interest in the land to his daughter by parol; and it may be conceded, so far as the appellee's claims are concerned, that her possession was merely permissive from the father. The improvements were made with his knowledge and consent, as well as that of the wife. Both of them knowingly suffered the husband to invest his means, which should have been used in the payment of his debts, in the way of permanent improvements upon the land. It was done to defeat his creditors, and, under such circumstances, they have the right to look to the property to the extent of the enhanced value. (Barbour v. Gaines, &c., 5 Ky. Law Rep., 690; Heck v. Fisher, &c., 78 Ky., 643.)

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If a debtor uses his means in improving the property of another, with the knowledge and consent of the owner, it is equitable to permit the creditor to look to the enhanced use or rent for the payment of his debt. The owner has no right to it. He has permitted the debtor to improperly and fraudulently divert his means from the payment of his debts; and it is immaterial, upon the facts of this case, whether the land belonged altogether to the wife, or whether her father could have asserted a right to the possession of it by virtue of his life estate as against her. Indeed the wife would perhaps, in such a case, be entitled to more favor at the hands of the chancellor than a third party; but a court of equity will not permit a fraud to be thus perpetrated upon the creditor for the benefit of either of them. The lower court found that the improvements had enhanced the annual rental of the land to the extent of $65; ordered it rented out, and this much of the yearly rental applied to the appellee's debt until it should be satisfied.

This finding is supported by the evidence, and the judgment is affirmed.

COMBS v. COMMONWEALTH.

(Filed November 15, 1888—Not to be reported.)

Self-defense—Instructions—As there was no evidence upon the trial of appellant for murder tending to show that he acted in self-defense, he was not prejudiced by the failure of the court to affirmatively instruct the jury as to the law of self-defense.

J. B. Marcum for appellant.

P. W. Hardin for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Bennett.

The appellant's attorney has filed no brief. We are, therefore, at a loss to know the grounds relied on for a reversal of the case unless it be the fact that the trial court did not instruct the jury affirmatively as to the law of self-defense.

An examination of the record shows that the appellant was not prejudiced by the failure of the court to give said instruction.

In the morning, before the appellant arose from his bed, his brother Bill got up and put on the appellant's pants, and then, with his knife drawn, told the appellant that he could not get them unless he got them by going over his dead body. The brother also drew an empty gun on the appellant, but he returned the gun to the rack from whence he got it, and the appellant then got the gun and took it out of doors—leaving the brother in the house—and loaded it; he then, with gun in hand, took a seat on a rock, and while sitting on the rock the brother, in company with a female companion, passed by, evidently going away, still, however, having his knife in hand. The appellant called to him, saying that if he did not give him his clothes he would kill him; thereupon the brother turned and advanced a few steps toward the appellant, with knife in hand, daring him to shoot. Just then appellant did shoot the brother, from which he died in a few minutes.

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While the proof shows that the brother was a devilish fellow and brought about the difficulty that occurred in the house, yet the proof also shows that the difficulty in the house had ceased, and that the appellant thereafter armed himself with a gun and lay in wait for the brother in order to kill him if he did not surrender the clothes, and that he did, without fear of an attack by his brother, shoot him because he would not give up his clothes.

Therefore, the appellant was not prejudiced by the failure of the court to affirmatively instruct the jury as to the law of self-defense.

The appellant having been found guilty of manslaughter, and his term of service in the penitentiary of the State having been fixed at eight years, the judgment of the trial court is affirmed.

OWEN & McKINNEY v. L. & N. R. R. CO.

(Filed November 15, 1888.)

1. Railroads—Contracts for shipment of stock—Waiver—The stipulation in a contract with a railroad company for the shipment of live stock, by which it is agreed on the part of the shipper as a condition precedent to his right of recovery for injury to the stock that he will give notice, in writing, of his claim thereof to some agent of the company before said stock is removed from the place of delivery, and before it is mingled with other stock, is reasonable, and will be enforced unless it is waived by the company, or the conduct of the company has been such, with reference to the matter, as to preclude it from setting up the want of notice as a defense.

Appellants contracted with appellee to carry a horse from Shelbyville, Ky., to the fair grounds near Chicago, the contract containing the stipulation as to notice of claim for damages above referred to. In removing the horse from the cars at the place of destination he was injured. The fact of the injury and of appellants' claim for damages was not only known to the officers and agents of the company, but an actual examination of the horse made by a surgeon at the instance of the company. In his crippled condition the horse was brought back from Chicago on the same line of road and delivered at the same depot from which he was originally shipped. Held—That the removal, although at the instance of the owner, must be regarded as by the consent of both parties, and a waiver of the notice required by the contract.

2. Same—Unsafe platform—Although the contract required the appellants to unload the stock, it was the duty of the company to provide a safe mode of delivery by having a platform suitable for the purpose of unloading stock; and if the agents of the company required appellants' agent to remove the horse from the car on a platform not ordinarily safe for the delivery of stock, and the horse was injured thereby, the company is responsible, although the agent of the owners may have been apprised of the danger.

3. Contributory negligence—Pleading—The defendant, by its answer, alleged that "in taking the horse from the cars the plaintiffs' agents, by their negligence, and by reason of the wildness and unruliness of the horse, suffered him to jerk, rear and fall, but he was not hurt or otherwise injured thereby." These allegations were not denied by the reply. Held—That as it is not alleged that but for this negligence the horse would not have fallen from the platform, and all injury of any kind is denied, the defense does not amount to contributory negligence, and no reply was necessary.

4. Same—The right to plead contributory negligence is denied only in cases arising under the statute authorizing the recovery of punitive damages, where the life of one person has been lost by the willful neglect of another. Therefore, in an action to recover for the loss of property of one

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person by the neglect of another, contributory neglect may be pleaded, whatever the degree of neglect alleged in the petition,

Brown, Humphrey & Davie and Luther C. Willis for appellants.

Barnett, Noble & Barnett and Wm. Lindsay for appellee.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Pryor.

The appellants, Owen & McKinney, being the owners of a valuable trotting horse, and desiring to exhibit him at the fair near Chicago, Ill., in the month of September, in the year 1886, contracted with the appellee, the Louisville & Nashville Railroad Co., to carry the horse from Shelbyville, Ky., where the appellants lived, to the fair grounds at Chicago. It seems that the horse was seriously crippled in taking him from the cars at the place of destination, the fair grounds, and the appellants instituted this action against the railroad company to recover damages for the injury sustained, alleging that it resulted from an insufficient and defective chute or platform upon which the horse was required to walk in leaving the car, and from which he fell to the ground, crippling him, as the proof conduces to show, for life. The negligence and improper conduct of the agents of the company is also alleged, in compelling the agent of the appellants to take the horse from the car onto such an unsafe platform as one of the grounds of recovery.

The contract of shipment is filed by the defendant, containing a stipulation by which it is agreed, on the part of the shipper, as a condition precedent to his right of recovery for the loss or injury to stock, etc., he will give notice in writing of his claim thereof to some officer of the party of the first part, or its nearest station agent, "before said stock is removed from the place of destination above mentioned, or from place of delivery of the same to the party of the second part, and before such stock is mingled with other stock." As one of the defenses to the action it was pleaded that this notice in writing had not been given as provided by the contract: that the horse was delivered in good order to the agents of the plaintiff for unloading, and in taking the horse from the cars the plaintiffs' agents, by their negligence and by reason of the wildness and unruliness of the horse, suffered him to jerk, rear and fall, but he was not hurt or otherwise injured thereby. There was no denial of the alleged negligence on the part of plaintiffs' agents in removing the horse from the car, and if this statement, by way of defense, is to be regarded as a plea of contributory negligence, the averment in this regard must stand admitted as true. The failure to give the written notice is admitted by the reply, and matters pleaded in avoidance that were deemed insufficient, or as not having been sustained by the testimony, and a nonsuit ordered.

It is argued by counsel for the railway company that if the evidence introduced was such as should have been passed on by a jury, still, the answer alleging contributory neglect being undenied, the nonsuit was proper; and we will, therefore, consider first the sufficiency of this branch of the defense. The alleged injury is said by the plaintiff to have resulted from this defective platform, that was only ten feet in width, with no support or railing on either side, and the horse, by reason of this defect, fell from the platform and was injured. In answer to this complaint is a traverse of the facts alleged, with the averment that the horse fell by reason of the negligence of

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the agent of the plaintiffs, but was in no manner injured. While the agent may have been negligent, it does not appear, nor is it alleged, that but for this negligence the horse would not have fallen from the platform; and all injury of any kind being denied, it seems to us the defense now interposed is not one of contributory negligence, and, therefore, no reply was required. The appellee maintains that, as gross negligence is alleged against the defendant, no plea of contributory neglect will be allowed, and cases are cited arising under the statute authorizing the recovery of punitive damages where the life of one is lost or destroyed by the willful neglect of another person, corporation or company, etc. This character or degree of neglect, and the recovery under it, is the creature of the statute and not applicable to the loss or destruction of the property of one by reason of the neglect of another. In the latter class of cases the common-law rule prevails, and whatever may be the degree of neglect alleged in the petition, whether gross or ordinary, the defense of contributory neglect may be pleaded; and if it appears that the injury would not have occurred but for the negligence of the party complaining, or the defendant could not, by the exercise of ordinary care, have avoided the result of the plaintiffs' neglect, the plea of contributory neglect is made out. Not so in an action to recover punitive damages under the statute for the destruction of human life by reason of willful neglect. In such a case willful neglect must be established, and, when made to appear, shows an absence of all care for the protection of the person whose life has been destroyed.

The principal inquiry in this case comes from that provision of the contract by which notice in writing is to be given by the shipper to some officer of the company, or its nearest station agent, before the stock is removed from its place of destination, of his intention to claim damages for the injury sustained. We do not understand this clause of the contract as exempting the railroad company from liability where the stock it undertakes to carry is injured by its negligence or that of its employes; but by its terms the shipper agrees that if his stock is injured he will give the notice in writing of his purpose to claim damages before his stock is removed from its place of destination. The company, when obtaining such a notice, will have an opportunity of investigating at once the cause and extent of the injury, so as to adjust the claim, if proper; and if executed in good faith, this stipulation must result in "benefit to both the owner of the stock and the carrier." It is not an unreasonable stipulation, or one that the shipper can not, in a reasonable time, comply with. (Goggin v. Kansas Pacific Railway Co., 12 Kansas, 416; New Jersey Steam Nav. Co. v. Merchants Bank, 6 How., 344; Southern Express Co. v. Hunnicutt, 54 Mississippi, 566; Texas Central Railway v. Morris, 16 American and English Railroad Cases, 259.) The appellants having failed to give the notice, it follows that a recovery must be denied unless the company has waived the notice, or its conduct has been such with reference to the matter in controversy as precludes it from now setting up the want of notice as a defense.

It is insisted by the appellant that the agent of the company had notice of the injury at the time the accident happened, and, therefore, it was unnecessary to notify that agent, or any other, in writing of the purpose to claim damages. We have already adjudged that this stipulation is valid, and if the mere fact of knowledge on the part of those in charge of the train of the injury to the stock is held to be sufficient, it renders this claim a nul-

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lity, for it must be assumed that when such accidents occur those in charge of the train have a knowledge of that fact, and having such knowledge, in every instance the written notice may be dispensed with and this stipulation entirely ignored.

Under the contract between the parties the appellee undertook to deliver the horse at the Chicago fair grounds, and in order to do this the shipment had to be made, after leaving the line of appellee's road, over the road of the J., M. & I. R. R. Co., this latter company undertaking, so far as this case is now presented, to deliver the horse at the place of destination for the appellee, the L. & N. R. R. Co. The agents and employes of the one road became the agents and employes of the other in so far as it affected the transportation and delivery of the horse. The horse was injured in the presence of those in charge of the train when unloading at the depot at the fair grounds, and the agent was invited to examine him at the place of the injury. In his crippled condition the horse was brought back from Chicago to Shelbyville on the same line of road and delivered at the same depot from which the horse was originally shipped and where the owners lived. The fact of the injury and of appellants' claim was not only known to the officers and agents of the company, but an actual inspection or examination of the horse made, as the proof conduces to show, by a surgeon, at the instance of the company, skilled in the treatment of such injuries as the horse had received. The animal was in fact removed by those who had been in charge when being carried to Chicago and when the injury occurred, and by that same company brought to Shelbyville and redelivered to the owners. This was in less than one month after the injury was received, and when this action was instituted the appellee, for the first time, alleged the failure of the owner to give the written notice mentioned in the contract. It was then too late to interpose such an objection. The opportunity was not only afforded the appellees of examining the horse, but, after being injured, he was returned by the same company to the owner in his crippled condition and redelivered at the depot from which he originally started. If, therefore, the agents of the L. & N. R. R. Co. had notice of this injury and removed the horse, although at the instance of the owner, on their trains back to the owner at Shelbyville, the removal must be regarded as by the consent of both parties and a waiver of the notice required by the contract. A reply alleging this state of facts having been filed was a complete answer to this ground of defense.

Another stipulation of the contract required the appellants, or their agents, to unload the stock, and it is, therefore, insisted that a delivery of the horse at the fair grounds in the car was a compliance on the part of the company. The proof shows that the cars of the appellee, or those of its agent, ran to the fair grounds, where there was a depot at which stock was delivered. There was no obligation on the part of the shippers, whether the destination was Chicago or the fair grounds, to provide a safe mode of delivery by having a platform suitable for the purpose of unloading stock. This obligation rested on the company, and if the agents of the company required appellants' agent to remove the horse from the car on a dangerous platform, one not ordinarily safe for the delivery of stock, and the horse was injured thereby, the company is responsible, although the agent of the owner may have been apprised of the danger.

If the platform was one suitable for the delivery of live stock, and the in-

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jury resulted from the negligence of the agents of the owner, the appellee can not be made to answer in damages.

While this court does not adjudge as to the question of negligence on the part of the appellees, that being a question for another tribunal, we think it manifest that, from the testimony introduced, the issue as to negligence should have been submitted to the jury. We have failed to notice other defenses made and questions raised, and have considered only the points made in the court below, and in this court, that caused the peremptory instruction. All other questions made are left open.

The judgment below is reversed and the cause remanded, with directions to award the appellants a new trial, and for proceedings consistent with this opinion.

(Response to petition for rehearing—Filed December 15, 1888.)

We have held, in the opinion already delivered, that the stipulation contained in the contract, by which the shipper agrees not to remove the injured stock before notice of claim for damages, is not unreasonable, but, at the same time this stipulation must be given a reasonable construction. The object is that the company may have at once an opportunity to investigate the extent of the injury and its cause. But here the horse, having been badly crippled, a fact known to the agents of the company, was, in a few days, brought back from Chicago by the same agents to his owners at the depot of appellee's road in Shelbyville, where the horse was, or could have been, examined by the company or its agent, and in fact, as the proof conduces to show, was examined; and now it is maintained that the removal was by the plaintiff himself, and not by the company, when the latter accepted the costs of transportation, with a full knowledge of the horse's condition, and furnished their cars and the same agents to bring him back to Kentucky. The removal was by the consent of the company, and was a waiver of the notice required, and this waiver or estoppel is specially pleaded. And not only so, it is further pleaded that the company agreed to bring the horse back to Kentucky when he was shipped to Chicago for exhibition. Whether there was a claim for damages or not is immaterial; the action of the company in removing the horse was a waiver, and the action can be maintained without the notice.

Petition overruled.

ROSS v. COMMONWEALTH.

(Filed November 15, 1888—Not to be reported.)

1. Indictment for murder—It is unnecessary to use the word "willful" in the accusatory part of an indictment for murder, since the charge of murder embraces it, all murder being willful.

2. Same—Aiders and abettors—In case of murder one who, being present, aids and abets him who gives the mortal blow, is equally a principal. In law both wield the weapon, and in a joint indictment against both it is sufficient to aver the manner of the killing, without stating what particular part each took in it.

3. Same—Instructions—Prejudicial errors—Where several persons are present and acting in the commission of a homicide, one may be guilty of murder and another of manslaughter, but as the accused in this case was engaged in a midnight robbery, and in carrying out this purpose, common to him and his confederate, he held the light that his confederate might strike the

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fatal blow, it is evident that his crime was murder, and the failure of the court to expressly tell the jury that in order to convict of murder they must believe, beyond a reasonable doubt, that he was actuated by malice could not have worked to his prejudice, the jury being expressly directed to acquit unless they believed his guilt was proved beyond a reasonable doubt.

H. T. Kendall for appellant.

P. W. Hardin for appellee.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Holt.

The appellant, James Ross, is under sentence of death for the killing of Benedict Rhodes. The deed was of a character which happily but seldom stains the reputation of our Commonwealth. It was done in the night time. The object was robbery. The evidence shows that the appellant and one Parker were the perpetrators. The only testimony showing the part each took in it is the confession made by the appellant upon a preliminary trial. He then stated that Parker killed the deceased in his bed with an axe, and that he held the light for this purpose. Other evidence shows that the deceased was murdered in his bed; that the appellant was seen about sunset going toward the house where the murder was committed; the bloody axe was found near by, and the two divided the ill-gotten plunder thus obtained between them, the pocket-book and watch of the deceased being found in the possession of the appellant. It is clear he was an actor in the murderous deed.

It is claimed, first, that the indictment is defective, and that the demurrer to it should have been sustained; and, second, that the jury were misinstructed as to the law of the case.

The indictment is a joint one as to appellant and Parker. The accusatory part of it charges them with "willful murder;" and then, by way of setting out the acts constituting the offense, avers that they "did willfully, unlawfully, maliciously and feloniously and with malice aforethought, strike, bruise and wound Benedict Rhodes with an axe, of which strike, bruise and wound said Rhodes died."

It is urged that it was a physical impossibility for both to have used the axe; and that it should have been charged what each one did in order to enable the appellant to know with certainty the character of the accusation as to him, and to prepare his defense. Section 122 of the Criminal Code provides that an indictment must contain "a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case."

It was unnecessary to use the word "willful" in the accusatory part of the indictment, since the charge of murder embraced it. All murder is willful.

Both the appellant and Parker were principals in the killing. Counsel have discussed at some length the law relative to principal and accessory. No such question arises. Both were present; and in case of murder, one who, being present, aids and abets him who gives the mortal blow, is equally

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a principal. (1 Wharton's Criminal Law, section 113.) In law they both wield the weapon and give the fatal blow. Each is equally guilty.

If A and B go out for robbery, and death results in the prosecution of the felonious design, it is murder upon the part of each, although but one struck the fatal blow. It would often be impossible to charge in the indictment what particular part each took in the homicide; nor is it necessary to a conviction to show it. Such nicety would be a hinderance to justice and a cover for crime. It is sufficient in such a case to aver the manner of the killing, since, in legal contemplation, it is the act of all who are present and aid in its commission. The requirement of greater particularity is not only unpecessary to enable the accused to defend himself, but it would be detrimental to public justice.

It is next contended that the second instruction authorized a conviction upon the mere presence of the appellant at the killing without regard to intention or act upon his part; and it is urged that the question of existence or nonexistence of malice upon his part should have been submitted to the jury.

Undoubtedly one may be merely present at a homicide and be guiltless. If several be present and acting in its commission, it is equally true that they may be guilty in different degrees. One may be guilty of murder and another of manslaughter. The one dealing the fatal blow may be guilty of manslaughter only, while the party assisting may be guilty of murder, or vice versa. It depends upon the question whether the one or the other is moved by malice. (1 Hale, 446; Russell on Crimes, 510.)

If, however, A confederates with B to make an attack upon C, or to commit a felony, as to rob, or if, being aware that B is actuated by malice in the matter, he is present and assists him and death results, both are equally guilty, although but one strikes the fatal blow.

Here the instruction, however, distinctly told the jury that they could not convict the accused, if Parker struck the blow, unless he was not only present, but aided and abetted him in the killing. It is true it does not tell them, unless by implication, that he must have done so from malice; but under the circumstances of the case the accused was not prejudiced by this failure. Instructions must be given according to the state of case presented. Here there was no manslaughter; evidently no instruction should have been given upon that subject.

There was no claim of self-defense, or that the accused acted in sudden heat and passion. He was engaged in a midnight robbery; and in carrying out this purpose, common to him and his confederate, he held the light that his coadjutor in crime might take the life of the sleeping victim. Evidently it was nothing but murder. If the jury had been told, in express language, that they must believe, beyond all reasonable doubt, that the accused in what he did acted from malice, yet a conviction for murder must have resulted. The testimony was clear and convincing. There was no conflict in it. The circumstances in evidence, as well as the appellant's confession, placed his guilt of the crime of murder beyond question.

As the jury could not possibly have acquitted him or found him guilty of manslaughter only, it results that an instruction which failed to expressly tell the jury that they must believe, beyond a reasonable doubt, that he was actuated by malice could not have worked to his prejudice. The instructions offered by him and refused by the court were objectionable in several respects. It is needless to point out the defects, because they were only in-

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tended to present to the jury the question of malice upon the part of the accused, and, as we have already seen, if they had been given the result could not have been different. The jury were expressly directed to acquit unless the guilt of the accused was proven beyond a reasonable doubt.

We have the more carefully considered the case owing to the severity of the sentence. Not a single mitigating circumstance appears. The appellant deliberately took part in a robbery, resulting in the assassination of a sleeping victim, and the voice of justice and public safety demands the severest punishment.

Judgment affirmed.

COMMONWEALTH v. LILLARD.

SAME v. SAME.

(Filed November 15, 1888—Not to be reported.)

1. Construction of statute—Local option—The construction of an act of the legislature, if any can be given, should be such as will give the law some effect; and a construction that would result in an absurdity ought never to be adopted.

An act of the legislature, entitled "An act submitting a proposition to the voters in district No. 3, in Garrard county, whether or not spirituous, vinous or malt liquors shall be sold therein," provided that the county judge should cause an election to be held as required by the provisions of the act of January, 1874 (the general local option law), and that the provisions of that act should govern the election, the act providing, however, that the vote should be taken at a special election instead of at a regular election, as provided by the general local option law. Held—That the intention was that, if the vote under this act should be against the sale of liquor, the provisions of the general local option law should be in force in the district named, as to hold otherwise would give no effect whatever to the vote provided for.

2. Same—The ordinary understanding of the expression "district No. 3, in Garrard county," would be that it was the civil district in which the vote should be taken, unless there was something else in the act showing a different purpose; but this is not material in determining the validity of an indictment under the act. If the vote has been taken in the wrong district it can avail as a defense.

3. The title of the act is not misleading, but plainly expresses the subject-matter of the act.

Wm. Herndon and P. W. Hardin for appellant.

R. H. Tomlinson for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Pryor.

We think it would be exceedingly technical, and a plain perversion of the legislative intent, to hold that the act of May 17, 1886, has no meaning, or if it has, then the legislature framed the act in an imperfect condition with a view of making it a complete law at some future time. The title of the act is not misleading, but in express terms recites that it is "an act submitting a proposition to the voters in district No. 3, in Garrard county, whether or not spirituous, vinous or malt liquors shall be sold therein." The subject-matter is plainly expressed in the title, and then follows only one section, under which the county judge is authorized to have the vote taken in Octo-

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ber instead of at a regular election, as provided by the local option law passed in January, 1874: "The county judge shall cause an election to be held as required by the provisions of the act of January, 1874, and the provisions of that act shall govern the election."

Now it is argued that this power conferred on the county judge only authorizes an election to be held in a particular manner, and that, after the vote had been taken, it was a mere expression of the popular will, with nothing accomplished by it. Such is not the literal meaning of the act, and certainly not the will of the legislature. In providing that the provisions of the act of January, 1874, shall govern the election, the legislative intent was to make the provisions of that act apply to and control the result as much so as if the legislature had said in express terms that the provisions of the local option law shall be enforced, or fall, on the result of the election if against the sale of spirituous liquors.

The intention of the makers of a law must be followed by reason at least when construing it, and a meaning attached to it that would result in an absurdity ought never to be adopted. The construction, if any can be given an act, should be such as will give the law some effect; and in this case it would be unreasonable to hold that the legislature only desired an expression of opinion from the voters in district No. 3, in Garrard county, as to the propriety of prohibiting the sale of spirituous liquors, and when that opinion was ascertained other and future legislation could be had in obedience to the popular will.

Again, it is argued in support of the demurrer that there may be various Districts No. 3 in Garrard county, such as Civil District No. 3, School District No. 3, etc., and, therefore, the title should have shown whether it was the one district or the other in which this vote was to be taken. The ordinary understanding would be that it was the civil district in which the vote should be taken unless there was something else in the act showing a different purpose, and, besides, it is not proper to speculate on this suggestion made when determining the validity of the indictment. If the vote has been taken in the wrong district it can avail as a defense.

Judgment reversed, with directions to overrule the demurrer and for proceedings consistent with this opinion.

FERGUSON, &c. v. THOMASON, &c.

(Filed November 17, 1888.)

Construction of devise—A testator, leaving a widow and several children, devised his entire estate to his wife during her life, but made no provision as to the final disposition of the estate save as follows: "I give and bequeath to my son, Thomas, $1,000 more than any of my other children; * * * and should he die without issue, then his portion to be equally divided among his surviving brothers and sisters and their heirs, if any there be." By a codicil the testator provided: "It is my further will that if any of my children should die without children the estate above devised to them shall be equally divided between my surviving children and the heirs of those that may die." Held—First, that the original will, by plain implication, disposes of the entire estate, and not merely of the portion of the son named; but, if not, the codicil makes it perfectly certain that such was the testator's intention; second, subject to the life estate of the mother, each of the children of the testator took his share in fee subject to be defeated only in the

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event of his death before the termination of the particular estate; and, therefore, upon the death of the mother, the life tenant, the estate of the surviving children became absolute.

A. Duvall for appellants.

Frank Chinn for appellees.

Appeal from Scott Common Pleas Court.

Opinion of the court by Judge Holt.

Richard Thomason died testate in 1855, leaving a widow and seven children. His will was made in November, 1844. Subject to the payment of his debts, it gave his entire estate to his wife during her life or widowhood. It made certain provisions for her in the event of remarriage, but they need not be stated as it never occurred. She died in 1884. Three of the children have died since the death of the testator, all leaving children. Four of his children yet survive.

The original will contains no provision as to the final disposition of the estate save as follows: "I give and bequeath to my son, Thomas Benton Thomason, $1,000 more than any of my other children, to be applied to his benefit when it or any part of it may be (in the judgment of his mother) convenient and necessary; and should he die without issue, then his portion to be equally divided among his surviving brothers and sisters and their heirs, if any there be."

In September, 1845, however, the testator added the following codicil: "It is my further will that if any of my children should die without children or heirs of their body, the estate above devised to them shall be epually divided between my surviving children, and the heirs of those that may die, in equal share as my children."

Three, if not all four, of the testator's children, who are yet living, have no children.

A considerable tract of land, which the widow held during her lifetime, has been sold in this action, and the question is presented whether the living children of the testator have, under the will, an absolute or a qualified estate in their proper proportions of the proceeds. The lower court held that they had but a life interest, and required each of them, as the condition of receiving it, to execute bond for the forthcoming of it at the termination of such estate. One of them, Mrs. Ferguson, now complains of this, and asserts a right to it absolutely. She contends, first, that the original will contained no devise of the estate, save to the widow and Thomas Benton Thomason; that the other cihldren, therefore, took as heirs at law and by descent, and that they are unaffected by the codicil because it speaks only of "the estate above devised to them." In other words, it is claimed that the codicil, by reason of the language quoted, must be held to relate only to the devises to the widow and son, Thomas.

In this view we can not concur. The will itself, by plain implication, disposes of the entire estate. It, in effect, says, that all of the testator's children are, subject to their mother's right, to have an equal portion of the estate, save the one son is to have $1,000 more than any of his brothers or sisters. This is evidently what the testator meant by the language used; and the codicil makes it perfectly certain. It says: "If any of my children

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should die without children or heirs of their body, the estate above devised to them," etc. He undoubtedly understood the original will as making a devise to each of them. His then intention is made evident by the codicil, and his purpose must control.

The next point to be determined is, to what time did the testator refer when he speaks in the codicil of any of his children dying without issue? Upon the determination of this question hinges the quality of the appellant's state in her portion of the property. Did he refer to the period of his own death, or to the termination of the life estate of the widow when the children, devisees, would come into possession, or to an indefinite period of dying without issue?

No iron rule can be established as applicable to words of survivorship. It would be unreasonable, because it would often violate the intention of the testator, which must be sought from the entire instrument; and if so found, it, and not any general rule of interpretation, must govern the direction and disposition of the bounty. Generally speaking, a testator is not supposed to contemplate the death of the object of it in his own lifetime. Where, therefore, there is another point of time to which the words relative to dying may relate, they will be construed as referring to the event of the death of the devisee at any time prior to that period.

Where, however, a devise is made to several as a class, with words of survivorship annexed, and the gift as to enjoyment is to take effect immediately upon the death of the testator, the rule is to refer the words of survivorship to that event, and to construe them as intended to provide against the contingency of the death of the devisee during the lifetime of the testator.

If, however, the gift is not to take effect until the termination of a particular estate, and by reason thereof the distribution of the bounty is to take place at some time subsequent to the time of the testator's death, then the most natural meaning of the words of the survivorship is that they relate to the period of distribution, and this is now both the English and American rule.

It was said, in the case of Birney v. Richardson & Ford, 5 Dana, 424: "In such a case the law will not incline to any other conclusion than that the death must be during the particular estate, unless the letter or context of the will plainly shows that the testator intended a death either in his own lifetime, or at any time whenever it might occur."

In the absence of such a disposing intent appearing from the will it will not be presumed that the testator intended that the property should be distributed to the devisee, and that he should enter upon the enjoyment of it, and yet his interest therein be liable to be defeated by his subsequent death, however remote.

Where unexplained words, equivalent to "dying without issue," are used they will be construed as meaning the death of the distributee after that of the testator and before the time which may be fixed for distribution.

So, where an estate is devised with remainder over, but in the event the remainderman shall die childless, then to a third person, the words relating to survivorship will be restricted to the death of the remainderman before the termination of the particular estate. We see no sufficient reason why this rule should not be applied to devises of realty as well as bequests of personalty. Any distinction formerly existing at common law doubtless arose from the tendency to restrict alienation, and from the existence and character of feudal tenures, which never obtained in this country.

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These rules are, of course, to be applied in arriving at the testator's intention where it does not plainly appear from a consideration of his entire will. Counsel contend there is no need of reference to them in this case, and insist that it is evident, from the language of the codicil as to survivorship, the testator referred to an indefinite dying without issue. It certainly does not say so, nor can the words be fairly so interpreted; and being silent, resort must be had to the recognized rules of construction. The will created a defeasible interest in the children, subject to the life estate of the mother. It fixed no particular time, by express words, when they should come into possession and enjoy it; but the testator must be regarded as having had in view that they should do so at the time fixed by law, to wit, at the termination of the life estate. The property was then subject to division among them; and in the absence of such an expressed intention it should not be presumed that he intended their interest to be defeated by their death without issue, however far in the future it might occur.

Applying the rule above indicated, the appellant, Mrs. Ferguson, must be regarded as having an absolute estate in her interest in the property in contest. These views are supported by the cases of Birney v. Richardson & Ford, supra; Pool v. Benning, 9 B. M., 623; Hughes v. Hughes, 12 B. M., 115; Wren v. Hynes' Adm'r, &c., 2 Met., 129, and Thackston v. Watson, 84 Ky., 206.

Judgment reversed as to V. H. and Alexander Ferguson and cause remanded for further proceedings consistent with this opinion.

COX v. REID.

(Filed November 17, 1888—Not to be reported.)

Weight given chancellor's judgment—As this is an action in the nature of an ejectment, and the only issue is one of fact as to boundary and possession, the court will not disturb the finding of the chancellor, the evidence being conflicting.

Wood & Day for appellant.

John T. Hazelrigg for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Pryor.

This was an action in the nature of an ejectment by the appellee against the appellant that was transferred, on motion of the latter, from the ordinary to the equity side of the docket. The parties owned adjoining tracts of land, and the only issue of fact presented involved the question as to boundary and possession.

That the land in controversy is embraced within the deed under which the appellee's claim, that was executed more than thirty years before the action was instituted, is made plain from the testimony, and it is also apparent that the bond for title, under which the appellant claims to hold, that was executed prior to appellee's deed, covers the same land.

On the cross petition of the appellant, in which he seeks to obtain the legal title, there is testimony conducing to show that the bond under which he claims had been interlined so as to embrace more land than was sold; and

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further, that the appellant had never complied with its provisions. While there is much doubt on this subject, with the weight of the testimony favoring the appellant, the fact remains that no claim for title seems to have been made under this bond until this suit was instituted; and while both parties introduce proof of the strongest character as to acts of ownership by each, it seems to us the legal title should prevail where there is such a conflict in the proof, and where it is at least doubtful whether the appellant ever held the land under the title bond from Henry. The land is unenclosed, and both parties seem to have been using timber from it with the knowledge on the part of the other: and the issue being one of fact merely as to the boundary and possession, this court ought not to disturb the finding of the chancellor, with a purely legal issue, and the appellant only in equity to obtain a conveyance from a third party by reason of his bond for title.

Judgment affirmed.

RISK v. RISK, &c.

(Filed November 17, 1888—Not to be reported.)

1. Liability of one who acted as administrator without appointment—G., with the consent of the only other adult heir, undertook to manage his deceased father's estate, faithfully applying all the money and property that came into his hands to relieve the decedent's land from an encumbrance upon it, giving his labor and time to that object, and to caring for and supporting his mother and her infant children. When he was subsequently appointed administrator he had appropriated all of the available assets. In this action by the heirs for a settlement, Held—That the acts of G. should be treated as those of a duly appointed administrator from the date of his father's death, and so much of the estate as could and should have been set apart to the widow and infant children should be regarded as having been done. Therefore, G. should not be charged with rent for the widow's dower, nor to the extent of the interest of himself or of the infant children, nor of any of the children while they lived upon or received support from the land.

2. Trust—Land of the decedent having been sold to satisfy a lien upon it, was purchased by the creditor under an agreement to allow the widow and heirs, or any of them, to redeem. G. having paid the purchase price, the purchaser conveyed to him. Held—That he holds the land in trust for the widow and heirs.

Wm. Lindsay and G. W. Craddock for appellant.

Jas. E. Cantrill and John W. Rodman for appellees.

Appeal from Franklin Court of Common Pleas.

Opinion of the court by Chief Justice Lewis.

In February, 1870, Moses Risk purchased the land in controversy for about $4,800, and having paid the first installment, being one-third of the purchase price, died in July, leaving a widow and six children, of whom only two, William and George L., were, at the time, of full age. Without administering upon the estate, George L., at the request, and manifestly with the concurrence of William, who had previously married, undertook to manage the estate so as to pay off the two deferred payments for the land and, in the meantime supporting the widow and infant children. And by a sale of stock and of produce of the farm, and with money left by his father and some furnished by his mother, he did succeed in paying the second install-

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ment; and also funeral expenses, physician's bills, taxes, etc. But being unable to pay the third installment, falling due two years after the purchase, the vendors instituted an action and obtained judgment for a sale of the land, and at the sale it was purchased by one Wilson at about the amount of the debt, interest and costs. Then followed an action by the widow and heirs against Wilson, who claimed to have made the purchase not in trust for them but for his ownuse; and notwithstanding judgment was rendered in their favor, the third installment and interest, supplemented by expenses of the suit, still remained unpaid. And to get the money to redeem the land from Wilson's purchase George L. applied to his kinsman, R. H. Risk, who, in 1872, furnished it for that purpose. But in 1873 the widow and heirs united in an action for the sale of the land for the purpose of paying off R. H. Risk, not being able, as it appears, to pay him otherwise; and at the sale made under judgment in that action R. H. Risk became the purchaser at the amount of his debt, interest and costs; and in February, 1876, a commissioner's deed was made to him. But it is satisfactorily shown that he purchased the land for the benefit of the widow and heirs, and offered to permit them, or any of them, to redeem. Nothing was done, however, until January 1, 1877, when R. H. sold and conveyed the land to George L. Risk, who succeeded in raising the means to pay off all the purchase price except about four or five hundred dollars.

This action was instituted in 1884 by William Risk, for himself and as next friend of Josie Risk, an infant, and Sarah L. Lewis, three of the children of Moses Risk, against George L. and R. H. Risk, the widow and other children refusing to unite as plaintiffs, being made defendants. The relief prayed for is a settlement of the estate of Moses Risk and a division of the land which, it is stated in the petition, was purchased by George L. Risk in trust, and the allotment of dower. It was adjudged by the lower court that the land had been purchased by George L. Risk in trust for the widow and other children, and that he was responsible for the reasonable value of the rent of the land from the death of Moses Risk; also for all the assets of the estate which came into his hands, but entitled to credit for only the sum of $1,490, paid to the original vendors on the second installment of the purchase money.

We think the court properly adjudged the land held by George L. Risk in trust for the widow and heirs of Moses Risk, deceased, for at the time of the purchase he held the position of administrator of the estate, without having accounted for what went into his hands, or made any settlement, and was also guardian of the infants. Moreover, the purchase was made by R. H. Risk, not for his own, but the benefit of the widow and heirs, and was held by him for nearly three years to give an opportunity for redemption for the benefit of all, and lasting and valuable improvements were in the meantime put on the land by the labor and means of others besides George L., in the belief and expectation all would get the benefit of them, either by an enhancement of the price in case of a sale or of the value of the land if redeemed.

But we think the lower court erred to the prejudice of George L. Risk in charging him with rent for the entire land, and with all the assets that went into his hands. Although it was the duty of George L. Risk to have obtained the appointment of administrator before taking charge of the estate, and he had appropriated all the available assets when he was appointed in August, 1873, there is no charge or proof that he misappropriated any prop-

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erty or money that went into his hands. On the contrary, he seems to have acted in entire good faith and with exceptional devotion to the interests of the widow and infant children, and of the estate. For he not only faithfully applied all the money and property that went into his possession to relieve the land from the encumbrance that existed when his father died, but gave his labor, time and attention to accomplish that object, and to caring for and supporting his mother and infant children. No objection or complaint was made to what was done, nor to the manner in which it was done, until fourteen years after the death of Moses Risk, when this action was brought, nor are creditors of the estate now complaining.

We, therefore, think the acts of George L. Risk should be treated as those of a duly-appointed administrator from the date of his father's death, and so much of the estate as should and could, according to law, have been set apart and allotted to the widow and infant children, should be regarded as having been done. It will thus result that George L. Risk should not be charged with rent for the one third of the land which the widow was entitled to as dower, nor to the extent of the interest of himself or the infant children, nor of any of the children while they lived upon or received support from it. There should be deducted from the value of the property received and appropriated by him the value of what the widow was entitled to have set apart to her for the support of herself and infant children. For she is not complaining or seeking to charge him therewith, nor, as she and the children were in the meantime supported on the land and by the labor of George L. Risk, could she charge him. While, therefore, the land belongs to the widow and heirs, subject to the lien of R. H. Risk for balance unpaid of purchase money, before it is divided there should be a settlement of the accounts of George L. Risk as administrator, charging him with what he may be accountable for as such and individually, upon the basis stated, and crediting him with what he has paid as well in the course of administering the estate as on account of the land, and whatever balance may be found in his favor should be paid before the land is divided, and a lien thereon for that purpose should be adjudged.

Wherefore, the judgment for the errors indicated is reversed and cause remanded for further proceedings consistent with this opinion.

HACKWORTH & BURNS v. JOHNS.

(Filed November 17, 1888—Not to be reported.)

Hus band and wife—Fraudulent conveyance—A father gave to his daughter certain notes, which he delivered to her husband under an express agreement that the proceeds of the particular notes should be invested in land for his daughter, and they were accepted and held by the husband for that purpose. Soon after this transaction took place the husband, by the consent of the wife's father, sold the principal one of the notes and used the money for his own purposes, with the agreement that he would convey to his wife that much land, which he subsequently did At the time this conveyance was executed the husband was solvent. In this action by antecedent creditors to set aside the conveyance, Held—That as the facts evidence good faith in the transaction the claim of the wife is superior to that of creditors.

R. T. Burns for appellants.

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K. F. Prichard for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Pryor.

The creditors of M. H. Johns are asking a court of equity to subject a house and lot of ground conveyed by a third party to the wife of Johns to the payment of their debts, alleging that the consideration was paid by the husband, and the conveyance made to defraud creditors. The facts show that the father of Mrs. Johns was a man of means, and in making provision for his daughter passed to her certain notes, amounting in value to about the sum with which the property in controversy was purchased.

The notes were delivered to the husband under an express agreement that the proceeds of the particular notes should be invested in land for his daughter, and they were accepted and held by the husband for that purpose. Shortly after this transaction took place the husband, by the consent of the wife's father, sold one of the notes, in fact the principal amount given her, and used the money for his own purpose, with the agreement that he would convey to his wife that much land. The husband was then free from pecuniary embarrassment, or at least not insolvent, and when the property was purchased by him conveyed to the wife under the agreement made with her father he was able, pecuniarily, to pay his debts, but in a few years thereafter became insolvent. The evidence conduces to show good faith on the part of Johns, and a purpose to comply with this agreement for his wife's benefit, and while a conveyance made by the husband for his wife without any other consideration than love and affection, however prosperous his condition, will not avail as against antecedent debts, where there is an agreement to invest the property of the wife for her benefit, and it is so invested, a court of equity will uphold it as against creditors, because their rights are not affected by it, and for the additional reason that the claim of the wife in such a case, where the agreement on the part of the husband has been executed, is superior to that of creditors. The notes were held in trust for Mrs. Johns, and the consent of her father that he might use them did not destroy the trust, and while that fact might be evidence to show that no trust was created, the facts of this record evidence good faith in the transaction.

Judgment affirmed.

BOWLES' ADM'X, &c. v. SMITH.

(Filed November 20, 1888—Not to be reported.)

Vendor's lien—The administrator of B. being indebted, as administrator, to appellants as distributees of the estate, assigned to them in part payment of said indebtedness a note executed to his intestate by appellee for the purchase price of land. Appellants instituted this action against appellee, alleging these facts, and that they had a lien upon the land for the amount of the note, and seeking an enforcement of the lien, but did not ask personal judgment. Held—That the court erred in sustaining a demurrer to the petition. The facts alleged show the existence of a lien as against the vendee. The plaintiffs had a right to forego a personal judgment.

R. L. Ewell for appellants.

J. M. Sebastian for appellee.

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Appeal from Jackson Circuit Court.

Opinion of the court by Judge Bennett.

There is no brief filed for the appellee. The petition alleges in substance that, on the 14th day of August, 1878, Anderson Bowles sold to the appellee 515 acres of land (giving the boundary), lying in Jackson county, Kentucky; that the conveyance was made by deed, which the appellee accepted, and caused it to be recorded in the Jackson county clerk's office; that at the time of making said deed the appellee executed to said Bowles a promissory note, due one day after date, for $185.25, for the balance of the purchase money owing on said land (the note is set out in full in the petition); that the appellants held a lien on said land for the payment of said note (as between vendor and his representatives and the vendee the law allows a lien for the unpaid purchase money); that the note was unpaid; that Anderson Bowles, since making said sale and receiving said note, had died intestate; that his widow, Emeline Bowles, was his administratrix, duly appointed by the Jackson County Court; that she, upon a settlement of the estate, was indebted to the appellee as distributee of the estate, they being sons in-law of Anderson Bowles; that she, as administratrix, assigned to them said note in part payment of said indebtedness. She had the right to assign to the appellants said note for such a purpose. The appellants in their petition prayed for an enforcement of their lien and for a sale of so much of the land, the same being devisible, as would satisfy said note, interest, etc.; but they did not ask for personal judgment.

As said, there has been no brief filed for the appellee, and we are at a loss to know upon what ground the court sustained demurrers to the petition and amended petition, for they indeed, as does the petition alone, set up a cause of action. It is true that the prayer of the petition does not authorize a personal judgment; but as the land itself is proceeded against for the purpose of enforcing a lien, which is shown by the petition to exist, the appellants had the right to forego a personal judgment, and look to their lien alone for the satisfaction of their debt.

The judgment of the lower court is reversed and the cause is remanded, with directions to overrule the demurrers and render judgment for the sale of the land unless the appellee files an answer within a reasonable time. The appellants should, if they desire it, be allowed to amend the prayer of their petition.

LIEB & SON v. CRADDOCK, &c.

(Filed November 20, 1888.)

1. Partnership—Even after a partner withdraws from the partnership he is liable upon contracts made by the remaining members of the firm with such persons as dealt with the firm before his withdrawal with the knowledge that he was a partner, and who have never had actual notice of his withdrawal. It is not necessary, in order to bind him, that such persons should have given credit to the firm upon the faith that he was a member of it; all that is necessary is that they, not having notice of his withdrawal, believe that he was a member.

2. A dormant partner, as to any person who knows that he is a partner, continues to be responsible after he withdraws from the partnership to the

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same extent that an ostensible partner is responsible after his withdrawal from the partnership.

3. Burden of proof—One of the defendants having denied that he was a partner, the burden was on the plaintiffs, and they were entitled to the concluding argument.

D. W. Lindsay and Marshall & Lochre for appellants.

Wm. Lindsay and G. W. Craddock for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

To an action of assumpsit, filed by the appellants against William Jones, J. W. Jones, W. T. B. South, J. H. Bowen, D. M. Bowen and G. W. Craddock, as partners doing business under the firm name of Jones & Bowen, D. M. Bowen denied that he was a member of said firm at the time the account was created. G. W. Craddock admitted that he was a dormant member of said firm "during the time intervening between the first day of August, 1880, and the twenty-seventh of April, 1881," at which latter date he withdrew from said firm; and that the account sued on was created after his withdrawal from said firm; that the appellants did not know that he was a member of said firm until long after his withdrawal from it.

The appellants in their reply alleged that prior to G. W. Craddock's withdrawal from the firm they knew that he was a member of it; that after acquiring such knowledge, and before his withdrawal, they sold the firm goods, that they had no notice of his withdrawal from the firm, and they, therefore, sold the firm goods under the belief that he was a member, etc. G. W. Craddock's rejoinder put in issue these allegations.

It is clearly established that Craddock withdrew from the firm on the 27th of April, 1881; that he gave no notice to the appellants of his withdrawal; that the goods, the price of which the appellants seek to recover, was sold to the firm of Jones & Bowen after the withdrawal of Craddock; that the appellants sold to the firm of Jones & Bowen goods from time to time during the time that G. W. Craddock was a member of the firm.

The appellants' reply to the answer of D. M. Bowen and the administrator's rejoinder thereto, D. M. Bowen having died intestate since filing his answer, evolve about the same issue as that made between appellants and Craddock.

It is established that D. M. Bowen was a member of the firm, and withdrew from it about the same time that G. W. Craddock did. The jury having found for G. W. Craddock and D. M. Bowens' administrator upon the issues joined, and judgment having been rendered accordingly, the case is here upon the appeal of the appellants.

Instruction "A," given for the appellee, Craddock, reads as follows: "The court instructs the jury that if they shall believe from the evidence he did not hold himself out to the public as a member of the firm of Jones & Bowen, and that he withdrew from and ceased to be a member, or connected with said firm, on the 27th day of April, 1881, then he is not liable for any part of the account sued on, which was created after the 27th day of April, 1881, and they should find for him, unless they further believe from the evidence that plaintiffs, before his said withdrawal, knew that he was a mem-

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ber of said firm, and had no knowledge of his withdrawal, and made said sales subsequent to the 27th day of April, 1881, under the belief that Craddock was still a member of the firm of Jones & Bowen, and extended the credits to them upon the faith of their belief that Craddock was still a member of that firm."

A dormant partner is liable for the partnership debts contracted during the time that he was a member of the firm upon the ground of agency. He is liable on any contract made within the scope of the partnership business by the ostensible partner, because he is taken to have adopted the firm name as his own for the purpose of such contracts. So, when such contracts are made in the firm's name by one of the ostensible partners, the firm name does not represent the names of the ostensible partners alone, but that of the dormant partner also, which name the dormant partner authorizes the ostensible partner to use in reference to all matters arising within the scope of the partnership business during his connection with it as such member. When he withdraws from the firm he also withdraws the authority of the ostensible partner to thereafter bind him: and he is not liable for any contract that the ostensible partner may make after his withdrawal; but this withdrawal of authority and nonliability are confined to such persons as did not know, while he was a member of the firm, that he was such member; as to such persons, he having withdrawn the agency from the ostensible partner by withdrawing from the firm, he is not responsible for any contract that they may thereafter make with the firm. But if, during the time that he is a member of the firm, he becomes known to any third person as such member, then he stands in relation to such person as an ostensible member of the firm, and is, as to such person, under all the responsibilities of an ostensible member.

By the formation of a partnership each member, unless expressly restricted, authorizes the other to act as his agent within the scope of the partnership business, and the act of each, within such scope, is for himself as principal and for the other members as their agent; and when one member makes a contract with a third person in behalf of his firm, and within the scope of the partnership business, he does so in behalf of himself as principal and as agent of his associates. Although one of the members withdraws from the firm he, as to such persons as theretofore dealt with the firm with the knowledge that he was a member, is liable for any contract that the remaining member may make in the name of the firm with such persons unless they had, in some way, actual notice of the withdrawal of the member; as to such persons the retiring member does not withdraw the agency of the remaining member to bind him until such persons have received actual notice in some way that the agency has been withdrawn. It is not necessary, in order to bind the withdrawing member, that such persons should have given credit to the firm upon the faith that he was a member of it. All that is necessary is that they, not having notice of his withdrawal, believed that he was a member. The basis of his liability is not that such persons gave credit upon the faith of his being a member, but it is based upon the fact that he theretofore agreed that his co-partner should act as his agent and legally bind him to all contracts made with them within the scope of the partnership business; and that such agency, for the purpose of legally binding him, should continue until they should receive notice of its withdrawal.

For the foregoing reasons the last clause of the instruction, to wit: "And extended the credits to them upon the faith of their belief that Craddock

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was still a member of that firm," was misleading and erroneous. For if the appellants dealt with the firm of Jones & Bowen while Craddock was a member of it with the knowledge that he was a member, and after his withdrawal they, not having notice of his withdrawal, sold the firm the goods mentioned under the belief that he was still a member of it, then he is liable to them for the price.

The foregoing views apply to the administrator of D. M. Bowen. D. M. Bowen in his answer having denied that he was a partner, the burden was upon the appellants, and they were entitled to the concluding argument.

The judgment of the lower court is reversed and the cause is remanded, with directions to grant the appellants a new trial and for further proceedings consistent with this opinion.

HARTFORD FIRE INS. CO. v. HAAS, &c.

(Filed November 20, 1888.)

1. Insurance—False statements in application or policy—Where one who is ignorant and illiterate trusts alone to the superior knowledge of an insurance agent, who undertakes to make such an application, or to issue such a policy, as will meet the requirements of the company he represents, and the statements embodied in the application or policy issued under such circumstances are false or erroneous, they should be regarded as the act of the company, the insured being guilty of no fraud or misrepresentation.

2. Same—Knowledge of agent that of company—Where an agent issues a policy of fire insurance upon property of which the insured is not the absolute owner, with knowledge of the nature and extent of the interest of the insured, the knowledge of the agent is that of the company, whether or not it has been acquired in the course of his employment as agent; and the contract is valid to the extent of the interest of the insured, although the policy provides that it shall be void if the insured is not the absolute and unconditional owner.

3. Agent treated as principal—Where the agent is not required to consult his principal before making the contract of insurance complete, his acts should be regarded as if he were in fact the principal.

4. Case: An ignorant German woman, unable to write or read the English language, procured insurance upon a house and lot in which she had a dower interest and her children the fee. She did not know the difference between a title in fee and a dower interest, and was entirely ignorant of what the policy contained. The policy provided that it should be void if the insured was not the owner of the property in fee simple. There was no written application, and the insured made no representation as to the nature or extent of her interest. The agent, who had power to effect insurance without consulting the home office, knew all about the nature and extent of her title, having acquired that knowledge in another business transaction. She had been insuring with the same agent for several years, and often in the same company, paying her annual insurance upon the entire cash value of the property insured. Held—That the interest which the insured had in the property was secured by the policy.

5. Insurable interest—The insured, having relieved the property from the lien of a purchase money note out of her own means, had an insurable interest to that extent in addition to her dower interest, and the fact that her children might have defeated a recovery by her, by reason of the lapse of time, is not in the way of her recovery against the company, although it has pleaded limitation as to this part of her claim.

6. Mistake—Reformation of policy—The mere fact that the insured supposed she was insuring the interest of her children, as well as her own in—

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terest, was not sufficient to authorize the chancellor to reform the policy so as to include their interest, as nothing was said as to the nature and extent of the interest insured.

7. Motion to transfer—After the court had adjudged that the contract could not be reformed, thus disposing of the equitable issue, it proceeded without objection to render judgment for the insured for the value of her interest. After this judgment had been rendered the defendant, for the first time, moved to transfer the case to the ordinary docket. Held—That the motion came too late.

8. Separation of conclusions—The case being in equity, it was not necessary for the judge to separate his findings of law and fact.

Haycraft & Slack and E. W. Hines for appellant.

Owen & Ellis for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

Margaret Haas and her children were the owners of a brick building in the town of Owensboro, upon which insurance was obtained by her for the sum of $2,000 in the Hartford Insurance Co.

The premium price was $32, and the insurance against loss or damage resulting from fire. The fee was in the children of Mrs. Haas, her interest being confined to her dower, and a lien for a purchase money note that had been taken up by her after the death of her husband out of her own means.

The policy of insurance is issued in the name of Margaret Haas, without reference to her interest or that of her children, and contains a stipulation to the effect that "if the assured is not the absolute and unconditional owner of the property insured, or if said property be a building and the assured is not the owner of the land, in fee simple, on which the building stands, and this fact is not expressed in the written portion of the policy, * * * then, and in every such case, the policy shall be void."

The building was destroyed by fire, and the appellant (the insurance company) contests the right of recovery on two grounds:

1st. The assured was not the owner in fee of the property insured, and failed to disclose her interest.

2d. The house became vacant during the life of the policy, and was unoccupied when destroyed, the policy providing that in such a state of case the liability of the company should determine.

The appellee, Mrs. Haas, ascertaining the character of defense relied on, filed her petition in equity, seeking to reform the policy, alleging that the contract of insurance as made with the agent was to insure not only her interest, but that of her children, and by mistake the provision for the children was omitted, and seeks to recover such a sum as she may be entitled to under the contract. The averment with reference to the character of the contract, as well as the mistake in its execution, was traversed by the company, and the defenses already alluded to relied on to defeat any recovery.

That the appellee supposed she was insuring the interest her children had as well as her own is evident, but from the testimony it seems there was nothing said as to the nature and extent of the interest insured, and the chancellor could not well enlarge the liability of the company by inserting a provision in the policy for the benefit of the children, when the only rea-

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son assigned for so doing consists in the belief by the mother that she had insured their interest in the property as well as her own.

The question then arises: Is the policy or contract of insurance void because of the failure of Mrs. Haas to state the real nature of her title?

There is no pretense that the assured made any representation, false or otherwise, in regard to the property she was insuring or her interest in it. She seems to have acted in the best of faith, believing that she had the right to insure the house at its full value, and was entitled to receive from the company its fair cash value in the event it was destroyed by fire during the life of the policy. So we have a case where the assured had an insurable interest, but having failed to state that she had less than a fee simple title, it is urged that the entire contract is void. The importance of disclosing the nature of the interest of the assured in the subject matter insured can not be overlooked, and such a stipulation in the contract will be enforced because binding on all the parties, although the assured may have regarded it as not essential at the time of entering into the contract, or have been ignorant, in the absence of some fraud practiced upon him, that the policy contained such a stipulation.

The evidence in this case shows, however, that the assured was an illiterate German woman, unable to write or read the English language, and dependent upon those with whom she contracted for the necessary information touching such a business transaction as that of insuring her property. She did not know the difference between a title in fee and a dower interest, and was entirely ignorant of what the policy contained. In this condition, as the proof clearly shows, she relied on the general agent of this company to inform her, or rather to instruct her, as to the nature of her rights. She had been insuring with the same agent for ten or twelve years, and often in the same company, paying her annual insurance upon the entire cash value of the property insured. This agent was invested with a general and plenary power not only to solicit but to effect insurance without even consulting the home office. He lived in the same town with the appellee; was fully apprised of her ignorance in regard to this business matter; sought and solicited her to insure her property, and, as the testimony shows, knew all about the nature and extent of her title. He knew this from having an actual examination made by those competent to investigate such a question; and now to hold that these parties, under such circumstances, were dealing at arm's length, and for that reason declare the policy void, would be a mere mockery of justice, and give to this derelict company the earnings for years of this confiding German woman, when the company or its agents knew that if the property was destroyed by fire it would render the policy void. The agent states, and it is doubtless true, he had forgotten the fact of investigating the title, yet the facts are so conclusive on that subject as to leave no doubt on that branch of the case. Nor do we understand that the agent is attempting to shield the company from liability, but his connection with the transaction must be treated as if this woman was dealing directly with the principal at the home office, and not with the agent.

If the principal knew the extent of appellee's interest, and had insured the property without any fraud or misrepresentation by her of her title, could any chancellor, under the circumstances, deny her relief to the extent of her insurable interest? In May on Insurance, section 143, page 161, it is said: "It has in fact been very generally held that knowledge by or notice

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to the agent of the inaccuracy of a statement in the application upon which a policy is issued, after such notice or knowledge, binds the company, and prevents them from availing themselves of the inaccuracy as a defense. And this is true even though the policy provide that where the application is made through an agent of the company the applicant shall be responsible for such agent's representations."

In this case there was no application made in writing. The subagent, or the agent of the principal agent, appeared and solicited a renewal of the policy, and it was then signed or filled up at the agent's office and delivered to the appellee. We are not disposed to adjudge that such contracts, shingled over with stipulations that are practically deceptive, if not inserted for that purpose, are binding on the ignorant and illiterate, when guilty of no fraud or misrepresentation, but have trusted alone to the superior knowledge of the agent, who undertakes to make such an application or to issue such a policy as will meet the requirements of the company he represents. The statements embodied in a policy issued under such circumstances, if false or erroneous, should be regarded as the act of the insurer. "The modern decisions," says Mr. May in his work on Insurance, "fully sustain this proposition, and are founded on reason and justice." (May on Insurance, page 165; Rowley v. Empire Ins. Co., 36 New York, 550.)

It is urged by the appellant that as the knowledge acquired by the agent of the nature of appellee's title was derived in the prosecution or transaction of business engagements entirely disconnected with the matter of insurance, therefore, the knowledge of the agent should not be held that of the principal.

We think it immaterial in what manner the information was acquired, whether in the course of his employ as agent or otherwise. He had personal knowledge of the fact that the fee to the property was in the children of the assured, and the appellee should not be made the victim of this neglect on the part of the agent, and the insurance company obtain the benefits of the toil and labor of this woman for years in raising the means with which to keep up her insurance. Here the agent was the sole judge as to whether he would issue the policy. He was not required to consult his principal before making the contract of insurance complete, and his acts should be regarded as if he was in fact the principal. (Harriman v. Queen Ins. Co., 49 Wis., 71.)

The interest, therefore, that the appellant had in this insured property was secured by this policy. The extent of that interest is another question involved.

That as widow she had a dower interest will not be controverted, and it further appears that she relieved the property from the lien of a purchase money note out of her own means, and held it against the estate. The appellant, in order to defeat this claim, has relied on the statutory bar as if the appellee was attempting, by a suit in equity, to enforce this lien against the protest of her infant children. Whether the children could defeat a recovery by the mother by reason of the lapse of time we will not stop to inquire. The company is not a creditor of the estate, or interested in any manner in the property itself. It is liable to the extent of appellee's interest in the house or building destroyed, and the plea of limitation is not in the way of a recovery. There are several issues of fact raised by the pleadings and proof—one, as to the value of the property, and another in regard to the property having been left vacant. The view taken by the court below is sustained by the testimony on the several issues.

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It is also complained that the court below erred in refusing to transfer the case to the ordinary docket after having adjudged that the contract could not be reformed, and the widow could only recover to the extent of her interest. It appears that after the equitable issues had been tried the court, without objection, proceeded to render judgment for the appellee for the value of her interest, which, including the lien note, amounted to $1,364, with interest. After this judgment had been rendered the appellant, for the first time, moved to transfer the case. It was then too late. Nor was it necessary for the trial court, the case being in equity to separate in his findings the law from the facts, and if it had been, the law, as well as the facts presented, has been fully considered. The appellee in her proof of loss, and in an ordinary action that was, for some reason dismissed, swore that she held the fee simple title, and it is argued that this should estop her from a recovery in this case. We have already in effect determined this branch of the case. It is plain that no fraud, misrepresentation or bad faith is to be attributed to the appellee, and equally certain that she failed to comprehend the character of her title, and labored under the belief, until this issue was raised by the company, that she had obtained a policy that covered fully the cash value of the entire building. In this she was mistaken, but there is no reason in law, equity or justice for denying her right to recover the value of her own interest in the subject-matter of the contract. This having been adjudged to her by the chancellor, his judgment is now affirmed on the original and cross appeal.

MUTUAL BENEFIT LIFE INSURANCE CO. v. DAVIESS' EX'OR, &c.

(Filed November 22, 1888.)

1. Life insurance—Suicide while insane—A policy of insurance provided that "in the case insured shall die by his own hands * * * this policy to be null and void, except that in case he shall die by his own hands while insane the amount to be paid by this company on the policy shall be the amount of the premium actually paid thereon, with the interest." The insured was found dead with a pistol by his side, from which the ball which caused his death was fired. In this action to recover the full amount of the policy the plaintiff admitted that the insured was insane at the time of his death, but denied that he died by his own hand. Held—That the insured was insane when he took his life, if he did so, is not of itself sufficient to defeat the recovery. In order to defeat a recovery the defendant must show that the insured knew the physical nature of the act he was about to commit, and that it would result in self-destruction; but it is not necessary for the defendant to show that he was either legally or morally responsible for his acts.

It was error in this case to instruct the jury that the law presumes that the insured did not intentionally shoot and kill himself, as no legal presumption arises on such an issue.

2. Misrepresentations—A misrepresentation by the insured in his application will not avoid the policy unless material to the risk.

The false statement of the insured that he never had "vertigo" was not material, as his trouble was merely temporary, the result of indigestion, and did not affect his general health.

3. Same—Estoppel—Where an insurance agent, with a full knowledge of the facts, causes the assured to make an untrue answer to a question propounded in his application, the company is estopped from relying upon the misrepresentation, in the absence of fraud or bad faith on the part of the assured.

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R. P. Jacobs for appellant.

John B. Thompson and Wickliffe & Bell for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Pryor.

On the 1st of March, in the year 1881, John B. T. David, a resident of the town of Harrodsburg, insured his life in Mutual Benefit Life Insurance Co. for the sum of $10,000, the amount of insurance in case of his death to be paid to his personal representative. On the morning of the 28th of March, in the year 1881, Davis was found dead in one of the stalls of his stable, a short distance from his dwelling, with a pistol by his side, from which, as the proof conclusively shows, the ball was fired causing his death. The ball entered the back part of his head, near the right ear, and came out in front, near the top of his forehead. The preliminary proof was made as the policy required, and the company declining to pay the insurance, this action was instituted by his executor.

One of the conditions of the policy is "that in case the insured shall die by his own hands, or in consequence of a duel, or by reason of intemperance, * * * then this policy to be null and void, except that in case he shall die by his own hand while insane, the amount to be paid by the company on this policy shall be the amount of the premiums actually paid thereon, with interest."

It is pleaded by way of defense to the action that the insured took his own life with his own hand by shooting himself with a pistol, and that he was insane at the time. The defense also tendered the amount of the premiums paid, with the interest, in compliance with the terms of its policy, insisting that this was the extent of the recovery, in the event other defenses that were interposed were held insufficient.

The other grounds of defense relied on consist in certain false statements alleged to have been made by the insured in response to questions propounded in the application for insurance, only one of which will be considered, as all the others seem to have been abandoned by the defense, or at least no evidence introduced to sustain them.

In the written application the insured was required to answer this question: Have you had since childhood gravel, gout, vertigo, disease of the heart, consumption, bilious colic, etc., to all of which the insured responded no. It was alleged that the insured did have vertigo from childhood, and that his answer was, therefore, untrue, and being material to the risk, or made so by the contract between the insured and the company, the policy for that reason is void. There was a general denial of these averments by the executor, and in the reply it is averred that if the assured had such a complaint it was not material to the risk; and, besides, he further alleged, and the fact is clearly proven, that the insured, at the time he obtained the insurance, made a full and frank statement to the agents of the company as to his condition by informing them that, prior to the date of the insurance, he had swimming or dizziness in the head, caused by indigestion, and being informed by the agents that the question referred to diseases of a chronic character, and that he (the insured) could truthfully say no, for that reason made such a response. On this branch of the case the court below declined to give an instruction asked by the company, and in effect told the jury

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hat no testimony had been introduced sustaining this part of the defense; or, if so, the company was estopped from relying on this erroneous statement to prevent the recovery because made in good faith by the insured, and at the instance of, or in explanation of, the meaning of the question given at the time by the agent of the defendant.

The first question we will consider is: Did the court err in taking from the jury the consideration of this particular defense? The only witness introduced by the defense on this subject was Dr. Price, who had been the family physician of the insured, and testifies that some three years before this insurance was obtained the insured complained of indigestion, and had more or less vertigo; that the insured went to Crab Orchard and remained a short time, returning feeling quite well. The witness did not consider him seriously affected, and, so far as he knew, Davis had no recurrence of the complaint, and he thought it merely temporary. While vertigo is swimming in the head, it must be of such a character as renders the insurance more hazardous, by affecting in some way the general health of the insured. If merely temporary, the result of indigestion, or from some cause that soon ceases to exist, and the condition of the insured is fully restored, it can not be regarded as material to the risk the company has assumed. By the express provisions of the act of February 4, 1874, such statements are to be held as mere representations, and not warranties, and before a recovery can be prevented on such a plea the misrepresentation must not only be made, but it must further appear that it was material. And in fact, regardless of the act of February, 1874, the defense, on this branch of the case, is not sustained, as, on the defendant's own testimony, no misrepresentation was made. (Germania Ins. Co. v. Rudwig, 80 Ky., 223.) It also appears from the testimony that the insured explained to the agents that he occasionally had swimming in the head, and was told by them that his trouble was immaterial, and that he could truthfully answer the question, "No." This testimony is uncontradicted, and there was, therefore, no issue of fact on this branch of the defense to try. The appellants, by their own explanation, or that of their agents, with a full knowledge of the facts, caused the answer to be made, and will be estopped from making the defense in the absence of fraud or bad faith on the part of the insured. (Insurance Co. v. Wilkinson, 13 Wallace, 2.6; Rowley v. Ins. Co., 36 New York, 550; Bliss on Life Insurance, 80; Beal v. Ins. Co., 16 Wis., 21; 4 Horwitz v. Ins. Co., 40 Mo., 557.)

In the second paragraph of appellant's answer it is averred that the insured, Davis, took his life with his own hand, by shooting himself in the head with a pistol, and that at the time of the shooting he was insane. The reply admits the death, and that Davis was then insane, but denies that he died by his own hand. In this issue the case went to the jury under general instructions, and also with the direction, at the instance of the defendant, to return a special verdict. On the motion of the defendant two questions were submitted to the jury for answer:

1st. Was the pistol shot wound, of which J. B. T. Davis died, inflicted by himself? To this the jury responded, "Yes."

2d. If so, did he at the time he inflicted the wound know the physical nature of the act, and intend by it to cause his own death? To this the jury responded, "No."

After propounding the special interrogatories to the jury, the court gave, at the instance of counsel for the plaintiff, the following instruction: "The

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law presumes that the deceased did not die by his own hands; that he did not intentionally shoot and kill himself; and the burden of proof is on the defendant to satisfy the jury from the evidence that he did intentionally shoot and kill himself." The same idea is embodied in instruction No. 2, given for the plaintiff.

To the giving of each of the instructions objection was made and an exception taken. In the diversity of opinion to be found in the text-books, as well as the reported cases, as to the effect the mental condition of the insured at the time he takes his life, is to have in determining the question of liability on the part of the company in cases of this character, we have found no rule of law or precedent upon which to base these instructions for the plaintiff. The presumption to be indulged, if any, in reference to an insane man is that he will commit irrational acts, and it is this peculiar conduct and action that enables the ordinary observer to perceive his mental derangement. No legal presumption arises, however, on an issue like this, either the one way or the other, and the jury should be left to determine, from all the evidence before them, whether the insured, at the time of the killing, had mind enough to know that if he fired the pistol ball through his head it would likely produce death, and fired the shot with that intention. If the insured had such knowledge, and fired the pistol for the purpose of taking his life, in that event the extent of recovery must be confined to the amount of premiums paid, with the interest as provided by the policy. The burden of showing the condition of the mind of the insured at the time is on the defense.

The plea for the defense was in avoidance of the policy, or such as would limit the recovery to the amount of premiums paid. The mere fact that the insured was insane when he took his life is not of itself sufficient to defeat the recovery. There are many phases of insanity. The mind may become so wrecked as to render one incompetent to form a purpose, or to execute that purpose when formed. One may be rational on some subjects and insane as to others, or his mind in such a condition as to relieve him from moral as well as legal responsibility, and still have mind enough to know that to shoot himself through the head would result in self-destruction, and if, with reason enough to know this fact, he commits the act with the intent to take his life, it is a bar to the recovery.

While the fact of insanity, and the circumstances connected with the killing, should go to the jury on this question of intention, it is necessary for the defense not only to establish the insanity of the insured, if denied, but that he fired the fatal shot with the intention to take his life, for if fired with this intent, his knowledge as to the result of the act necessarily follows. Whether he was a moral, responsible agent or not is an immaterial inquiry. His condition may have been such as to exempt him from legal and moral responsibility, and he may still have had reason enough to know the physical nature of the act he was about to commit.

This case is unlike that of the Life Ins. Co. v. Terry, 15 Wallace, 580. In that case the words of the policy were "shall die by his own hands," and nothing more.

The court held in that case that the language used referred to an act of criminal self-destruction, and had no application to one insane who, in that condition, took his life. The insured must have been guilty of a felonious suicide before the company could avoid liability on its contract of insurance.

We have been cited to many cases establishing the proposition that death by one's own hand when insane is an act done without mind to control it,

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and is only death by accident, and that when the act is not the result of thought or reason, should no more be the subject of punishment than if produced by accident. Those cases all arise where the words of the policy are, "if the insured die by his own hand," or shall commit suicide, in the latter case the court holding that suicide means "the deliberate purpose to end one's existence when in the possession and enjoyment of his mental faculties." (Breasted v. Trust Co., 8 N. Y., 290; Insurance Co. v. Broughton, 109 U. S., 121.)

There is something more in the stipulations embodied in the policy before us than the language, if the insured die by his own hand. "In case he shall die by his own hand while insane, the company agrees to refund the premiums, the policy fixing the amount of recovery."

The question of criminal self destruction is not involved in the controversy, as the contract, by its very terms, is made to apply to the insanity of the insured. The object in view in inserting such a clause in the policy may have been, and doubtless was, to avoid the effect of the decisions confining the meaning of the language, die by his own hand, to criminal self-destruction, or the word suicide to the deliberate purpose of a sane man to take his own life. The company enters into a contract with the insured, when perfectly rational, that if he should afterwards become insane and die by his own hand the policy shall become void, or the company liable to return the premiums, with the interest, and nothing more.

This is a reasonable contract entered into between parties capable of contracting, and is neither against public policy nor unjust to the parties who accept its terms. In the case of Bigelow v. Insurance Co., the Supreme Court, in a case similar to the one before us, Mr. Justice Davis delivering the opinion, said: "Nothing can be clearer than that the words sane or insane were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity." It may now be regarded as well established that intentional self-destruction will avoid a policy containing conditions like that, whether the act was committed voluntarily or from irresistible impulse, unless the mind of the insured was so far gone when he took his life as to render him unconscious that he was taking his life at the time he committed the act. In the case of Pierce v. Insurance Co., 34 Wis., 389, the condition in the policy was in these words: "Shall die by suicide, felonious or otherwise, sane or insane." It was held that the language used could not be construed to mean a criminal self-destruction, and such a condition released the company from liability when the self-destruction was intentional. It results, therefore, that if the insured fired the fatal shot, and had sufficient mental power at the time to know that it would take his life, and fired the pistol with that intention, the recovery in this case is limited to the premiums paid, with the interest; while on the other hand, if the firing of the pistol was not intentional, because of the unconsciousness, on the part of the insured that such an act would take his life, the recovery must be had of the principal sum. The shooting in such a case must be regarded as the result of accident, as much so as if the pistol had gone off unexpectedly to the insured and killed him. In the discussion of the legal question applicable to the mental condition of the insured we are not to be understood as directing the court to take from the jury the question as to

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whether the killing of the insured was the result of accident in the ordinary meaning of that word. If the act was unexpected or unforeseen, then there is no obstacle in the way of recovery. The instructions asked by the plaintiff and refused failed to embody the law of the case, and, therefore, no errors existed in refusing to give them. The court below having erred, however, in instructing the jury as asked by the plaintiff, but that law (the insanity of the insured having been admitted) presumed that the deceased did not die by his own hands, and also presumed that he did not intentionally kill himself, were errors prejudicial to the substantial rights of the defense, and, therefore, the judgment is reversed, and the cause remanded, with directions to award the appellant a new trial, and for proceedings consistent with this opinion.

ALLEN v. COMMONWEALTH.

(Filed November 22, 1888—Not to be reported.)

1. Exclusion of witnesses from courtroom—The rule providing for the exclusion from the courtroom, upon the demand of either party, of all witnesses, save the one testifying, does not extend so far as to require the exclusion of attorneys of the court who are witnesses, they having the right at all times to be present in the courtroom.

2. Instruction as to self-defense—Although the court, upon a former appeal in this case, condemned an instruction telling the jury that the defendant could not avail himself of the plea of self-defense "if he brought on the difficulty," there being no evidence to authorize such a limitation as to the right of self-defense, yet as a witness testified upon the last trial that the accused had made a threat against the deceased shortly before the killing, this evidence, together with the fact that the accused had gone armed to the house of the deceased and begun an angry conversation, authorized such an instruction, it being no longer merely a question as to whether the accused acted in self-defense at the moment of the killing.

3. Same—While the expression "brought on the difficulty" was objectionable as being too indefinite, yet as the jury were told in another instruction that this must have been done with the intention of killing the deceased or inflicting serious injury upon him, it plainly implied some act on the part of the accused, and the jury could not well have been misled by the expression, coupled as it was with the required intention.

Lewis McQuown for appellant.

P. W. Hardin for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Holt.

This is the second appeal in this case. Upon the first trial the appellant, James Allen, was convicted of manslaughter, and sentenced to the penitentiary for ten years. The judgment was reversed because the jury were misinstructed. (Allen v. Commonwealth, 9 Ky. Law Rep., 784.) Upon a retrial the appellant was again convicted of the same offense, but his punishment fixed at five years' confinement in the penitentiary. He now complains upon two grounds.

The lower court, upon his motion, separated the witnesses and excluded them, save the one testifying, from the courtroom during the hearing of the evidence, except it refused to enforce this rule as to two of the witnesses

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who were attorneys of the court. They were officers of the court; and the rule does not and should not, in reason, extend so far as to require their exclusion. The court should at least have a discretion as to whether it would dispense with its own officers. Moreover, although a trial in a particular case may be progressing, yet the court has, at the same time, a general jurisdiction in other cases, and may make orders in them. Both the duties and rights of an attorney, therefore, dictates that he should have the right to be present at all times in the courtroom.

It is contended, secondly, that the lower court has failed to follow the former opinion of this court, and has fallen into the same error which led to the reversal of the former conviction. If this be true, and the same testimony only was offered upon the last trial as upon the first one, then another reversal must follow.

The third instruction given upon the first trial was as follows: "If, at the time of the shooting, the defendant believed, and had good grounds to believe, that he was then in danger, or apparent danger of losing his life, or receiving serious bodily harm at the hands of John Miller, he had the right to rid himself of such danger by the use of any means then in his possession, even to the shooting of Miller, 'unless they shall believe from the evidence that defendant brought on the difficulty in which Miller was shot, and in that event he (defendant) could not avail himself of the plea of self-defense or apparent necessity until he, in good faith, abandoned the difficulty.' "

This court condemned the instruction upon the ground that the evidence then in the record did not authorize the limitation contained in it (and which is quoted above) as to the right of self-defense, and said that, upon the testimony then introduced, the single question whether the accused did the shooting in self-defense should, upon proper instructions, have been submitted to the jury. It also declared in substance that the term "brought on," as used in the instruction, was too general, because it left out of view the intention of the appellant in going to where the deceased was, and authorized the jury to find that the accused "brought on" the difficulty by merely going to the house of the deceased, or opening a conversation with him. In short, that a jury thus instructed might find that a party had brought on a difficulty by an idle word, or a jest, although there was no intention to injure. The instruction was also objectionable because it only required the jury to believe from the evidence that the accused brought on the trouble, and permitted them to find upon this question upon a mere preponderance of evidence. Upon the last trial, however, a witness was introduced who did not testify upon the former trial. He proved in substance a threat by the accused toward the deceased made shortly before the killing. The witness was contradicted; but the jury may, and doubtless did, judging from their verdict, believe him. It was their province to pass upon his testimony. With it before them, together with the fact that the accused had gone armed to the house of the deceased and began an unpleasant and angry conversation with him, it was no longer a mere question whether the accused, at the moment of the difficulty, acted in self-defense.

Objection is made to the fifth instruction, which relates to this point, and which was given upon the last trial. It reads thus: "The court further instructs the jury that if they shall believe from the evidence, beyond a reasonable doubt, that the defendant willfully brought on the difficulty with the deceased, John Miller, for the purpose, and with the formed design, to

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kill him, or to inflict upon his person serious injury with a pistol, and he did so, then he can not avail himself of the plea of self defense or apparent necessity unless before the shooting he withdrew, or attempted in good faith to withdraw, from the difficulty, and avoid the same."

This is an affirmative statement of the law relative to appellant's liability, if he provoked the difficulty with an intention to injure or kill the deceased. The jury were required to believe it beyond a reasonable doubt. It is true it used the objectionable phrase "brought on," but it distinctly told the jury that this must have been done with the intention of killing the deceased or inflicting serious injury upon him. It plainly implied some act upon the part of the appellant, and required the jury to believe, beyond a reasonable doubt, that it was done with an intention to provoke a difficulty in order that he might kill or injure the deceased. They could not well have been misled by the expression, coupled as it was with the required intention.

Independent instructions were given at the instance of the appellant, defining his right of self-defense, and which were fully as favorable to him as he had a right to demand.

The transaction has been twice investigated by a jury. Twenty-four of appellant's neighbors have, after hearing the evidence, concurred in finding him guilty. The last trial appears to have been a fair one and conducted in accordance to law, and the judgment is affirmed.

KENTUCKY SUPERIOR COURT.

HERNDON v. THE LOUISVILLE BANKING CO.

(Filed November 13, 1888.)

The relation between a bank and a depositor is that of debtor and creditor, and as long as that relation exists the bank must honor the drafts or checks of the depositor in the order in which they are presented, to the extent of the deposit. But when, on account of any legitimate transaction, the relation is shifted, and the balance of the account is against the depositor, the bank is not required to respond to the demand of the holder of a check which was drawn before this altered condition, but of which the bank had no notice until afterwards.

H. & M. executed and delivered to appellant a check on appellee's bank for $500. When the check was drawn, and when it was presented for payment, H. & M. had $800 to their credit in the bank. After the check was drawn, but before the bank had any notice of its existence, the bank cashed for H & M. a draft for $3,000, which, when presented to the drawee for payment, was dishonored. In this action by appellant against the bank upon the check executed to him, Held—That H. & M. became indebted to the bank to the amount of the draft when it was presented for payment and was dishonored, and that the bank had the right to retain the $800 then on the credit side of H. & M.'s account as a credit on said indebtedness.

Fairleigh & Straus for appellant.

Barnett, Miller & Barnett for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Barbour.

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The law and facts of this case were submitted to the court, and the facts found were these: On the 3d of December, 1887, Hodgen & Miller executed and delivered to the appellant, Herndon, their check upon the appellee's bank for $500, which was presented to the bank for payment on the 5th of December, when the bank refused to pay it. When the check was drawn, and when it was presented for payment, Hodgen & Miller had $800 to their credit in the bank. The check was not paid because of the existence of the following facts: On the 2d of December, the day before the check was drawn, Hodgen & Miller drew their bill of exchange in favor of the bank on the Hodgen Commission Co., of Cincinnati, O., for $3,000. Hodgen & Miller procured the bank to accept this bill as cash, and to place the amount hereof to their credit. The bill, which was payable on demand, was sent by the bank to Cincinnati for collection, and was, on the 3d day of December, presented to the drawee for payment. Payment was refused, and it was protested for nonpayment, of which the bank was notified the same day. On the morning of the 5th of December Hodgen & Miller made an assignment for the benefit of their creditors, and this fact was known to the bank before the check was presented to it, and before it knew that such check existed.

At the time the draft was drawn and cashed for Hodgen & Miller, they had no funds with the drawee, nor did they have any credit with the drawee that gave them the right to expect that the draft would be honored. Upon these facts the court adjudged, as matter of law, that Hodgen & Miller became indebted to the bank to the amount of the draft when it was presented for payment, and was dishonored, and that the bank had the right to retain the $800, then on the credit side of Hodgen & Miller's account, as a credit upon said indebtedness. The correctness of these conclusions of law is the sole question raised by this appeal.

It is the settled law of this State that the payee of a check may, after its presentment to the bank and the bank's refusal to pay, maintain an action thereon against the bank, if the drawee of the check had, at the time of the presentment, sufficient funds in the bank to pay it. It is also well settled that the drawing and delivery of a check is, as between the drawer and holder, an appropriation of the amount of the check in the hands of the bank; but we are of opinion that until the bank has notice of the existence of the check it can not be affected by it—its liability is not fixed until the check is presented.

The relation between the bank and the depositor is that of debtor and creditor, and as long as it exists the bank must honor the drafts or checks of the depositor, in the order in which they are presented, to the extent of the deposit. But when, on account of any legitimate transaction between the parties the relation is shifted, and the balance of the account is against the depositor, it seems to us that, upon principle, the bank should not be required to respond to the demand of the holder of a check which was drawn before this altered condition, but of which the bank had no notice until afterwards.

If, as must be conceded, the depositor can, after a check is delivered to the holder and before it is presented to the bank, draw out the fund, and thus defeat the check, we see no reason why any contract that the depositor should make with the bank, which would result in denying to him the right to draw upon the bank, would not justify the bank in refusing to pay the holder of a previously drawn check, of which the bank had no notice.

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When the holder of the check presents it for payment he has no better right to demand the amount of the bank than the drawer himself would have if he had not given the check. Therefore, it seems clear that the liability of the bank arises when the check is presented, and not when it is drawn.

In Morse on Banking, page 34, the author says: "The rule may be broadly stated that the bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account. Of course so long as the balance is in favor of the depositor the lien has no vitality in it. But when the payment upon an overdraft, a discount, an acceptance or other species of advance or loan by the bank to him creates an indebtedness in his bank, all the funds which the bank has to his credit may be applied upon such indebtedness until it is fully discharged. And in the Masonic Savings Bank v. Bangs, 8 Ky. Law Rep., 18, the court says: "The right of a bank to a general lien on the money and funds of the depositor in its vaults for the payment of the balance of the general account of the depositor is recognized by all the elementary books on the subject of banks and banking, and sustained by an unbroken line of American decisions. So where a depositor is indebted to the bank, his funds in the bank may be applied to the payment of the debt at its maturity, and the failure of the bank to make such an application has been held to discharge the endorser or sureties." Deathridge v. Crumbaugh, 8 Ky. Law Rep.. 593, cited by counsel, is not in point. There the contract was between an attaching creditor and the holder of a check which was drawn and delivered before, but was not presented for payment until after, the fund in bank to the credit of the drawee of the check had been attached. In such case the only right to the fund that the attaching creditor had was derived through the debtor, and as he had by drawing the check, as between him and the holder of it, transferred the amount to the latter, and could not, as against him, assert any right to the amount, his attaching creditor could not.

As said by the court, "the bank by accepting the deposit, became the debtor of the depositor, and agrees to pay the amount to his credit as he may, by checks drawn from time to time, direct, and the rights of conflicting claimants to the fund due by the bank to the depositor must of necessity rest upon the fact as to which has the first or better claim, just as it does in case of the ordinary assignment of any claim or chose in action."

In this case, when the draft was presented at Cincinnati, and its payment refused, that instant Hodgen & Miller become indebted to the bank in the sum of $3,000; and when Herndon, two days afterwards, presented this check to the bank, instead of the bank owing them the amount of the check they owed the bank $2,200.

Under these circumstances, we know of no rule of law or justice which requires the bank to pay this check, of which it had no notice until the check was presented to it. The check was drawn the same day the draft was dishonored. Which act occurred first does not appear. The defendant in effect avers that Hodgen & Miller were indebted to the bank on account of the dishonored draft at the time the check was drawn. This, however, we do not deem material.

We have discussed the case upon the theory presented by counsel for the appellant, and hold that the bank is not liable upon the broad ground that, at the time the check was presented, the bank owed the drawee nothing.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

RIVES v. WOOD.

Filed December 5, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Malicious prosecution—A controversy between appellant and a turnpike company as to appellant's liability to pay toll at a gate on the company's road culminated in the appellee, the president and the company, suing out a warrant having appellant arrested on the charge of attempting to evade the payment of tolls. That trial resulted in the acquittal of appellant, and thereupon he instituted this suit against appellee for a malicious prosecution. Held—

1. Evidence—Evidence as to what the tollgatherer said after the arrest simply relating to the right still claimed by the company to collect toll, but at a different rate from that theretofore demanded, was incompetent, and was properly rejected.

2. Same—What the gate-keeper said to appellee relative to what took place at the time it was claimed appellant evaded the payment of toll was competent, and was properly admitted, as it was necessary to illustrate the grounds upon, and the motive with which, appellee acted.

3. Same—As the board of directors had suspended the collection of toll until they could investigate the question as to their right to charge appellant and others toll, and in making that investigation appellee, in addition to taking advice from attorneys, read the charter and amended charter of the company to inform himself, they were thereby made a part of his acts, and as a part of what he did, and as illustrating the motive with which he acted, they were competent evidence.

4. Same—The court properly refused to allow the attorney upon whose advice appellee acted, to state what his advice would have been if appellee had stated the facts as appellant claimed them to be, appellee having stated the facts as stated to him by the gate-keeper, upon whose information he had the right to rely.

5. Instructions—If, as a matter of law, appellant was in duty bound to pay toll at the time, it was for the jury to say, from all the facts given in evidence as to what occurred at that time, whether there was or not probable grounds to believe that appellant's purpose was to evade the payment of toll, and an instruction singling out one fact of many, and telling the jury that one fact excluded the idea of probable cause for the arrest, was properly refused.

6. Turnpikes—Toll—A turnpike company, unless its charter provides otherwise, has the right to collect toll from persons passing through its gates, although the distance traveled and to be traveled is less than one mile.

7. New trial—The court properly refused appellant a new trial on the ground of newly-discovered evidence, as there was no diligence after appellant ought to have known the evidence was important.

Ben. Spalding and C. S. Hill, Jr., for appellant; Thompson & McCord for appellee.

KENTON INSURANCE CO. v. WIGGENTON.

Filed December 5, 1888. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Insurance—Proof of loss—Where a policy of fire insurance provides that no action can be maintained without the preliminary proof of loss required by the policy, the objection for the want of such proof, whether by demur-

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rer to the petition or by answer, is in the nature of a plea in bar; but this plea can not be made available if there is a denial of liability, or if the company has done anything to induce the belief, upon the part of the insured, that the preliminary proofs are not desired or deemed important.

In this case the company induced the insured to believe that it would send one of its agents to see about the loss. It sent the agent to the county seat, within four miles of the site of the destroyed property, and he, after examining the title to the property and satisfying himself that the company was not liable by reason of a defect in the title, returned without communicating with the insured. In addition to this the company, by its answer, denies all liability upon the contract, and claims that it is void. Held—That after doing this the company can not be heard to say that the plaintiff should have furnished preliminary proofs of loss, as they were useless if there was no liability.

2. Misrepresentation as to title—The insured represented that he was the owner in fee of the insured building and of the land on which it stood, whereas he was the owner of only an undivided fourth of the land in fee, but owned an estate for life in all of the tract not owned in fee. He had, however, erected the insured building under the belief, in good faith, that he was the owner of the entire tract in fee. Held—That in a division of the land the insured would have been entitled to have his one-fourth interest in the land allotted to him so as to have included the house, and without taking its value into consideration. So it results that he was, in fact and in law, the owner in fee of the insured building and the land on which it stood, and he is entitled to recover on the policy, although it provides that it shall be void if the interest of the insured be other than the unconditional ownership.

3. Insured property "in litigation"—A litigation in which the insured is claiming five-eighths of the land, instead of one-fourth, is not sufficient to avoid the policy under a provision therein that it shall be void if the property is "in litigation."

Collins & Fenley for apppellant; George C. Drane for appellee.

CARTER BROTHERS & CO. v. WHITE, GREEN & HUFFAKER, &c.

Filed December 5, 1888. Appeal from Barren Circuit Court. Opinion of the court by Judge Barbour, affirming.

Exemptions—Pleading—Appellants, who, by their answer, deny that a sum of money paid to them upon a debt due them was any part of the estate of their debtor which had passed to his creditors by reason of an act done by him which operated as an assignment, state that the debtor "is a man with family, a wife and infant children." Held—That this answer is insufficient to show that the debtor was entitled to the money as exempt from his debts, under the act of April 22, 1884, as only a bona fide housekeeper with a family is entitled to the exemptions named in that act. Besides, it was necessary to aver that the debtor did not have the specific articles of personal property in lieu of which the money is allowed.

Boles & Duff for appellants; Lewis McQuown for appellees.

CONN v. CORRY.

Filed December 5, 1888. Appeal from Carroll Circuit Court. Opinion of the court by Judge Bowden, reversing.

Pleading—Departure—Appellant sued appellee on a promissory note, alleging in his petition that "no part of said debt has been paid, except the interest, up to June 8, 1887." Appellee answered that he was surety only, and that each of the sums credited on the note was paid by the principal as interest in advance, pursuant to an agreement whereby he thus procured an extension of time. Appellant offered a reply, which was rejected, denying that there was any agreement to extend time, or that any of the payments were made for interest in advance, and alleging that a pencil memorandum on the note, showing the credits, was not made when the payments were made, but subsequently, and for the purpose of showing how much was due. Following the last credit, of date April 9, 1887, was this memorandum:

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makes a balance of interest up to June 8, 1887." Held—That the ıld have been allowed. It in effect corrected the allegation in the ·at no part of the debt had been paid except the interest up to ', as it showed that the several payments were made on the note ıy. The entry quoted may have been made after all the payments been made, and as expressing merely the plaintiff's opinion how those credits should be applied.

Geo. C. Drane for appellant; M. J. Dudley for appellee.

WARE v. STEVENSON.

Filed December 5, 1888. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bowden, affirming.

Conditional acceptance of order—A and B made a written contract, whereby B agreed to furnish all material and do all the work in the erection of a wall on A's premises. It was agreed that B should be entitled to monthly payments of 75 per cent. of the value of the work done, on production of the engineer's certificate. It was also agreed that during the progress of the work the whole work should be at B's risk. C sold and delivered to B stone, to be used in the wall, at the agreed price of $752.50, and B endorsed on the bill for the stone a request to A to pay the amount to C. By a writing thereon A assumed to accept and pay "this order" as soon as his indebtedness to B should reach "the amount of $752.50, certified by Anderson & Hobbs," who were the engineers. After the acceptance there was an estimate made, upon which A paid B $400. As a result of defective work, done in the month for which that estimate was made, the wall was subsequenty destroyed before completion, and A's lot was injured. In this action by C against A, upon the order accepted by A., Held—That in this state of case it can not be said that A was, under his contract, ever indebted to B in any sum whatever after the acceptance of the order, and C can not recover.

Tisdale & Gray for appellant; Wm. Goebel for appellee.

NEALE v. RECTOR, CURATOR.

Filed December 5, 1888. Appeal from Wayne Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Proof of execution of note—Appellant sued appellee, as curator of the estate of Edward Maloney, on a note signed "Edward (his X mark) Maloney," without attestation, upon which several credits were endorsed. The answer pleaded non est factum and limitation, denying that the alleged payments were made. There was no direct evidence of the execution of the note; the utmost the evidence tended to show was an existing indebtedness for some amount, and that the plaintiff had had the note in possession ever since its date, and had entered the credits endorsed. Held—That, conceding that a note so signed without an attesting witness may be valid, it nevertheless devolved on the plaintiff to prove in some way that Maloney executed the note, and as the evidence did not conduce to show that fact, a peremptory instruction for the defense was proper.

2. Evidence—The plaintiff was not a competent witness to prove the execution of the note, or that Maloney made the alleged payments, or that the credits were entered by his direction.

J. C. Saufley and Anderson & Herndon for appellant; J. Knox Taylor and John W. Tuttle for appellee.

MARKS BROS. v. SQUAIR & CO.

Filed December 5, 1888. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Set off—Appellants sued appellees upon an account, and appellees pleaded as a set-off a claim of damages for an alleged breach of warranty of title to certain chattels which they had bought from appellants, and the set-off was allowed by the judgment appealed from. Held—That as the demand of appellees, although arising out of contract, is for unliquidated damages, it

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can not be pleaded as a set-off. The rule in this regard as it existed under the Code of 1854 has not been changed by the Code of 1877.

John S. Kelley for appellants; Nat. W. Halstead for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. PIPES.

Filed December 5, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Railroads—Negligence—Appellee was riding on horseback along a road which ran near to and parallel with appellant's railroad, when a train approaching from behind frightened her horse, which ran about 1,200 yards, when the horse, the train having caught up with it, threw her. In this action by her against appellant, the trainmen claim that their reason for not applying the brakes was that it would have been necessary to have sounded the whistle in order to do so, and that this would have increased the fright of the horse. Held—That it was for the jury to say whether, under all the circumstances, it would have been prudent to sound the whistle for the application of brakes, and the court can not say that their verdict for plaintiff is flagrantly against the evidence.

2. Excessive verdict—A verdict for $100 was not excessive, for, while the plaintiff received no great bodily injury, she must have been greatly frightened.

W. J. Lisle for appellant; S. A. Russell for appellee.

GOUGH'S ADM'R v. ALVEY & CO.

SAME v. SAME.

Filed December 5, 1888. Appeals from Union Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Claims against decedent's estates—In an action instituted against a personal representative and the heirs of a decedent the defendants can only take advantage of the want of the proper verification and demand before or at the time of filing answer. After that it is too late.

2. Same—Interest—As there was no objection made to the prosecution of the action for the want of verification and demand, and no defense to the action or the plaintiff's right to recover accrued and accruing interest, the court can not assume, in order to reverse the judgment, which allows interest accruing after the death of the debtor, that an affidavit copied into the record was the only verification of the demand that was made. If the objection had been made the plaintiff might have been able to show that he made the required affidavit and demand within one year after the appointment of the administrator.

3. The plea of limitation is a personal plea, and such a plea by one defendant will not inure to the benefit of other defendants.

Ken Chapeze for appellant; J. W. Marshall for appellees.

ALVORD & SONS, &c. v. MALLORY & SON, &c.

Filed October 24, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Judge Bowden, reversing.

1. Assignments by operation of law—Of this action in equity assailing as a preference a mortgage executed by a debtor to his creditor, the equitable jurisdiction was exclusive. And in such cases this court, with deference to the opinion of the chancellor, will review the evidence and will reverse when satisfied that the finding of fact is against the weight of the evidence.

2. Same—It is a sufficient answer in such a case to deny that the plaintiffs are creditors.

3. Same—The evidence shows that the debtor knew at the time of the execution of the mortgage, attacked as a preference, that he was insolvent. The burden of showing ignorance was upon him.

4. Same—When an act done is clearly a preference as matters then stand, and will result in an unequal distribution of an insolvent's estate, unless that result is prevented by some future successful transaction, the act is an assignment.

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The fact that the chief purpose of the debtor in this case was to lull the fears of the mortgagees so as to obtain additional credit, whereby he hoped to be able to pay all he owed, does not prevent the mortgage from operating as an assignment.

5. Same—Mortgage to secure future advances—The mortgage recites an existing indebtedness, and that the debtor "will continue to make purchases in the future and incur other indebtedness," and that the object of the mortgage is "to secure payment of said existing indebtedness, and to secure said future indebtedness when created." The mortgagees acted in perfect good faith in taking the mortgage, and made subsequent advances on the security obtained. Held—That the lien attached as a security for each bill when it was created; and, being contemporaneous, it is not affected by the statute.

6. Same—It is not essential that a mortgage to secure future advances shall contain a stipulation that they shall be made, nor that the limit, either in time or amount, shall be fixed.

7. Negligence—The mere fact that fish which had been shipped were found spoiled eighteen hours after their arrival, without any evidence to show that they had been kept under conditions not calculated to produce that result, does not tend to show negligence in the original packing.

D. M. Rodman and W. S. Watts for appellants; Young & Trabue for Mallory & Co.; Brown, Humphrey & Davie for German Insurance Bank; W. Mix and C. B. Seymour for appellees.

CARTER v. WILLIAMSON, &c.

SAME v. VETTER.

Filed October 10, 1888. Appeals from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Ward, affirming.

Municipal corporations—Right of taxpayer to enjoin misappropriation of public funds—A taxpayer of a municipal corporation having no interest other than that his property will be subject to increased burden by reason of an unlawful appropriation of public money, may have an injunction to prohibit such an unlawful expenditure of the public funds, but the injunction will not be granted unless there was an arbitrary assumption of power or a palpable and flagrant violation or abuse of the public trust. Therefore, the courts will not in this way review the action of the constituted authorities and agencies of a city about a matter within the scope of their powers, and hear evidence and correct mere errors of judgment or mistakes in the interpretation of laws.

As the claims, the payment of which is sought to be enjoined in this case, were allowed by the tribunal which had the authority to allow them, and were allowed in the utmost good faith in accordance with the written opinion of the attorney for the city, which was sought by the general council, the courts can not interfere.

Beattie & Fible for appellant; H. S. Barker, H. M. Lane and Wm. Lindsay for appellees.

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The Kentucky Law Reporter

EDITOR:

EDWARD W. HINES . . . . . Frankfort, Ky.

VOL. 10. FEBRUARY 1, 1889. No. 15

KENTUCKY COURT OF APPEALS.

HUNT v. KEMPER.

(Filed November 24, 1888—Not to be reported.)

Practice—Passways—Injunction—In this action by appellee against appellant to recover damages for the past obstruction of a passway claimed by him, and to enjoin appellant from obstructing his right of way in future, a jury selected to try the issue as to damages found for appellee. The court having overruled appellant's motion for a new trial, and an amended petition having been filed setting up the verdict of the jury and judgment of the court thereon, the case was transferred to the equity side of the docket, where the court enjoined appellant from obstructing the appellee's free use of said passway. Held—That in the absence of the evidence and instructions the verdict of the jury can not be disturbed, and the appellee's right being thus established, it follows that the court did not err in enjoining the appellant.

Thos. R. Gordon for appellant.

W. Montfort for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Bennett.

The appellee contended that he was entitled to a passway at a specified place on the appellant's land, which passway had been established and continued at said place for more than twenty years; that he was entitled to said passway under and by virtue of grants from his immediate and remote vendors, who owned the tracts of land now owned by himself and the appellant; that he purchased the land now owned by him before the appellant purchased his; that his vendee, in the deed of conveyance, granted him the right of way on the land now owned by the appellant, which passway was then established and in use at a certain place on the land; that thereafter, when the appellant bought the land now owned by the appellant from his, the appellee's remote vendor, or his assignee, who had previously granted said right of way, as it was then and now located, to his immediate vendor, it was understood and agreed by the appellant that the appellee's right of way on said land existed as it was then located; that said right of way on

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said land, as it was then located, had existed, and had been continuously used and enjoyed at said place as an exclusive right for more than twenty years; that the appellant had obstructed his right of way at said place and would continue to obstruct it, unless enjoined by the court. The appellee asked for damages for the past obstruction, and that the appellant be enjoined from obstructing his right of way in the future. The appellant put in issue the appellee's allegations, except the fact that he was entitled to a passway on his land at some convenient place, which he, the appellant, had the right to fix, change or alter, provided such change did not materially inconvenience the appellee; that he had made such change, to which the appellant agreed, which change did not inconvenience the appellee. These affirmative allegations were put in issue.

A jury selected to try the issue as to damages found for the appellee, and the court having overruled the appellant's motion for a new trial, and an amended petition having been filed setting up the verdict of the jury and the judgment of the court thereon, the case was transferred to the equity side of the docket, where the court enjoined the appellant from further obstructing the appellee's free use of said passway as it had theretofore been located.

The record shows that evidence was introduced before the jury, and that they were instructed by the court, but neither the evidence nor the instructions appear in the record.

The issues as to the particular location of the passway, the length of time it had been used and enjoyed at said place as an exclusive right, the convenience or inconvenience of fixing it at another place, the question of agreement so fix it, were involved in the jury trial of the question of damages. In the absence of the evidence from the record it must be presumed that competent evidence was introduced before the jury upon each point involved; and in the absence of the instructions it must be presumed that the court properly instructed the jury in reference to each point involved.

The appellee's right, as appears from the record, being thus correctly established, it follows that the court did not err in enjoining the appellant

The judgment is affirmed.

NEIGHBORS v. COMMONWEALTH.

(Filed November 24, 1888—Not to be reported.)

1. Local option—Indictment—It is no objection to an indictment under a prohibitory liquor law which provides that it is not to take effect until approved by a majority of the votes cast at an election to be held for the purpose of voting on the question, that it alleges that the act was favored by a majority of all the legal voters of the county. The Commonwealth is not precluded from showing that a majority of the votes cast favored the act, and it is not competent for the defendant to show that a majority of all the voters of the county did not favor the act.

2. Same—The averment "that the sale was made after a majority of the legally qualified voters of said county, at the regular first Monday in August election, 1884, held in said county, had voted against such sales, pursuant to an act of the general assembly approved May 5, 1884, compared and certified by the board of examiners," although awkwardly drawn, was in effect a specific charge that the vote had been cast under the act in question.

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3. Same—Title of act—The title, "An act to prohibit the sale of spirituous, vinous or malt liquors in Hardin county," was not misleading, the subject matter of the act being fully expressed in the title, and there being nothing in the body of the act that has not a direct connection with the title.

4. Same—Time fixed for act to take effect—The act in providing that it is not to take effect until it has been voted on and favored by a majority of the votes cast, fixes that as the time when the operation of the law is to begin, as much as if a particular day of the month had been named.

5. Same—Evidence—While there is nothing in the local statute, as there is in the general local option law, making the certificate of election prima facie evidence of the result of the vote, it was the best evidence that could be introduced, and the fact that the court regarded it as conclusive did not prejudice the defendant.

6. Same—The appellant was in the possession of the house in which the alleged sale of liquor took place. The witnesses for the Commonwealth state that they drank liquor in the house, and left the money on the counter. Appellant was in the house at the time, but not in the same room. Held—That the evidence was sufficient to authorize his conviction.

Montgomery & Poston for appellant.

P. W. Hardin for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Pryor.

This appeal involves the validity of the prohibitory liquor law applicable to the county of Hardin.

The appellant was indicted for violating its provisions and fined $100. The act was not to be enforced or take effect until it was ratified and approved by a majority of the votes cast at the election against the sale of liquor. The indictment charges the appellant with selling liquor in violation of the act approved May 5, 1884, in selling spirituous liquors to C. C. Hagan, after a majority of the legally qualified voters of Hardin county, at an election provided for in the act, had voted against the sale of spirituous liquors; further alleging that the vote had been compared and certified by the board of examiners of said election to the county court clerk, and their certificate filed and recorded in the county court clerk's office according to law.

There was a demurrer to the indictment, and also a plea of not guilty.

The objection to the indictment is, that the charge was broader in its terms than the act required, the statement being that a majority of the qualified voters of the county had, by their votes, favored the law under which the proceeding was had, and, as the appellant had pleaded not guilty, it is argued that the issue to try was, "whether the majority of all the voters in the county had voted against the sale of liquor," and not whether (as the act provided) a majority of the votes cast had voted against the sale.

On this issue, the appellant offered to prove that a majority of the legally qualified voters had not voted on the act, the one way or the other, and the court refused to hear the evidence. We think the court acted properly, as it is evident the indictment was found under the act of 1884, and the allegation that more voters favored the law than was required, did not preclude the Commonwealth from showing that a majority of the votes cast favored its provisions; nor was the indictment defective on that account. And the averment "that the sale was made after a majority of the legally qualified

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voters of said county, at the regular first Monday in August election, 1884, held in said county, had voted against such sales pursuant to an act of the general assembly, approved 5th of May, 1884, compared and certified by the board of examiners," although awkwardly drawn, was in effect a specific charge that the vote had been cast under the act in question.

The title of the act was not misleading. The title is, "An act to prohibit the sale of spirituous, vinous or malt liquors in Hardin county." The subject-matter of the act is fully expressed in the title. There is nothing in the body of the act that has not a direct connection with its title. The attention of the legislature was called to the fact that the object was to prevent the sale of spirituous liquors.

The body of the act provides the time at which the operation of the law is to begin; that is, when a majority of the votes cast favor it, as much so as if the law had provided that, from and after the 1st of January, 1885, no liquor should be sold, etc., in Hardin county.

The clerk of the county court was introduced as a witness, and, having the custody of the court's records, produced the certificate of election, attested by him, that was offered in evidence, and was competent to show the result of the vote. The general law makes the entry of the certificate on the record of the county court, or a certified copy thereof, prima facie evidence. If so, it was prima facie evidence in this case. It is a part of the local option law, and, although there is no express provision of the local statute making the certificate competent, we do not see how any better evidence could have been introduced. There was no attack upon it, or offer to do so, and the fact that the court regarded it as conclusive did not prejudice the appellant.

The court refused to permit evidence of the fact that all of the voters in the county, or a majority of them, had not voted on the question, and this was proper.

It is also urged that a peremptory instruction should have been given, because both of the witnesses for the Commonwealth testified that they never bought any spirituous liquors from the defendant, or saw him sell any. The fact that the appellant was in the possession of the house is established, and that the two witnesses drank the liquor in the house and left the money on the counter. Appellant was in the house at the time, but not in the same room. On such evidence the jury could not well have returned any other verdict than that of guilty.

Judgment affirmed.

COMMONWEALTH v. ST. BERNARD COAL CO.

(Filed November 24, 1888—Not to be reported.)

Taxation of corporation—Construction of statutes—Under the statute as it existed prior to the present revenue law, corporations, like natural persons, had the right, in listing for taxation property not specially mentioned in the statute, to deduct their indebtedness. This being the construction placed upon the statute for many years by the other departments of the State government, and being equitable and just, the court will not depart from it and thus invite litigation.

Gilbert & Reed and P. W. Hardin for appellant.

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Henry Burnett for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Pryor.

The questions in this case arise under the former revenue law, and have no application to the law as it now exists. The mining company, in making its report to the auditor, or rather, in paying its taxes into the treasury of the State, deducted from the value of its property, not enumerated or required to be listed, the value of certain boats belonging to the company, that value being greatly less than the indebtedness of the company. The statute required such a company to pay a tax equivalent to the tax on real estate on the value of its property that, by its language, includes every species of property owned by it. It is claimed that the legislative purpose was to place a burden on certain corporations that was not imposed on a natural person, requiring the one to pay taxes on all its property, and the other to deduct his or her indebtedness from the value of property not required to be listed. Whether or not the privileges given a corporation by the State that does not pertain to the individual citizen is a sufficient consideration to make this discrimination is not necessary to be decided. The practice has prevailed in the State for many years to permit this deduction by the corporation, and to place a different construction on the law from that placed by those who have received the taxes, would open the doors for much litigation, and involve many companies in pecuniary trouble. They have given in their lands, their horses, mules and other property required to be listed and deducted from their indebtedness in the same manner the natural citizen has, and equality in the burden being at least equitable and just, we are not supposed to invite litigation by disregarding the construction placed upon the statute by the other departments of the State government.

Judgment affirmed.

COX v. COMMONWEALTH.

(Filed November 24, 1888—Not to be reported.)

1. Breaking into depot—Evidence—The appellant being indicted for breaking into a railroad depot, with intent to steal therefrom, proof that the depot had been broken into by some one and a box of clothing prized open, and that some of the clothing was missing, together with the fact that appellant was found with numerous suits of clothing similar to those in the box which had been opened, for which he failed to account, was sufficient to convict him of the breaking with intent to steal.

2. Same—Statements made by the wife of appellant in his presence as to the manner in which possession was obtained were competent evidence; but if not they were not prejudicial.

C. D. Dickey for appellant.

P. W. Hardin for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Pryor.

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It is apparent, from the testimony, that the clothing of Hayslip & Morgan was stolen by some one. The appellant is indicted for breaking into the railroad depot, with the intent to steal therefrom. The facts show that the door of the depot building, or the lock upon it had been tampered with, and that some one had entered during the night and opened a box filled with clothing consigned to Hayslip & Morgan. Several suits of clothing were found in the possession of the appellant a few days after. One of the suits he proves his mother gave him, and to the remaining suits, he seems to have no knowledge whatever. Whether the merchants named lost any clothing or not is not required to be proven. The indictment is for the breaking with the intent to steal. The invoice of the merchants show that some of their clothing was missing, and the appellant is found with numerous suits corresponding with those in the depot, for which he fails to account. Now the fact of the breaking and entering by some one, the lid of the box prized off, and this appellant afterwards found well clothed in suits of a similar character, was sufficient proof to convict him. He is not indicted for stealing goods of the firm, but for breaking and entering with the intent to steal. It was not necessary that the goods should have been identified as the property of the merchants; the fact of their similarity with those found in the box connected with the breaking authorized the verdict, the appellant failing even to attempt to account for the possession being with him. The wife of the appellant made statements in his presence as to the manner in which possession was obtained that were admitted, and we think properly; and if improper did not prejudice the appellant's defense. The jury was not authorized to convict on a preponderance of the testimony, but was told that they must believe him guilty beyond a reasonable doubt.

Judgment affirmed.

SNAPP, &c. v. SNAPP, &c.

(Filed November 27, 1888.)

1. Homestead—Res adjudicata—The judgment of a court of competent jurisdiction is conclusive not only of all matters determined by it, but of all incidental matters which might and ought properly to have been then asserted and decided.

Creditors claiming the right to subject land conveyed by their debtor to a third party upon the ground that the conveyance was fraudulent, disregarded the conveyance and had the land levied on and sold under execution. Thereafter the grantee, in the alleged fraudulent conveyance, brought an action to set aside the execution sale and to quiet his title, to which the debtor was made a party. Upon issue joined the conveyance was held to be fraudulent, and thereafter the purchaser at the execution sale obtained a sheriff's deed. In this action by the debtor to recover the land as a homestead, Held—That the claim to a homestead which he now asserts would have been a complete defense to the action in which the creditors asserted the right to subject the land, and, having failed to assert the claim in that action, he can not now assert it.

2. Pleading—It was not necessary for the plaintiff to aver in his petition that the debt for which the land was sold did not exist prior to its purchase.

John P. Norvell for appellants.

Thos. Kennedy for appellees.

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Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Holt.

In September, 1874, Sylvester Snapp was the owner of five small tracts of land. They adjoined, and were worth less than $1,000. He, together with his wife and children, lived upon them as a housekeeper. On September 1, 1874, he conveyed one of them to his son, John W. Snapp, Jr., and in September, 1875, he conveyed a second one to him. The father was involved, and in April, 1878, two of his creditors sued out executions, and disregarding the conveyances to the son upon the ground that they were fraudulent, had them levied upon the land that had been conveyed to him by his father. It was sold and purchased by John W. Snapp, Sr., for $372. In August, 1878, John W. Snapp, Jr., brought an equitable action to set aside the execution sale and quiet the title he claimed to have acquired under the conveyances from his father. To this action the execution creditors, as well as John W. Snapp, Sr., and Sylvester Snapp, were made defendants. Issues being joined, the deeds to John W. Snapp, Jr., were adjudged fraudulent, and in 1883 he executed a deed purporting to reconvey the land to his father. The latter, when he conveyed to the son, gave him possession of the land, and he continued to hold it until the deed was held to be fraudulent, when the execution purchaser, John W. Snapp, Sr., having obtained a sheriff's deed to it, secured possession, and has held it ever since.

In 1884, or about ten years after the making of the deeds to the son, Sylvester Snapp and wife brought this action against John W. Snapp, Sr., to recover the land embraced by them, upon the ground that it is a part of their homestead, and as such was exempted from execution sale. The record of the suit of John W. Snapp, Jr., brought to uphold the conveyance to him, is, by the petition, made an exhibit in this one, and the matters we have above recited as facts are admitted by the demurrer to the petition.

It was held in the case of Nichols v. Sennitt, &c., 78 Ky., 630, that the petition in an action like this one need not aver that the execution debt for which the land may have been sold did not exist prior to its purchase. The reason for this is, that the exemption is given by one section of the statute, while the exception to the right on account of the existence of the debt prior to the purchase of the land is contained in a distinct one; and where an exception to the general provisions of a statute is found in a distinct clause, the complainant need not aver that he is not within the exception. The petition, therefore, is not defective in this respect.

It was decided in the case of Knevan, &c. v. Specker, &c., 11 Bush, 1, that the right to a homestead exemption is not lost by a fraudulent conveyance by the husband and wife to a third party, who reconveys to the wife, because the fraudulent transfer being void, the status of the creditor and debtor as to the property remains unchanged by it. The rights of the one or the other are not altered by it. In that case, however, the debtor remained in possession of the property, while here he surrendered it to the son upon the making of the conveyance, and when the claim of the latter was declared invalid, the purchaser at the execution sale obtained possession and has held it ever since. It is unnecessary to decide, however, whether this surrender of possession should be treated as an abandonment of this portion of the land as a part of the homestead, and as an estoppel to any claim to it as such, inasmuch as the judgment below dismissing the action must be sustained

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upon other grounds, that are beyond question. Generally, however, the debtor, in order to be entitled to land as a homestead, must either be in the occupancy of it as such, or have parted with such use of it only temporarily.

The exhibit filed with the petition shows that Sylvester Snapp became the owner of one of the tracts of land in contest after the creation of the Orr debt, wihch was one of the debts for which the land was sold. It does not appear when he became the owner of the other. The price at which the two sold under execution did not equal the amount of the Orr debt.

Again: The appellant, Sylvester Snapp, was a defendant to the suit brought by John W. Snapp, Jr., to quiet the title. He is named as such in the caption of the petition. He gave his deposition in that case, and in it testifies that he is a defendant to it. The assertion of his homestead right to the land in that suit would have defeated the claim of the defendants therein, that the conveyance by him to the son was fraudulent. If the land was exempt to him as a part of his homestead, he had a right to convey it without claim or objection upon the part of his creditors. He remained silent, however.

It has been held that the sale of land under the judgment of a court does not divest the owner of his right to a homestead exemption unless it has been waived in the manner directed by the statute. He may assert it by an independent suit. But certainly a time should come when he can no longer do so. He can not sue for it and suffer defeat, and then bring a second action for it by joining his wife with him. He is the owner of the homestead. If he once asserts his right to it by an action and his claim be rejected, this adjudication is a bar to a second suit.

It is equally true that the judgment of a court of competent jurisdiction is not only conclusive of all matters determined by it, but of all incidental matters which might and ought properly to have been then asserted and decided.

Here certain creditors claimed the right to subject certain land conveyed by their debtor to a third party upon the ground that it was fraudulent. The debtor was a party to the suit. If it was exempt as a homestead, they, of course, could not subject it. He fails to so assert; and, under the rule above alluded to, he can not now be heard to set up a claim, which could properly and ought then to have been asserted. The end of the litigation could then have been reached, but for his own omission, either purposely or through neglect.

The judgment of the lower court sustaining the demurrer to the petition as amended, and dismissing it, is affirmed.

ALLEN, &c v. MERIWETHER.

(Filed December 1, 1888—Not to be reported.)

Husband and wife—Fraudulent conveyances—Vendor's lien—A father conveyed his farm to G., his son, the deed acknowledging the payment of the purchase money, but the purchase money was not in fact paid, G. executing his notes to his brothers and sisters therefor. In this action by a sister of G. upon some of these notes, the plaintiff seeks to subject the land for which

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they were executed, attacking as fraudulent a conveyance thereto which G. has executed to his wife. G. and wife resist the relief sought upon the ground, first, that the transaction resulting in the execution of the notes sued on was designed by his father and his brothers and sisters and himself to defraud the father's creditors; and, second, that G. reduced to possession his wife's money under a parol agreement that he would purchase this land for her, and make her a deed when she reached twenty-one years of age. The father of G. is not asking to set aside the original conveyance, and he now has no creditors. The consideration agreed to be paid by G. for the land, of which he has already paid about one half, was a fair equivalent for the land. The conveyance by G. to his wife was not made until after the lapse of thirteen years from the time he says he was to convey to her under the parol agreement. Held—1. There is no evidence of fraud in the execution of the conveyance to G. by his father; but, even if fraud had been perpetrated, G. is not in a position to make such a plea available.

2. Although the husband may have used the wife's money under an agreement to purchase this land for her, her claim under such an agreement should be held in equity subordinate to the claim of the vendor for the purchase money, although no lien was retained in the deed.

Wm. Lindsay, J. S. Pirtle and Lane & Burnett for appellants.

P. J. Foree, Brown, Humphrey & Davie and Bullock & Beckham for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Fryor.

This controversy is between George B. Allen and his wife, who are the appellants, and Mrs. Bettie Meriwether, the appellee, and involves the validity of a conveyance made by George B. Allen to his wife of a valuable tract of land in the county of Shelby, for the acknowledged consideration of $15,000. The deed is dated on the 26th of January, in the year 1885, and was lodged for record in the Shelby County Court clerk's office on the next day, the 27th of the same month.

On the 27th, the day on which this deed was lodged for record, and perhaps recorded, the appellee filed a suit in the Louisville Chancery Court, seeking to recover a large indebtedness evidenced by several notes on the part of George B. Allen to her, and obtained an attachment against his property on the ground that he was about to dispose of his property with the fraudulent intent to cheat his creditors, and finding that the conveyance had been made by the debtor to his wife of this land on the 26th, and recorded on the 27th, the day she filed her original petition, she filed an amended petition, attacking the deed as fraudulent, and making the wife of Allen a defendant to the action.

The notes executed by George B. Allen, and upon which the action was instituted, were given for a tract of land conveyed by John P. Allen, Sr., to his son George, on the 1st of October, in the year 1872. The recovery is resisted by the appellant, George, on the ground that the conveyance of the land made to him in the year 1872, and the notes executed by him in consideration therefor, was a transaction entered into between his father and his adult children, the appellant being one of them, for the purpose of placing all the estate of his father beyond the reach of his creditors. The land embraced by the conveyance included the bulk of the father's estate, and shortly after the conveyance was made he had a public sale of his personal estate.

It is alleged by the appellant that his father was the surety of one Johnson, who was the executor of Carter, and by reason of the provisions of the

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will of Carter, and the breach of duty on the part of the executors, the devisees of Carter instituted an action in the Shelby Circuit Court to make the sureties on the executor's bond liable for a large sum of money, and his father being liable as to the surety of one Bell at the same time for $600, the conspiracy was formed to evade the payment of their liabilities. There were two sureties on this bond of Johnson besides Allen, who were both solvent, and their joint liability could not have exceeded $7,000 or $8,000. Besides, the circuit court, prior to the execution of the conveyance to the son by the father, had decided that the sureties were not bound, and the case went to the Court of Appeals, where it was affirmed or dismissed in the year 1873, after the making of the deed. It seems that Allen and Owsley, two of the sureties on that bond, filed an action against the heirs or representatives of Saunders, another surety, who had died, attaching so much of his property as would pay $3,000, deeming this the extent of his liability, and afterwards released the attachment of all but $500. They seemed to have attached but little importance to the controversy with Carter's heirs, and Allen, at least, seemed to make no effort at concealing his liability, if any should be adjudged against him. The fact, however, of the conveyance by which the father divested himself of all title would be regarded as a badge of fraud, and, perhaps, conclusive against him in behalf of creditors; but there are no creditors complaining, and it is shown by all the parties in interest, or those charged with conspiring to perpetrate this alleged fraud, that the conveyance was made with a view of distributing the estate by the father between his children. He had six children; one of them, the appellee, a sister of the appellant George, whose husband had died, leaving her to manage a large estate, advised her father to live with her and aid in the management of this estate. His other children had but little, if any, property, and being desirous, as he says, of alloting to or giving to them his estate, made a sale of the land to his son George. He made an equal division between his children, requiring them to account for the advancements made; sold his personal estate at public auction, delivered possession of his farm to his son George, with a deed acknowledging the payment of the purchase money, and George executing his notes for the land to his brothers and sisters. He then left his farm and removed to his daughter's home in Shelbyville. Some of those notes George paid off, and the remaining notes are those in controversy. If there was an arrangement to defeat creditors by the execution of the conveyance, there never was any reconveyance to the father, and no pretense that such was the agreement; but, on the contrary, the appellant George has been in the undisturbed possession of this land from the date of the deed up to the institution of the action, claiming it as his own, paying taxes upon it and enjoying all the rents and profits to the exclusion of the father and the other children. This is inconsistent with the alleged charge of fraud. After 1873 John Allen, Sr., had no creditors, or at least none but the payee of the Bell debt that has been satisfied, and was only for $600. So, for thirteen years the appellant has been the sole and exclusive owner of the property, and the father, with no creditors, has set up no claim whatever to the land, the appellant paying off to the children one half of the purchase-money notes.

If fraud had been perpetrated, is the appellant in a position to make such a plea available, by pleading, as a defense to the recovery, the fraudulent

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transaction? The deed has been made him. The consideration agreed to be paid was a fair equivalent for the land. The father is not asking to rescind the contract, or to cancel the conveyance, but the party in possession is relying on his own fraud, as well as the alleged fraud of his father, to enable him to retain the possession and defeat any recovery. The father, as well as the brothers and sisters of the appellant, all testify to the good faith of the transaction. The deposition of the father bears the impress of truth. He says the only conversation ever had in regard to the suit against him by Carter's devisees was in reference to the security of George in the event of a reversal in the Court of Appeals, and his daughter, the appellee, said to her brother that her interest would indemnify him, and she would see that he was made safe.

The old man had a public sale of his personalty, and the sale of his farm and removal to town must have been known by the entire community. He informed the clerk, who drew the deed to his son, that the son was to give his notes to the children, and, if designing to perpetrate a fraud under such circumstances, exhibited but little judgment in the attempt. The notes to the appellee amounted to near $4,000, a sum more than sufficient to meet all his liabilities. He was perfectly solvent, and the valuable tract of land left in the possession of his son. We can not perceive the intent to defraud, or any evidence that fraud was practiced under such circumstances.

It is further argued that the money of the wife of the appellant was reduced to possession by the husband on the parol agreement that he should purchase this farm for her, and make her a deed when she reached twenty-one years of age. The wife arrived at age in June, 1873, and has lived with her husband on the land since that time and prior thereto, and until his removal to Louisville, when, on the 27th of January, 1885, the day her husband was sued in this case, he lodged the deed for record to the wife in the Shelby county clerk's office, bearing date on the 26th, by which he attempts to invest his wife with the absolute title to the entire tract of land.

This deed to the wife was executed when the appellee, ascertaining that she had no lien on the land, was asking the execution of a mortgage to secure it, and when the husband was attempting to raise money by a mortgage to others to enable him to conduct his business in Louisville, or to pay off other indebtedness. That the appellant had paid of his wife's money about $9,000, in discharge of the purchase-money notes, is evident, and he may have purchased the land for her; but, after the lapse of thirteen years from the time he says he was to make this deed, and a longer period from the time he says the parol agreement was made with her, he executes the conveyance that, if upheld, deprives his brothers and sisters of collecting their portion of the purchase money, and leaves the wife the undisputed owner of the entire estate, or at least the greater part of it. His acquaintances and relatives, or those who ought to be familiar with such transactions on the part of the appellant, knew nothing of this parol agreement. His sister had indulged him for many years; was his surety for borrowed money, and was asked to consent to a mortgage on the place for other purposes than to pay her debt, and no intimation was made of this parol contract to her until this suit was instituted.

If the agreement on the part of the husband was to purchase the farm for his wife, or invest it in this land, the investment under such an agreement should be held in equity subordinate to the claim of the vendor for the purchase money.

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The husband will not be allowed to purchase in his own name, with a deed made him acknowledging the payment of the purchase money, and, when called on to make the payment in fact, to respond by saying that he had conveyed the land to his wife under a post-nuptial agreement, by which he was to purchase it for her. Cases might and have occurred where the investment of the wife's money has been made in the husband's name, when it should have been in the wife's name, and the chancellor has reformed the agreement, but in such a case as the one mentioned, the chancellor would scarcely reform the deed, and give the wife the preference over the vendor for the purchase money unpaid, although no lien had been retained. This is attempted to be done in the present case by the parties themselves under a post-nuptial agreement made nearly fourteen years before the transfer is made to the wife, and then upon testimony as to the parol agreement that is neither satisfactory nor convincing.

Here the wife knew that the purchase money was unpaid, and there is no pretense that the father, or any of his children, knew of this parol agreement, or that the husband paid more for the land than it was worth. Here was a complete conversion of the wife's money by the husband, he receiving it and investing it for his own purposes, or if for the wife, under the parol agreement, so far as these notes are concerned, the claim of the wife is subordinate to that of the appellee.

The husband was credited by the father in the distribution of the estate by his portion as one of the heirs, and the effect of this transaction, if upheld, between the appellants, is to deprive the other children, who are unpaid, of any interest in the estate, and the evidence on which to base the relief is a parol contract of fourteen years' standing, that springs suddenly into legal form when the rights of the distributees are about being asserted. (Anderson's Ass'ee v. Anderson, 80 Ky., 638.)

The judgment below is affirmed.

COOK v. CLEMENS, &c.

(Filed December 1, 1888.)

Delay in enforcing execution levy—Where the enforcement of an execution levy has been delayed for an unreasonable time, a third party, even though he has had notice of the levy, has a right to presume that it has been abandoned, or that some arrangement waiving it has been made between the parties to it. And it matters not whether the unreasonable delay has resulted from arrangement between the debtor and the execution creditor, or the mere neglect of the creditor. In either case the lien should not be allowed to prevail as against one who has been more diligent.

In this case a delay of two years in the enforcement of an execution levy on land is held to have been unreasonable, and another creditor, who, at the end of that time, had the land levied on and sold under his execution, and at the sale thereunder became the purchaser, acquired a perfect title, although he had notice of the former levy.

J. D. Wickliffe for appellant.

C. T. Atkinson for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Holt.

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An execution in favor of James Muir and against Irvine Miller issued on November 8, 1880, and was levied five days thereafter on a tract of land belonging to the latter. January 10, 1881, the appellant, Cook, paid off the execution to Muir's attorney, and the latter assigned it to him. It was then returned to the office. In October, 1882, the appellee, Clemens, obtained a judgment against Miller. Execution issued thereon November 8, 1882; it was levied on the twenty-first day of the same month upon the same land, and upon the 11th of December following the sheriff sold the land under it. The appellee became the purchaser. It being subject to redemption by reason of not having brought two-thirds of its appraised value, he sued out another execution upon his judgment upon the last named day, and under it, and upon January 11, 1883, the equity of redemption was sold, and also purchased by him. December 4, 1882, or about two years after the levy of the Muir-Cook execution, a ven. ex. issued in favor of the appellant, Cook. Nothing was done under it, and after its return to the office, and on February 12, 1883, another one issued, under which the land was sold, but this time for the appellant Cook's debt. Not bringing two thirds of its appraised value an execution was then sued out upon the Muir judgment belonging to Cook, and at the sale of the equity of redemption under it the latter became the purchaser. The returns upon the Clemens executions made no reference to the Cook executions, and vice versa.

January 24, 1884, the sheriff conveyed the land to the appellee, Clemens, and on June 13, 1884, the appellant, Cook, obtained a like deed from the same officer. Clemens subsequently obtained the possession of the land under a judgment therefor in his favor, and against Miller; and Cook now sues for a cancellation of the sales and deed to Clemens and the recovery of the land.

Where land is conveyed by a debtor, which is then subject to a lien by virtue of the subsisting levy of an execution, the title passes to the vendee, subject, however, to be overreached by a subsequent sale of the property under the execution and a conveyance by the officer.

In the case of Owens v. Patterson, 6 B. M., 488, the execution creditor permitted his levy to remain unenforced until, at the end of seventeen months, the debtor sold and conveyed the land to a third party, who had no notice of the levy, and it was held that there was no subsisting lien. In the case of the Deposit Bank of Cynthiana v. Berry's Adm'r, 3 Bush, 237, no steps were taken to enforce the levy for three years. At the end of that period the debtor died insolvent. The creditor asserted a lien by virtue of his levy and a right to priority of payment out of the proceeds of the property levied upon over the general creditors. It was denied, owing to the delay in enforcing it.

In the case now presented, the appellee, Clemens, insists that the appellant, Cook, is not entitled to any relief because of the delay of about two years in enforcing the levy made under his execution. The latter responds by saying that before you purchased the land under your execution, both you and your attorney had notice that my execution had been levied upon it. It appears that the attorney of Muir, who assigned the execution to Cook, subsequently became the attorney of Clemens in his suit against Miller; but he testifies it had been so long since he, as such attorney, made the assignment that he had entirely forgotten it until reminded of it by the officer who had levied the execution of Clemens, and then had it, and who had also, in November, 1880, levied the Muir execution. It also ap-

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pears by the officer's testimony that before the sale under the execution of Clemens, he told him of the levy of the Cook execution. The appellee, however, testifies otherwise.

It is perfectly evident from this record that the appellant, Cook, paid off the Muir execution, and took an assignment of it as a favor to Miller, and with the intention of indulging him. In fact, it appears that since his purchase under his execution, he has received some money from Miller as a payment upon his debt, for which he had the land sold.

He testifies, in substance, that Miller was to have the land in case he paid him his debt. The testimony shows that when the appellee, Clemens, brought his action upon his sheriff's deed against Miller to obtain possession of the land, the appellant, Cook, resided within a mile and a half of it. It only appears by presumption that he knew of it. If he did, he remained silent. It further appears that after the appellee, Clemens, had, by virtue of his judgment, obtained a writ for the possession of the land, and when he, with the proper officer, was upon the ground for the purpose of dispossessing Miller, the appellant agreed to be responsible to the appellee for a certain amount of rent for the premises if Miller did not pay it, provided the appellee would not turn the Miller family out of the house. We, therefore, find him consenting to the Miller family becoming the tenants of the appellee.

No absolute rule can be established fixing any certain time at the end of which a levy shall cease to give a subsisting lien. Each case must, in the main, depend upon its own circumstances. Our statute, however, contemplates a prompt enforcement and return of an execution. Unreasonable delay is likely to result in injustice to third parties if, notwithstanding it, a lien upon the debtor's property continues. Our statute, therefore, fixes a certain time when executions shall be returnable. Officers are made liable in heavy statutory penalties to plaintiffs for failing to return them to the office from whence they issued within the proper time without a reasonable excuse therefor. They are not only subject to fine if they delay for an unreasonable time to advertise property taken under execution, but are, moreover, liable in damages to the party injured.

Thus it appears that not only the letter, but the spirit of our law, in giving a lien to the creditor by virtue of his execution levy, requires at the time, as a condition of its continued life and existence, that it shall be promptly enforced. The statute provides him with the means to compel prompt action upon the part of the officer. It is unlike the case of an unrecorded title bond or mortgage. The execution creditor or purchaser can not override them if he has notice of their existence before his purchase.

Where, however, the enforcement of an execution levy has been delayed for an unreasonable time, a third party has a right to presume that it has been abandoned, or that some arrangement waiving it has been made between the parties to it. Any other rule would deceive innocent parties into the giving of false credit, afford the debtor an opportunity to cover up his property, and lead to the perpetration of injustice and wrong. It matters not whether the unreasonable delay results from arrangement between the debtor and the execution creditor, or the neglect of the latter merely. It should not, in either case, be allowed to prevail over the diligent. The creditor may, through his execution, secure his debt, provided he acts with reasonable diligence. The law affords him the remedy upon this condition, because otherwise he may deceive innocent parties or enable the debtor to do so.

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The inaction of the appellant in this case authorized the belief, upon the part of even those who knew of the levy, that it had, in some way, been arranged or else abandoned. His neglect to have it enforced for so long a time, coupled with the attending circumstances, must, as to third parties, be treated as a waiver or abandonment of it.

The judgment dismissing the petition is affirmed

STRUTTON v. STRUTTON, &c.

(Filed December 4, 1888.)

Adverse possession—R. entered into possession of land in the year 1852, under a parol gift from J., his father, and retained possession, claiming the land as his own until his death in 1883. J. died in 1873, leaving a will by which he devised this land to appellant, another of his sons. J. never asserted any claim to the land except by the devise, and appellant never asserted any claim until this suit was instituted in 1884 against the children of R. to recover the land, after the death of R. and ten years after the death of J. Held—That the possession of R. was adverse, and that the title was not only in appellees when the action was instituted, but was in R. at the death of J., R. having then been in the adverse possession of the land for over twenty years.

D. W. Lindsey, John B. Lindsey and George C. Cohen for appellant.

C. B. Beetner for appellees.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Pryor.

While we have not been furnished with a brief for the appellees in this case, it is manifest, we think, that the title to the land in controversy was in the appellee, not only when the action was instituted, but at the death of John Strutton. The evidence clearly shows that the ancestor of appellees had this land in possession at least twenty years prior to his death, and exercised such acts of ownership over it by cultivation and otherwise as is inconsistent with a mere tenancy under the will of the landlord. Besides, it is shown that the appellant's land, for which he holds a deed, was surveyed, and the line between his land and that he is now claiming run and marked, the father of the appellant, and the ancestor of the appellees, stating that the land in controversy was for the father of the appellees. This land was given to Richard Strutton in the year 1852; in fact, he had the actual possession of the most of it from that date by an inclosure, and used that outside of his fence. He instituted his action of tresspass for an entry on this uninclosed land, and his acts of ownership were manifested in every way that indicated title in himself. Besides, it appears that he had the same claim on the beneficence of his father that the appellant had, and there is no reason apparent for his giving all the estate to the one to the exclusion of the other.

The appellant endeavors to show acts of ownership over this land, or the part not inclosed, by proving that he occasionally cut timber upon it, when it is clearly shown that his boundary was fixed by the deed from his father, and his entry beyond that line when made without the consent of his brother

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was a trespass. The appellant claims, under the will of his father, by which his father devises to him the remainder of the Adams tract, and it is insisted that as all the Adams tract had been previously conveyed to the appellant and to William Strutton, one of the grandsons of the common ancestor, except the portion in possession of the appellees, that the remaining portion of the Adams tract must have necessarily been that part of the tract, and to which the ancestor of the appellees had no written evidence of title. This view as to the intention of the testator follows from the reading of the will, but here is a possession of land from or about the year 1852 by Richard Strutton to his death in the year 1883—a period of thirty years. John Strutton died in the year 1873, and Richard, the father of the defendants, died ten years after, and not until after his death did the appellant assert his claim by action to this land.

The parties who knew the important facts connected with this possession are gone, and this claim of the will is seized on to deprive the widow and children of Richard of the entire estate given him by his father. The doctrine is settled that a mere possession by permission from the father, with the expectation that the father will give, does not create an adverse holding; but here, there was an adverse holding under the gift from the father, although by parol, and under such circumstances as forbids the conclusion that the son in possession was the mere tenant.

In the case of Wells' Heirs v. Head, 12 B. M., 166, if the title or holding in that case had been adverse to the father, it had never ripened into a title by reason of the lapse of time; but here the possession continued from 1852 or 1853 to 1884, a period of thirty-one years, without any claim by the father, except the devise, and none by the appellant, inconsistent with his brother's title, until the father and brother were both dead, and this suit instituted in October, 1884.

The judgment below dismissing the petition was proper and must be affirmed.

OWEN v. HOWARD INSURANCE CO.

(Filed December 4, 1888.)

Insurance—Limitation—Sundays—A policy of fire insurance provided that no action could be maintained on the policy unless brought within twelve months after the loss. The insured property was burned March 16, 1884. Suit was instituted on the policy March 16, 1885, which was Monday. Held —That as the last day of the twelve months fell on Sunday, the insured, under a fair and equitable construction of the contract, was entitled to sue on the day following.

Bullitt & Shield and Turner & Cunningham for appellant.

Augustus E. Wilson and Baker, Smith & Baker for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Bennett.

The 10th clause of the policy, which the appellant claims was issued to him by the appellee, provides: "This company hereby limits its liability under this policy, and it is hereby expressly provided that no suit or action against this company for the recovery of any claim by virtue of this policy

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shall be sustainable in any court of law or chancery until an appraisal shall have been obtained, fixing the amount of such claim above provided. Nor unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of any such claim, any statute of limitations to the contrary notwithstanding."

On the 16th day of March, 1885, the appellant instituted this action in the Jefferson Court of Common Pleas for the purpose of recovering the amount for which the appellee, as alleged, insured his storehouse, situated in Corydon, Henderson county, Ky., which house, it is alleged, was destroyed by fire on the 16th of March, 1884. The appellee, as one ground of defense, relied upon the contract limitation, above set forth, of one year as a bar to the appellant's right to maintain his action. The appellant demurred to this defense upon the ground, among others, that the last day of the year in which he was allowed to bring his suit was Sunday, which was not a secular day, and as he was allowed, by the terms of the contract, a whole year from the destruction of the storehouse by fire in which to bring his suit, and as the last day of the year was Sunday, and as it was unlawful to bring his suit on that day, he was entitled to bring it on the day following, Monday. The demurrer was overruled, and the appellant declining to reply, the allegations of this paragraph were taken as true, and the action was dismissed. If the ground of demurrer above mentioned was well taken, it is needless to notice other grounds urged for sustaining the demurrer. Which ground we will proceed to investigate.

It is to be kept in mind that the limitation of one year relied on by the appellee was the result of contract, and must be fairly and equitably construed in order to effectuate the intention of the parties to it. It is clear, therefore, that it was the intention that the appellant should have three hundred and sixty-five days—one year—in which to bring his suit, and that Sundays should be counted to make up said number of days; but that the appellant should have at least three hundred and sixty five days in which to make his proofs of loss, etc., and to bring his action for the recovery of the amount of the policy; that he should be as much entitled to the last day for the performance of these things as to the first day; that no laches should be imputable to him if he waited until the last of the three hundred and sixty-five days in which to bring his suit; that it was not contemplated that he should bring his suit on Sunday, because it was not lawful for him to do so; that he should not be deprived of any one of said days in which to bring his suit, and if the last of the three hundred and sixty-five days fell on Sunday, he should not be compelled, in order to sue at all, to bring his suit on Saturday, the day preceding, for that would deprive him of one of the three hundred and sixty-five days which he, by the contract, was entitled to in which to bring his suit; but as the courts were not open to him on the last day, he should have the following day in which to bring his suit.

At the time of making the contract, had it occurred to the minds of the parties that the last day for bringing the suit might be a Sunday, we can imagine a conversation concerning it as follows: The appellant said to the appellee, you are to allow me twelve months, or three hundred and sixty-five days, after the fire, in which to bring suit? Yes. This is my absolute

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right under the contract? Yes. Suppose the last day is a Sunday; I can not bring a suit on that day; what then? Bring it on Saturday. No; by the terms of the contract, you allow me three hundred and sixty-five days, and it is not fair that you should require me to lose one of these days by bringing the suit on Saturday. Why not fair? Because, if the house should be destroyed by fire, you will owe me the amount of the policy, and the debt will be as just and equitable on the last of the three hundred and sixty-five days as on the first day, and I am, by contract, limiting my right to sue you to within said time, and it seems to me to be equitable and fair that I should have every minute of the agreed time; and if, on the last day, I am obstructed in my right to bring my suit, you, and not I, should lose the day. But the other Sundays in the year are to be counted; why not deduct them, as well as the last one? Because they do not obstruct my right to sue; the last day, Sunday, by the terms of the contract, belongs to me; but I have no right to use it for the purpose of suing you. Therefore, I am entitled to sue you on the following day. Also, if the last day of the year should fall on Monday, or any other day of the week than Sunday, and it should turn out that the law denied me the right to sue you on that particular day, I would, according to the principles above mentioned, have the right to sue you on the following day. So it seems that the day in which the appellant had the right to sue being Sunday, a fair and equitable construction of the contract would entitle him to sue on the day following.

The following cases illustrate the foregoing views: Hammond v. American Mutual Insurance Co., 10 Gray, 309. The insured in that case contracted to pay his premium quarterly, and not later than noon of the quarter day, and a failure to do so forfeited his policy. One of the quarter days came on Sunday, and the insured died in the afternoon of that day. It was held that as it was unlawful to transact business on Sunday, a tender of the premium on the day following was a compliance with the contract.

In Edmonson v. Wragg, 104 Pa. St., 501, where the right to recover usury paid was limited to six months after the payment of the usury, it was held that the last day of the six months being Sunday, the party had the right to bring his suit on the following day.

In Sands v. Lyon, 18 Conn., 28 9, where a testator devised to his son a tract of land, upon condition that he paid, within a year after the testator's death, certain legacies, and the last day of the year being Sunday, it was held that a tender on the following day was sufficient to save his right to the land.

The case, decided by this court, of National Mutual Benefit Association v. Miller, 8 Ky. Law Rep., 731, does not militate against the foregoing views, but is in harmony with them. It was held in that case that a holiday appointed by the president of the United States, or by the governor of this State, was not regarded a Sunday, except for purposes respecting the presentment for payment or the acceptance of bills of exchange, bank checks and promissory notes placed upon the footing of bills of exchange, and the giving of notice of the dishonor of the same. For all other purposes, a holiday was a business day, if persons chose to transact business on that day; and as the company's office was open on that day for the transaction of its business, it was Miller's duty to pay his premium on that day; the same being the last of the thirty days in which he was allowed by the contract to pay it.

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Under the Code of Practice, the Jefferson Court of Common Pleas had jurisdiction of the case.

We deem it unnecessary to notice the other questions made in the case.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

TRACY v. COMMONWEALTH.

(Filed December 6, 1888.)

1. Indictment—Libel—An indictment for libel which charges that the defendant did "unlawfully and maliciously compose, write and cause to be printed and published of and concerning ' a certain person or persons the libelous matter set out, is sufficient without stating the mode of publication. The averment that the libel was printed and published is not a mere legal conclusion, but the statement of a fact.

2. Same—A man may be indicted for a libel on two or more persons where the libel is contained in a single writing, published at one time and by a single act, without rendering the indictment liable to the objection that it charges more than one offense; for, if the defendant be guilty of as many offenses as there are persons libeled, he can not complain because the Commonwealth has seen proper to regard the entire publication as one offense. And this is true, although the acts condemned by the libel may have been committed by the several persons named therein at different times.

3. Same—Under such an indictment the defendant may justify as to the libel on the one, where the statements are divisible, and plead not guilty as to the libels on the others; but where the defense omits or fails to deny statements in the indictment that are libelous, and attempts to justify other statements, the prosecution has then made out the case, and the defendant will be subjected to punishment for the libel admitted.

4. Same—Evidence—The defendant in this case being indicted for a libel by reason of the publication of a writing condemning the official action of the sheriff and jury upon the trial of a writ of ad quod damnum, and the action of the circuit judge who subsequently tried the case upon appeal, upon the trial the entire publication was read in evidence over the defendant's objection. The instructions were based alone on the libelous matter, so far as it related to the action of the judge. Held—That the entire publication was competent, as it would have been, for the purpose of showing the animus of defendant in its publication, if the indictment had been framed alone on the charges made against the circuit judge.

Wm. Lindsay, Mulligan & Beauchamp and D. J. Falconer for appellant.

P. W. Hardin for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

This is an appeal from the judgment below imposing a fine on the appellant for an alleged criminal libel, under an indictment of the Fayette Circuit Court, in which the defendant is charged with having willfully and maliciously composed and caused to be printed and published of and concerning W. D. Nicholas, late sheriff of Fayette county, and the jury, before whom the value of certain landed property was tried on a writ of ad quad damnum obtained by the Lexington & Big Sandy Railroad Co. against the appellant and others, and of and concerning J. R. Morton, the presiding

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judge of the Fayette Circuit Court, before whom the case was subsequently tried, a certain false, scandalous and malicious libel, one part of which is as follows: The pleader, proceeding to charge such libelous matter in reference to the sheriff as made him, if true, a corrupt official, and then proceeds, "another part whereof is of the tenor following: 'I am indignant and forced to say to the public that the ruling of Judge Morton (meaning the judge of the Fayette Circuit Court), is unjust and a disgrace to his position. He denied me the right of a trial by jury because he did not want it out of his hands, as he could not decide in favor of the railroad company as he has done.'" This libelous matter, appearing in the newspapers published in the city of Lexington, the indictment followed, resulting in a fine of $500

The accused filed a general and special demurrer to the indictment, the ground of the special demurrer being that the Commonwealth, in one count of the indictment (and it contains but one), had charged him with committing two or more public offenses. The demurrers were overruled, and the defendant pleaded not guilty.

It is evident that the defendant, in publishing the libelous matter in which he maligned the judge and misrepresented his official conduct, went beyond the bounds of legitimate criticism, and we shall, therefore, notice only the grounds urged by counsel for a reversal. It is insisted that, as there are so many ways of printing and publishing written productions, the statements of an indictment should contain the manner in which the printing and publication were made, and in support of this rule of pleading the attention of the court is called to the crime of forgery, where this court held, in the case of Commonwealth v. Williams, 13 Bush, 267, that, as there were so many ways in which that offense can be committed, the indictment must inform the defendant of the particular acts relied on to constitute the offense, and also the acts showing how the paper was uttered, and for a like reason it is urged the manner of printing and publishing the libelous matter complained of should also be stated, as there are so many ways of printing and publication. It is difficult often to determine what acts constitute forgery, or whether the act said to have been done by the accused amounts to the uttering of the forged paper, and for that reason, under our system of Code pleading, the statements of the indictment are required to be more specific in this class of cases than at common law, section 124 of the Criminal Code providing that the statements of the indictment must be direct and certain "as to the particular circumstances of the offense charged, if they be necessary to constitute a complete offense." Subsection 2 of section 122, also requires a statement of "the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of ordinary understanding to know what is intended."

The crime of forgery may be committed by signing the name of another without authority, or by causing another to sign the name, or by altering a writing already signed; and while the trial judge will know the legal meaning to be given the word forgery, and the acts necessary to constitute the offense, a charge in an indictment that the accused committed forgery by altering a certain instrument of writing, etc., is but the conclusion of the pleader and fails to inform the accused of the facts necessary to make the offense complete. So one may be guilty of libel, which is simply a malicious defamation of another, but as this may be done in various ways, such as by

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printing, writing, sign or picture, it becomes necessary to state in the indictment the facts necessary to constitute the offense in such a way as one of ordinary understanding may know what charge he has to meet.

It is averred in the indictment before us that the defendant did unlawfully and maliciously compose, write and cause to be printed and published of and concerning, etc. These facts, with the ordinary averments following as in this case, constituted a complete offense, either at the common law or under the Code, and apprised the defense of every fact necessary to constitute the offense with which he stood charged. The facts are: That you composed and caused to be printed and published this libelous matter, and every one with ordinary understanding must know what was intended and specifically charged. It is also averred that the accused caused the publication to be made, which, in effect, was saying that it was published by another by his direction; and if not, we are not disposed to hold that such an averment as that it was printed and published is a mere legal conclusion. It is as much a fact as the statement that it was composed or written by the defendant. The words have a plain common sense meaning, and require no legal interpreter to inform the accused of the offense he is charged with having committed.

It is further argued that the indictment is fatally defective because two distinct and separate libels are attempted to be charged. The entire printed matter containing the libel is but one writing, signed by the defendant and published in the Lexington papers. In that writing the defendant comments on the conduct of the sheriff and the jury, the tribunal trying the case, upon the inquisition as to value, etc., that trial having no connection with the act of Judge Morton in refusing a jury trial, save as a history of the proceeding to condemn the same land, the inquisition being held first by the sheriff and then finding its way under appellant's charter to the circuit court. It was not an attempt, on the part of the defendant, to criticise any single procedure in the circuit court, but an effort to give a history of the attempt on the part of the railroad to condemn defendant's property, in which he attributes improper and dishonest motives to the judge, sheriff, and the jurors, or the most of them, in the trial of his case.

It is argued that, as the action of the circuit judge assailed by the defendant was at a different time, and independent of the action of the sheriff, that was also criticised, the offenses were different, and the special demurrer should have been sustained. Whether these libels can be regarded as independent acts of defamation, and, that being so, as many indictments can be maintained as the number of persons he has defamed, is one of some difficulty. This was a single publication in which a libel was contained on the judge, sheriff and the jurors, the libelous matter being the one act of the defendant in printing and publishing the one communication in the newspapers of the city, and, although a libel on each person named, the Commonwealth had the right to indict the offender, and treat the entire publication as one offense; nor are we prepared to say that in such a case the appellant could be indicted for a criminal libel on each of the parties named. If the appellant has been guilty of as many offenses as there are persons libeled, where the libel is contained in a single writing, published at the same time, and by the same act, the defendant should not complain because the Commonwealth has seen proper to regard the entire publication as one offense.

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Mr. Bishop, in his treatise on Criminal Procedure, considering this question, says: "It is now generally understood that a man may be indicted for the battery of two or more persons in the same count, or for a libel on two or more persons, when the publication is one single act, without rendering the count bad for duplicity." (Section 192, 1st edition.)

In Reg. v. Giddins, Car. & M., 634, the defendant was charged with the offense of robbery in assaulting and robbing two persons (naming them) at the same time. Counsel insisted that this pleading was bad for duplicity, and the court responded that but one act had been charged. (Rex v. Renfield, 2 Burrows, 980.) Libel is a public wrong. The publication is, in effect, a breach of the peace. It produces public mischief, and for that reason is an indictable offense. It is a breach of the peace, whether published as to one or more persons. The more persons affected by the libelous matter, the greater the public wrong, but the one act of publication is the libel complained of. If a several injury has been inflicted by the publication of the defamatory matter, the parties injured may each seek redress by a civil action.

Under the rule of the common law, as the truth of the matter alleged to be libelous was inadmissible as a defense in a prosecution for libel, it is for that reason insisted that as the truth may be pleaded under our Constitution and laws in justification of the offense, that where the libelous matter affects more than one in the same publication, the defense may desire to justify as to the one and not as to the other, and, therefore, there should be a severance in the charge.

We see no reason why the defense may not plead the facts under such an indictment, in the same manner that he would be allowed to plead in an indictment for assaulting two persons at the same time. He might plead an assault demesne as to one and not guilty as to the other.

That he may justify as to the libel on the one, where the statements are divisible, and plead not guilty as to the other charges, we have no doubt, but where the defense asserts, or fails to deny statements in the indictment that are libelous, and attempts to justify other statements, the prosecution has then made out the case, and the defendant will be subjected to punishment for the libel admitted. Starkie on Slander and Libel says: "If a libel contain statements that are divisible, one or more of such statements may be justified apart from the rest, if a proper justification can be made out." (Folkard's Starkie, section 489, page 533.) Besides, the evidence in this case shows that the defendant caused the libel to be published in the Lexington Press, the Transcript and the Evening Advertiser, and when the witness was being examined he was asked to read the article, and having read as far as comments had been made by the defendant on the sheriff or his official conduct, the defense objected to any further reading for the reason that what followed related to the circuit judge (Judge Morton). The objection was overruled, and the entire article read to the jury. When the case was submitted an instruction was given, based alone on the libelous matter so far as it reflected on the official action of Judge Morton in the conduct of the trial between the appellant and the railroad company, so the appellant at least was made to respond only to the charge made against the judge, and not for libel on the sheriff and jurors. If the indictment had been framed alone on the charge made against the circuit judge, the entire article being one, although separate statements made in it, was competent to be read to the

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jury, for the purpose of showing the animus of the defendant in its publication.

In our opinion no error has been committed to the prejudice of the appellant, and the judgment is affirmed, with damages.

SMOOT, &c. v. BOYD, &c.

(Filed December 6, 1888.)

Reformation of deed—Guardian and ward—J. sold land to B., agreeing to make her a deed in her absolute right; but, without the knowledge of B., J. executed to her a deed for life, with remainder to her children. B. sold the land to R , and thereafter instituted an action against her infant children and their guardian and against J. and husband to have the deed executed by J. set aside, and a deed executed in accordance with the contract, which the chancellor ordered to be done. Pursuant to that judgment, J. and husband executed a deed to B. in her absolute right. In this action by B. against R. and S., his vendee, to enforce a lien for purchase money, which is resisted by S. upon the ground that B.'s title is defective. Held—

1. It is not material whether or not the guardian of the infant children of B. was summoned to answer in the action to reform the deed, as he did file an answer, which he had the right to do without being summoned.

2. The fact that the husband of J. was not summoned in that action is not material, as he voluntarily performed the judgment of the court, and is not now complaining.

3. The fact that, subsequent to the sale to R., but prior to the proceedings to reform the deed, the guardian of B.'s children procured a judgment authorizing the sale of his ward's remainder interest in said land, and that, at the sale, S. became the purchaser of that interest, does not avail as a defense, as that proceeding did not establish in the children of B. a greater right than the deed gave them, as B. was not a party to that action, and did not, in any way, aid or encourage it.

Wm. Lindsay and V. B. Young for appellants.

R. Gudgell & Son for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Bennett.

On the 4th day of December, 1879, Mrs. Margaret Boyd (now Johnson), mother of the appellee, Mollie I. Boyd, conveyed to said Mollie I. Boyd a tract of land containing thirty-nine acres. Said conveyance was by deed, which contains the following clause: "To have and to hold the said land and appurtenances unto said party of the second part as her separate estate, and at her death to descend to her then living children forever." On the 23d day of September the appellees, Mollie I. Boyd and her husband, Cyrus Boyd, sold, by title bond, said tract of land to Samuel Rogers, who agreed to pay for said land $1,250 on the 1st day of November, 1883, and $1,250 more on the 1st day of November, 1884. The last payment, however, was subject to the condition that the appellees were "able to make a good title to said land." Notwithstanding said condition said Rogers, in November, 1883, accepted a general warranty deed to said land from the appellees. In 1886 the appellees, Mollie I. Boyd and her husband, Cyrus Boyd, instituted an equitable action in the Bath Circuit Court against all of their infant children, they being under fourteen years of age, and their statutory guardian,

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J. A. Reynolds, and said Margaret Johnson and her husband, for the purpose of setting aside the deed of the 4th of December, 1879, above referred to, upon the ground that the clause above quoted in said deed did not represent the true contract as made by them with Mrs. Boyd, her mother, now Johnson, for the reason that she purchased said land in her own absolute right, and the deed was to be made accordingly; but said clause was inserted therein by fraud or mistake.

The uncontradicted proof is, that the appellee, Mrs. Mollie I. Boyd, owned in her absolute right forty-six acres of land, which she, by agreement with her mother, Mrs. Margaret Boyd, exchanged for said tract of thirty-nine acres; that Mrs. Margaret Boyd caused the deed from the appellees, Mrs. Mollie I. Boyd and her husband, to be drawn up in their absence, which they signed without question; that she also caused the said deed from herself to be drawn up, and which she signed and acknowledged, and caused the same to be recorded without the appellees having any knowledge of its contents; that the clause above quoted was inserted in said deed by her direction; that she requested the attorney who drew up the deed to say nothing to the appellees in reference to said clause having been inserted therein; that the contract was, that the said land was to be conveyed to the appellee, Mrs. Mollie I. Boyd, in her own absolute right; that she never discovered the mistake or fraud until November, 1883. Not one of the foregoing facts is opposed by any evidence whatever. They were certainly sufficient to authorize the chancellor to set aside said deed and order the making of a new one, conveying to the appellee, Mollie I. Boyd, said land in her absolute righ which the chancellor did.

The appellant, Smoot, having purchased said tract of land from Samuel Rogers, and the appellees having made him a defendant to this action, which they instituted for the purpose of enforcing their lien on said land for the satisfaction of the $1,250 due on the 1st of November, 1884, he, Smoot, resisted the enforcement of said lien upon the grounds First, that in the action to reform said deed, the statutory guardian of said infants was not summoned to answer. There are two answers, either of which is sufficient, to this objection. First. The statutory guardian appeared and filed his answer to the petition, in which he denied the material allegations of the petition; but it is contended that he had no right, as statutory guardian, to appear in the case where he is sued with his wards without a formal summons so to do. In other words, when he was sued with his wards, as the legal representative of their interest, he could not appear and file his defense, unless he had been summoned so to do; and his having appeared without being summoned, the court ought to have turned a deaf ear to his answer in behalf of his wards as a penalty for his presumption. It seems to us, however, that the object of the summons is to notify the guardian, as the legal representative of the wards, to appear and defend their interests; and that, as such representative, he may appear without a summons and defend their interests. Second. But in the supplemental record it is clearly shown that the guardian was summoned to answer the petition.

2d. It is also contended that the judgment is erroneous because the husband of Mrs. Margaret Johnson was not summoned. It is true that the record fails to show that he was summoned. But the record also shows that Mrs. Johnson and her husband, in obedience to the judgment of the court, did make the appellee a deed to said land. Now Mrs. Johnson and her husband do not complain. On the contrary, they voluntarily comply with the judgment of the court. The infants can not complain, because they were

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properly before the court, and a clear case was made out against them. So the appellant finds himself with a clear title to the land, for the deed by Johnson and wife to the appellee, Mrs. Mollie I. Boyd, enures to his benefit.

3d. But the appellant further contends that, prior to the proceedings above mentioned, and after the sale of the land by the appellees to Rogers, the statutory guardian of said infants procured a judgment authorizing a sale of the infants' remainder interest in said land; and that at the commissioner's sale he purchased said interest at the price of $100. The record fails to show that said purchase was made, also, that the appellees were not parties to said suit; nor is there any evidence even tending to show that they had any knowledge of said proceedings, or, in any manner whatever, advised or encouraged the same. On the other hand, the infants and their statutory guardian, who was conducting said proceedings, were made defendants to the appellees' action, which resulted as above mentioned. Had the guardian's suit been prosecuted to a finish before the appellees commenced their suit, it would not have established in them a greater right to the land than the deed of the 4th of December, 1879, apparently gave them, unless it was shown that the appellees, with a knowledge of their own rights, aided and encouraged said proceedings; but they did not. It was the object of the appellees's suit to set aside said deed, and thereby destroy the apparent rights of the infants thereunder, which the appellees succeeded in doing, and which, of course, superseded the proceedings of said guardian, he and his wards being parties to the appellees' action.

If the proceedings of the guardian to sell the land were to stand, the appellant would get their interest in the land for $100, which, after paying costs, would amount to nothing; whereas, by the judgment rendered in behalf of the appellees, which, according to the record before us, was essentially equitable, he must pay the full value of the land.

The judgment is affirmed.

COMMONWEALTH v. DUFF.

(Filed December 6, 1888.)

1. Indictment—Making of fraudulent poll book—Under an indictment against the clerk of an election for making up a fraudulent poll book by a false entry of votes actually cast and recorded, it is not material whether the persons whose votes he thus entered were or not legally registered voters.

2. Same—Misjoinder—Thus making up a fraudulent poll book is a single offense, whether consisting of the false entry of one or more votes, or of votes for one or more candidates for office, and no question of misjoinder of offenses arises in this case.

3. Same—Municipal corporations—The laws of the State operate within the limits of municipal corporations, and upon the inhabitants of the same, as elsewhere, unless it is otherwise clearly provided in the charter or by some statute of the State.

Article 12, chapter 33 of General Statutes, the title of which is "Penalties Against Frauds on Elections," applies to municipal as well as State elections.

4. Same—The general council of the city of Louisville has no power to provide by ordinance for the punishment of offenses committed by officers of municipal elections. A general grant of power should not be held to confer

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authority upon a municipal corporation to make an ordinance punishing an act which is made punishable as a criminal offense by the laws of the State.

5. Repeal of statutes—The repeal of a statute does not terminate pending prosecutions for offenses committed under the statute unless such appears to be the legislative intent. And this rule applies whether the repealing statute is local or general in its character.

The "Wallace election law," applicable to the city of Louisville, did not terminate this pending prosecution against appellant under section 5 of article 12, chapter 53 of General Statutes, for making up a fraudulent poll book as clerk of a municipal election in the city of Louisville.

P. W. Hardin and B. F. Buckner for appellant.

Aaron Kohn for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is an appeal by the Commonwealth from a judgment sustaining a demurrer to and dismissing an indictment against appellee for the crime of making up a false and fraudulent poll book of an election for mayor and general council of the city of Louisville, charged to have been committed in the following manner: That he, being duly appointed and qualified to act as clerk of said election at a certain designated precinct, and requested by qualified voters, whose names are set out, to record their several votes for Avery, who was then a candidate for the office of mayor, willfully, falsely and feloniously recorded them for Jacob, who was also then a candidate for said office of mayor. And that in like manner, and with like intent, he recorded the several votes of said persons in favor of Bohn, a candidate for the office of councilmen, when they had requested him to record them for Miller, a candidate for the same office.

A general demurrer to the indictment, filed in December, 1887, was overruled, but in February, 1888, another demurrer was filed, the cause of which, as stated, is that the court had no jurisdiction to try the case, as, after the indictment was returned, the law upon which the prosecution is based was repealed by the general assembly without any saving clause as to pending prosecutions, and that demurrer was sustained. The offense for which appellee was indicted is described by section 5, article 12, chapter 33, General Statutes, which provides that any officer who shall make, or aid in making, or authorize the making up of, any false or fraudulent poll book or certificate of an election, or election return, shall be confined in the penitentiary from one to five years, forfeit any office he then holds, and be disqualified from holding any office.

1st. As the offense charged was alleged to have been committed by him as clerk of the election in making a false entry on the poll book of votes actually cast and recorded, and not for recording illegal or refusing to record legal votes, about neither of which he had any legal discretion, it is not material whether the persons, whose votes he thus entered, were not legally registered voters.

2d. Making up a fraudulent poll book in the mode described in the indictment is a single offense, whether consisting of the false entry of one or more votes, or of votes for one or more candidates for office, and no question of misjoinder of offenses arises in this case.

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3d. It is contended that, as the alleged offense was committed by an officer of a municipal election, the statute we have quoted has no application. If that position be correct there exist no regulations for securing free and fair municipal elections in the city of Louisville, unless they have been adopted by the general council. But even if the power to make the necessary regulations could be delegated by the general assembly to the municipal legislature, it has not been done by the city charter, nor can the existence of such power be implied.

"The laws of the State operate within the limits of municipal corporations, and upon the inhabitants of the same, as elsewhere, unless it is otherwise clearly provided in the charter, or by some statute of the State, and unless so provided, in case of conflict between laws and by-laws, the latter must give away." (Dillon on Municipal Corporations, section 367.)

"A general grant of power, such as authority to make by-laws for the good government of the place and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act which is made punishable as a criminal offense by the laws of the State." (Ibid, section 368.)

As said by this court in March v. Commonwealth, 12 B. Mon., 25, the presumption can not be indulged that the legislature intended that an ordinance passed by the city council should be superior to and take the place of the general law of the State upon the subject.

As, therefore, the general council of the city of Louisville neither possesses, nor, so far as this record shows, has attempted to exercise the power of providing, by ordinance, punishment for offenses committed by officers of municipal elections, they are not punishable at all if not by the general law of the State. And, inasmuch as the power to regulate elections of officers of towns and cities is expressly given to the general assembly by section 6, article 6 of the Constitution, and the duty of prohibiting, under adequate penalties, all undue influence on elections from power, bribery, tumult or other improper practices, is expressly enjoined by section 4, article 8, we must presume it was intended that article 12, chapter 33, General Statutes, the title of which is "penalties against frauds on elections," should apply to municipal as well as State elections. Otherwise, the operation of that statute, obviously intended to be general, must, without reason and in disregard of a well established rule of construction, be so restricted that offenses, made felonies when committed by officers of State elections, shall not be punishable at all when committed by officers of town and city elections.

4th. It being to us clear the statute was intended to apply to the offense with which appellee is charged, the question arises on the demurrer sustained by the lower court, what effect, if any, the act entitled "An act to regulate municipal elections in the city of Louisville," approved February 24, 1888, had on the pending prosecution against him?

The rule was formerly that the repeal of a statute terminated all proceedings under it, whereby persons guilty of crime often escaped punishment. To remedy that evil the following provision, being section 23, chapter 21, was made part of the General Statutes as it had been of the Revised Statutes: "No new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or

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any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the law in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provision of the new law, such proceeding may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

The purpose of that section, as plainly indicated, is to limit the consequences of repealing statutes, and, as has been held by this court, it should be construed in connection with such statutes, unless contrary to the manifest intent of the legislature. (Acree v. Commonwealth, 13 Bush, 353; Waddle v. Commonwealth, 84 Ky., 276.)

The first of these cases was where, pending an indictment for selling spirituous liquors at the residence of the defendant, who was a distiller, the law was so changed as to make the sale at his residence thereafter lawful. But it was held that as the sale made at that place was unlawful when the indictment was found, he could not escape by reason of a change of the law after the offense was committed.

In the latter the offense charged was setting up and keeping a faro bank. But after the indictment was returned an act was passed making the offense a felony instead of a misdemeanor, section 6 thereof being as follows: "All acts or parts of acts in conflict with this act are repealed." Nevertheless it was held that construing section 23, chapter 21, in connection with that act, as it was intended should be done in all such cases, the statute under which the defendant had been indicted was unrepealed as to that offense, and he was still liable to the punishment therein prescribed.

The same ruling has been made in the case of Commonwealth v. Sherman, 85 Ky., 686 (9 Ky. Law Rep., 218). By the act to regulate elections in the city of Louisville, which we are now considering, it is provided that thereafter in all municipal elections the votes shall be given by ballot instead of vira voce, the effect of which has been to dispense with the use of poll books, and as a consequence the offense of fraudulent making up poll books can not be committed under that act. But to decide the act has repealed article 12, chapter 33, as to the offense appellee is charged to have committed against it, would be, we think, a violation of the rule of construction prescribed by section 23, chapter 21, and in the face of the ruling of this court in the cases cited. But it is contended that section does not apply to the act in question, but it is a local law.

By the terms of section 23, chapter 21, all repealing statutes are comprehended, and even if the language then used permitted, we see no reason for excepting local laws from its application, especially when, as in this case, the effect would be to render the General Statutes relating to felonies heterogeneous and complicated.

It seems to us that, as it is never to be presumed the legislature intended to condone public offenses already committed, the rule should be applied to each repealing statute, whether local or general in its character, when it would otherwise operate to terminate pending prosecutions for public offenses, and set the person charged free without a trial. Moreover, when we consider that the purpose of the act is to more effectually prevent the commission of offenses of the same character as the one with which appellee is charged, it becomes manifest it was passed in view of and with the intent its repealing effect should be limited by the rule of construction mentioned. For it is expressly provided that the penalties prescribed in article 12, chap-

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ter 13, and as far as applicable in article 13, and the proceedings therein authorized shall apply to elections as regulated by the act, and as therein explained and modified.

The cases cited are the only ones decided by this court that have an application to the question before us, and it is unnecessary to refer to any others.

We think the lower court erred in sustaining the demurrer and dismissing the indictment, and the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

COMMONWEALTH v. SELBY.

(Filed December 6, 1888.)

1. Indictment for bribery—As the indictment in this case for bribery at an election alleges that the person bribed was a legally-qualified voter and entitled to vote at the election which is stated to have been duly and legally held, and that the defendant bribed him to vote by giving him a consideration named, and, influenced thereby, he did vote for a candidate named for an office named, nothing more was necessary to be stated.

2. Same—Misjoinder—As but the single offense of bribing a single person to vote for a single candidate for office is set out, there was no misjoinder.

3. Repeal of statutes—The "Wallace election law" did not repeal the law (section 12, article 12, chapter 33, General Statutes), under which the indictment was found, as to pending prosecutions thereunder.

P. W. Hardin and B. F. Buckner for appellant.

Aaron Kohn for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Chief Justice Lewis.

The offense charged in the indictment against appellee to which a demurrer was sustained, is bribery at an election, committed in substance as follows: That at an election for city officers, held in the city of Louisville in December, 1887, appellee, willfully and unlawfully endeavoring to influence one Brown, authorized by law to vote at said election, did tender and pay him $2 as a bribe to cast his vote for a candidate named for the office of mayor, and in consideration thereof the said Brown did then and there so vote.

The cause of the demurrer is stated as follows: "Defendant says the indictment herein should be dismissed, because, since the filing of the same, the law upon which it was predicated has been repealed by the general assembly of Kentucky without any repealing (saving) clause." The offense with which appellee is charged is described in section 12, article 12, chapter 33, General Statutes, and is as follows: "Whoever shall bribe another shall, on conviction, be fined from $50 to $100, and imprisoned from ten to ninety days, or both so fined and imprisoned, and be excluded from office and from suffrage for five years."

It is contended for appellee that the indictment is defective for the following reasons: 1. That the allegations are insufficient to constitute the offense named. 2. A misjoinder. 3. That the effect of an act, entitled "An act to regulate municipal elections in the city of Louisville," approved February 24, 1888, was to repeal the law under which the indictment was found, and appellee is not now punishable therefor. It seems to us that all the fact

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necessary to constitute the offense charged are stated in the indictment. It is alleged that the person bribed was a legally-qualified voter, and entitled to vote at the election, which is stated to have been duly and legally held, and that appellee bribed him to vote by giving him a consideration named, and, influenced thereby, he did vote for a candidate named for an office named. 2. As but the single offense of bribing a single person to vote for a single candidate for office is set out in the indictment, we do not see how there could be a misjoinder of offenses.

In the case of the Commonwealth v. Duff (ante, page 617), the same question arose as to the effect of the act referred to that is presented in this case, and the opinion in that case, to be delivered on the same day as this, is referred to and made part hereof as containing the reasons for reversing the judgment of the lower court and remanding this cause for further proceedings consistent with this opinion, which is done.

JOHNSON, &c. v. HURST.

(Filed December 8, 1888—Not to be reported.)

1. Res judicata—In a litigation between appellant and H. as to the title and right to possession of a tract of land, in which appellant set up both a paper title and a title by possession, the judgment was in favor of H., the court holding that appellant was not in the actual possession of the land. Pending an appeal from that judgment, which was subsequently affirmed, H. conveyed the land to the present appellee. In this action by appellee to enjoin appellant from committing trespasses on the land, appellant sets up both a paper and a possessory title in himself. Held—That the former judgment is a bar to appellant's claim of title.

2. Champerty—The plea of champerty is not available, for the reason that it was determined in the former suit that appellant was not in the actual possession of the land; and, besides, there is no evidence in this case of actual possession by appellant. Entries on the land for the purpose of getting timber and coal are not sufficient to render the conveyance to appellee champertous.

Wood & Day for appellants.

H. C. Lilly & Son and W. W. McGuire for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Bennett.

In a litigation between the appellant and Hardin Hurst, the father of the appellant, which was commenced in 1868, in reference to the title and right to the possession of the land in controversy in this suit, the circuit court held that the title papers, under which the appellant claimed said land, did not cover the same; and that he was not entitled to the same by reason of having held the actual possession of the same for the length of time required by the statute of limitations. Indeed, it was adjudged that he was not in the actual possession of said land. On the other hand, it was adjudged that said Hardin Hurst was the owner of said land by title regularly derived from the Commonwealth. The appellant brought said case to this court, and the judgment of the circuit court was, in 1879, affirmed, in toto, by this

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court. A short time before said case was affirmed by this court, Hardin Hurst conveyed said land to his son, the present appellee.

The appellee, in 1883, filed his petition in the Breathitt Circuit Court against the appellant, for the purpose of enjoining him from committing trespasses upon said land. The appellant denied the appellee's title, and set up a paper and possessory title in himself.

It is contended that, as between the appellant and the appellee, the judgment of the Breathitt Circuit Court in the case of the appellant against Hardin Hurst has no binding force. But it is to be remembered that said judgment was final, and was affirmed by this court, and it now stands in full force. And it is not only binding, to the extent of all questions settled therein, upon the appellant and Hardin Hurst, but is equally binding upon the privies of each. Therefore, the plea of the want of title in the appellee; the plea of paper title in the appellant; the plea of possessory title in the appellant, were all settled against the appellant in said case, which must, for the purposes of this trial, be treated as res adjudicata.

Also, the plea of champerty is available for the reason that, in said case, it was settled that the appellant had no possession of the land; and for the additional reason that it appears, from the evidence in this case, that the appellant had no actual possession of the land. Entries thereon from time to time, for the purpose of cutting and carrying away timber and getting coal, constitutes the only acts of his in reference to possession, which acts are not sufficient to render the conveyance to the appellee champertous.

Judgment affirmed.

CURRY, &c. v. CURRY, &c.

(Filed December 8, 1888.)

1. Agent—Voluntary payment—Subrogation—An agent who pays money out of his own pocket to protect the estate of his principal that is in his charge is not a volunteer, and he is entitled to all the equities that his principal would be entitled to had he paid the demand himself.

P. and others executed their joint note to H. for money borrowed for the use of C., who agreed to execute to them a mortgage on land to indemnify them. C. thereafter executed his note to P. for the amount, and also a mortgage on land to secure it. P. having died, and no administrator having been appointed, J., who was managing the estate as the agent of the only heir, paid off one half the note which P. and others had executed to H.; and G., another obligor, paid off the other half. Thereafter the administrator of P., when appointed, assigned to J. and G. the note and mortgage which C. had executed to P. In this action by them to enforce the mortgage, C. defends upon the ground that J. was a volunteer. Held—That J. had the right to make the payment for the protection of the estate of his principal, and was, therefore, not a volunteer. Besides, C. can not complain that J. was an intermeddler with his affairs, as the debt paid was not a debt on which C. was bound.

2. Same—Trust—The note and mortgage executed to P. were held by him in trust for himself and co obligors, the trust to enure to the exclusive benefit of any one of said obligors who might pay off the joint obligation.

Montgomery & Jones for appellants.

H. C. Baker for appellees.

Appeal from Adair Circuit Court.

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Opinion of the court by Judge Bennett.

It appears, from the weight of the evidence in this case, that James Curry borrowed of Hunter & Rowe, by an arrangement with the appellant, $200 for the use of the appellant, and executed his note secured by mortgage for said sum that afterwards, it became desirable to make some other arrangements in reference to securing the payment of said loan so as to release the mortgage executed by James Curry to secure the payment of the loan. So, at the request of the appellant, a plan was entered into, by which the appellee, George W. Curry, A. M. Petty and others executed a joint note to Hunter & Rowe for said $200, due and payable in twelve months from date. It was also agreed that the appellant was to give a mortgage on his land (the $200 originally borrowed having been used for the purpose of finishing paying for said land) to secure the obligors on said note.

The appellant, as appears from the exhibits filed, did, on the same day that note was executed by the appellees, Curry and others, execute to A. M. Petty, one of said obligors, his promissory note, due twelve months from date, for the sum of $200; the note recites that it was secured by mortgage. In a short time thereafter the appellant and his wife did execute a mortgage on said land to secure the payment of said note. It also appears, from the weight of the evidence, that said note and mortgage were executed to A. M. Petty for the purpose of carrying out the agreement that the appellant made with the said obligors to indemnify them. Before the note executed to Hunter & Rowe was paid A. M. Petty died intestate, unmarried and without issue, whereby, his father, who was living, became his heir at law. The father thereafter died; but in the meantime no administrator was appointed to take charge of A. M. Petty's estate, and the appellee, James N. Petty, who was managing said estate at the request of his father, and for his benefit, paid off one-half of the note on which was A. M. Petty and the appellee, George W. Curry, etc., and the appellee, Curry, paid off the other half. At the time of said payment the appellant, desiring further indulgence, and it being apprehended that the land was not sufficient security, executed to the appellee, Curry, a mortgage on some personal property for the purpose of additionally securing said sum. After the death of A. M. Petty's father, an administrator was appointed on the estate of A. M. Petty, who assigned the note and mortgage which the appellant executed to A. M. Petty to the appellees, George W. Curry and James N. Petty, which assignment was made in consideration of appellees having paid off the note to Hunter & Rowe. Although the note and mortgage were executed by the appellant to A. M. Petty alone, yet he held them in trust for the equal benefit of himself and co-obligors; and said trust would enure to the exclusive benefit of any one of said obligors who might pay off said joint obligation.

It is said, however, that the appellee, Petty, was a volunteer paymaster to the extent of one-half of said debt; and for that reason he is not entitled to the benefit of said lien. This position can not be sustained, for the reason that the appellee, Petty, did not volunteer to pay any debt on which appellant was bound; he can not complain, therefore, that the appellee intermeddled with his affairs. If it be true that he was an intermeddler in the affairs of any one for the purpose of making such one his debtor, such intermeddling related to the estate of his brother, A. M. Petty; but the administrator thereafter, so treating him as an intermeddler, ratified his act and assigned to him as an indemnity the note and mortgage which he held

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as administrator on the appellant. But James N. Curry was not an intermeddler, for it appears from the proof that he was managing the estate of A. M. Petty as the agent of his father, who was entitled to the estate as the heir of his son, and to discharge the demand upon the estate, which was being pressed for payment, he paid one-half of the demand out of his own means, George W. Curry, one of the obligors on the note, paying the other half. It is well settled that an agent who pays money out of his own pocket to protect the estate of his principal that is in his charge, is not a volunteer, and he is entitled to all the equities that his principal would be entitled to had he paid the demand himself.

The judgment of the circuit court subjecting the land mortgaged to A. M. Petty, and the personal property mortgaged the appellee, George W. Curry, to the payment of the amount paid to Hunter & Rowe by the appellees, together with interest thereon, is affirmed.

GREEN AND BARREN RIVER NAVIGATION CO. v. CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO.

(Filed December 11, 1888.)

1. Obstruction of navigation—A State legislature may authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river which is altogether within its own boundary, so long as congress does not interfere.

2. Same—The appellant, under its lease from the State of the "Green and Barren river line of navigation," acquired no peculiar right in the navigation of these streams, but merely the exclusive proprietorship, during the lease, of the improvements made by the State. Therefore, the grant to a railroad company to bridge these streams, "so as not unreasonably to obstruct navigation," was valid as against appellant; and appellant can not complain of the obstruction of navigation by the railroad company in repairing a bridge constructed under this grant, the repairs being made in such a way "as not unreasonably to obstruct navigation."

Wright & McElroy and Alex. P. Humphrey for appellant.

John Mason Brown and Geo. M. Davie for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

The legislature of Kentucky chartered the Memphis, Paducah & Northern Railroad Co. on March 25, 1878. It also incorporated the Chesapeake, Ohio & Southwestern Railroad Co. on January 19, 1882.

The last-named corporation was, at the time of its creation, the owner of so much of the first-named road as had then been constructed from Memphis, Tenn., to Paducah, Ky.; and its charter conferred upon it certain powers and privileges that had been granted to the Memphis, Paducah & Northern Railroad Co.

The charter provision of the last-named corporation which was, by reference to it, in the appellee's charter, made a part of it, and which is material to the proper consideration of the questions now presented, is as follows:

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"Section 19. The board may provide for the construction of telegraph lines, workshops, warehouses, bridges (so as not unreasonably to obstruct the navigation of any navigable stream), and other buildings and erections, and for conducting them, and such other operations as may be necessary and convenient to the most efficient operation of the railroad of the company for the common carriage of freight and passengers."

Prior to 1883 the appellee's road had, in conformity to its charter, been extended from Paducah northward to Louisville; and as a part of this extension, and under its legislative grant, the company had erected across the Green river at Rockport, in this State, a bridge with a revolving or draw span so as to admit of the passage of boats and other craft navigating the river. In November, 1883, it became necessary to replace this draw span with a new and more improved one, and to this end the appellee caused notice to be published that it would close the channel of the river under the span from December 5 to about December 31, 1883. It also had notice of its intention to do so served upon the appellant, the Green and Barren River Navigation Co., a lessee from the State under an act approved March 9, 1868, of the locks, dams and other improvements erected by it upon Green and Barren rivers, and the owner of a line of steamboats plying upon these waters between Bowling Green, in this State, and Evansville, Ind. There is no complaint of want of proper notice.

Accordingly the railroad company, over the protest of the navigation company, closed the draw span by the erection of false work under it, and it thus remained until January 22, 1884, a period of forty-seven days. No unnecessary time was consumed, however, in the erection of the work, and during fifteen of the forty-seven days navigation was prevented upon the appellant's line by ice in the Ohio river.

The lower court, in its finding of facts, found that the obstruction of navigation might have been altogether avoided by throwing open the draw span, and erecting the false work along the river bank, upon the edge of which the draw pier stood. Doubtless this would have been possible; but it would not only have severed the railroad, but have been an unusual mode of erecting such structures, requiring more time for its completion, and involving 50 per cent., or, at least, a much greater cost.

While the navigation was thus obstructed, the navigation company continued the operation of its line, save when prevented by ice, by running one of its boats upon the upper and the other upon the lower end of it, and by transferring its passengers and freight from one boat to the other over the deck of a barge anchored under the bridge. It brought this action to recover damages consequent upon the obstruction.

The lower court found that it caused one of the appellant's boats to remain idle and partially maimed at Rockport during the closing of the span at an expense of $1,585.25. We fail to understand why this was either a necessary or reasonable result. The bridge was not far from the middle point upon its line of navigation. It seems to us that one boat could have been constantly plying between the bridge and one end of the line, and the other between the bridge and the other end of the line, the two meeting at the bridge, thus avoiding the detention of one boat at the bridge while the other went from it to the other end of the line and returned. As it was a finding of fact, however, we will regard it as well founded.

The judge below also found that a reasonable rent of the barge, etc., was $1,551, thus fixing the entire damage at something over $3,000; but he dis-

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missed the claim upon the ground that the legislative grant to the railroad company to make the improvement was valid, and that it, in doing so, had kept within its terms.

The Green and Barren rivers are navigable streams, and entirely within the boundary of this State. They are public highways by nature or of common right. They exist by common law, and the public can only be deprived of their free use by legislation. Although they are national as well as State highways, and beside serving the purposes of internal commerce, also facilitate commerce between the States; yet it is well settled that, in the absence of legislation under that clause of the Constitution of the United States giving to Congress the power to regulate commerce between the States, a State has plenary power over a navigable stream altogether within its borders. In such a case, until Congress intervenes, the legislature of the State is sovereign. It may, as to such a stream, and in the absence of national legislation, enact a law which incidentally may have a material influence upon commerce between the States. Such a river is not outside of State jurisdiction so long as Congress does not interfere.

The mere grant of the power to the national legislature to regulate commerce between the States is not per se an inhibition upon State legislation as to a navigable river entirely within its boundary. It is quite proper that it should, in such a case, regulate its internal commerce as a part of its internal police.

The Supreme Court of the United States, speaking upon this subject in the case of Hamilton v. Vicksburg, &c., Railroad, 119 U. S., 280, said: "As has often been said by this court, bridges are merey connecting links of turnpikes, streets and railroads; and the commerce over them may be much greater than that on the streams which they cross. A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public than the obstruction to navigation caused by a bridge with proper draws. In such cases, the local authority can best determine which of the two modes of transportation shall be favored, and how far either should be made subservient to the other."

We regard it as now settled beyond question that a State legislature may at least authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river, which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions that its will must be obeyed so far as may be necessary to insure free navigation. (Wilson, &c. v. The Black Bird Creek Marsh Co., 2 Peters, 245; Transportation Co. v. Chicago, 99 U. S., 635; Cardwell v. Bridge Co., 113 U. S., 205; Hamilton v. Vicksburg, &c., Railroad, supra.) In fact many of the cases hold that the obstruction may go to the extent of entirely destroying the navigation of the stream.

The appellant contends, however, that it stands in a different attitude from the general public as to the right of the State to obstruct Green river, or to authorize it to be done, by the building or repairing of a bridge. It insists that the legislature had no right, after making, and during the continuance of the thirty years lease to it, to pass any law repealing or abridging the privileges conferred by it, because to do so would impair the obligation of the contract; and that the State can not obstruct its navigable stream, or authorize it to be done, if Congress has legislated as to it under

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the commerce clause, or if to do so would violate a contract made by the State with an individual or a corporation. It becomes necessary, therefore, to ascertain what rights the appellant did in fact acquire by its lease.

The rights of the parties to this controversy are not to be determined by the relative importance of river or railroad transportation to the commerce of the country. We have no right to compare benefits or contrast injuries. Whether one, and if so, which one, is to be subservient to the other, is a question addressed to the legislature, and not to the judiciary.

Prior to March 9, 1868, the State had improved the navigation of Green and Barren rivers by means of locks and dams, and tolls were charged for their use. The money thus realized proved inadequate to maintain and operate the improvements, and the enterprise was a losing one to the State. The legislature, by an act of the date last named, incorporated the appellant, and, in the language of the second section of the act, leased to it the "Green and Barren river line of navigation and their tributaries, together with the grounds, houses, waterworks, rents, profits, tools, machinery, implements and appurtenances, and all the franchises thereunto belonging or appertaining." The act requires the company to keep "the line of navigation" in repair, and to permit all water craft to navigate the rivers upon the payment of certain rates of toll prescribed by it.

The constitut onality of this act, and the validity of the lease based upon it, were maintained by this court in the two cases of McReynolds, &c. v. Smallhouse, 8 Bush, 447, and Commissioners Sinking Fund v. Green and Barren River Navigation Co., 79 Ky., 73.

What, then, was the extent of the property right thus acquired by the appellant? Manifestly it did not confer upon it an exclusive right of navigation. It was not a lease of the rivers themselves. The company did not, during the term of the lease, acquire such a right in them as it would have obtained under a lease of a canal or turnpike. The public had a natural right to use them before the State improved them. They were not the subjects of private ownership. The company acquired no exclusive right of fishing in them, or using the water for motive or navigating purposes.

What, then, was intended by the expression, "line of navigation," as used in the act? The history of the matter, and the existing circumstances, will serve to explain it. The rivers themselves were navigable streams, open to public use by common right. The State had, however, erected locks and dams and other subsidiary improvements. Tolls were being charged for their use by the State when the lease was made. These improvements belonged to it, and not to the public by any common right. They constituted its line of navigation, and it leased what belonged to it in its corporate capacity as distinguished from what was subject to public use under common right. Properly speaking, these improvements were all the State had to lease, and, although the grant should be construed strictly, yet a fair interpretation of the act of the legislature confines its operation to the property of the State.

The fourth section requires the company "to use due diligence in keeping up said line of navigation in good repair." These words certainly refer to the improvements only, and aid us in reaching a conclusion as to what was meant by the words "the line of navigation.

The company acquired no peculiar right in the navigation of these rivers under its lease. As to it the appellant occupied the same attitude as the general public, and, as none of the improvements have been injured or in

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terfered with, and as the license to bridge the river was valid against the public, it results that the appellant can not complain if the appellee, in repairing its bridge, has kept within the grant. It is not a case of two interfering franchises, because the contract between the State and the navigvation company invested the latter with the exclusive proprietorship, during the lease of the improvements only, and not the navigation of the river. This court, in effect, so held in the case of the Green and Barren River Navigation Co. v. Palmer, 83 Ky., 646, and it is unnecessary to consider the question of the power of the State to barter away the control of its navigable streams, which is a part of its internal police power, because it has not attempted to do so in this instance. It is reasonable to suppose that the parties so understood the contract.

If the bridge had not been constructed when the lease was made, then the acquiescence of the appellant in its construction under legislative grant, and the knowledge that it would necessarily need repair, shows how it regarded the contract. Upon the other hand, if it had already been constructed, then the company knew that its repair and renewal would follow as a duty to the traveling public, and as necessary to its convenience and safety; and it is unreasonable to suppose that the parties intended to enter into a contract forbidding such repair.

The work was done at a season of the year when it was likely to interfere with navigation the least. Ample notice was given that it would be done, and it was done as expeditiously as possible In fact, it is not claimed that there was any unreasonable delay, or that the obstruction continued longer than was necessary. It is plain that nothing was done negligently or wantonly, but that the appellee acted in good faith and with proper precaution. While it was possible to have opened the draw and constructed the new one upon the edge of the river, and thus have avoided all obstruction to navigation, yet the railroad company was not required to take an unusual course in constructing its improvement, and one which would involve unreasonable delay and expense. It was done in such a manner as "not unreasonably to obstruct the navigation," and the appellee is entitled to the protection of the rule of damnum absque injuria.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

GODSHAW, TRUSTEE OF JURY FUND, EX PARTE.

(Filed December 12, 1888.)

Pay of jurors—Jurors in the Louisville Chancery Court are not entitled to pay, even where they serve more than one day. The provisions of the General Statutes as to pay of jurors in circuit courts do not apply.

In this case, appellant, trustee of the jury fund, was ordered by the Louisville Chancery Court to pay jurors who had served in that court in a proceeding to condemn a right of way for the use of a railroad company. It does not appear whether any of the jurors had served more than one day. Held—That these jurors are not entitled to pay, even if they served more than one day.

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P. W. Hardin, Attorney General and O'Neal, Jackson & Phelps for appellant.

J. P. Helm for the jurors.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bowden.

The State may require citizens to serve as jurors without compensation; and, unless some statute has escaped our search, this was required until the passage of the act of February 29, 1836. Before that time the State paid no juror, grand or petit. The only provision for paying jurors up to that date was one in the occupying claimant statute (section 5, M. & B., 1241), that the party applying for the jury should pay a reasonable allowance at the direction of the court.

In considering legislation on this subject, it must be held in mind that we can not invoke the general equity which suggests that a juror serving in one court ought to receive as much as a juror serving in another court. That any are paid is a concession of the sovereign, which may exact the service without pay.

We do not think there is room for reasonable doubt that in the formative legislation, beginning with the act of February 29, 1836, and extending up to the adoption of the Revised Statutes, there was no intent to pay, and that there was no provision for paying jurors serving anywhere except in the circuit courts. By section 1 of the act of February 29, 1836, it was provided, that "before each common law term of the circuit courts," the sheriffs should summon thirty jurors to attend said court; by section 8 it was provided that if any so summoned failed to attend, the sheriff, by order of the court, should fill their places; and by section 9, that "jurors summoned agreeable to the first and eighth sections of this act shall * * * receive for their services, for every day which they attend, $1." And it was provided by section 11 that the court might, as often as it deemed necessary, direct bystanders to be summoned as jurors pro hac vic, with the provision that "no such bystander shall be entitled to any compensation for such service, unless such bystander shall be detained more than one day, in which case he shall be paid at the rate of 50 cents for each day he may be detained," thus discriminating to the extent of allowing nothing for only one day's service, and only 50 cents per day to the bystander who served many days, while paying the regular panel a $1 per day. Under this act, certificates of service were issued to jurors, which were receivable for taxes, and were payable by the auditor.

The act of February 15, 1838, originated the jury fund system, providing that all fines and forfeitures accruing from judgments of the circuit court, county court, courts of justices, and police courts, and the jury fee of $4 provided by the previous act, should constitute a jury fund, of which the circuit court should appoint a trustee. It was made the duty of the trustee to "attend the court," by which was manifestly meant the circuit court which had appointed him, and pay the jurors "as they may be discharged;" for failure in duty, he was liable to fine and imprisonment by the court, whose duty it was made, by an act passed February 5, 1840, to "know" that the duty had been performed. If the fund was not sufficient, the court could add to it taxes received by the clerks of the circuit and county courts on writs, deeds and seals. From the original fund were excepted the fines and forfeitures under town ordinances, and $3,200 of those inflicted by the police

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court of Louisville; the residue of the latter being made a fund for paying jurors in that police court, whose duty it was to appoint a trustee of that fund, and which was to be managed in all respects as the fund for paying jurors in the circuit court is managed by that court.

This is a mere outline of the system as established by these several acts. The Revised Statutes, chapter 55, did but little more than make an orderly restatement of their provisions. There is not the slightest intimation of a purpose to pay jurors, except those who served in the circuit court. That chapter relates to "juries, grand and petit." It provides for the selection of both juries by commissioners, to be appointed by the court, as did the act of February 16, 1838, for petit jurors; and it is to the jurors so selected that all its provisions under article four refer. It would not be possible for the trustee to perform the duties declared, or for the circuit court to perform those devolved on it, if all jurors, serving in any court in the county, were to be paid. Was it intended that the trustee should personally attend every court in the county and pay jurors? Was it meant that every justice of the peace should have power to fine and imprison him for failing to discharge the duties of his office? If the fund had been exhausted, could a police judge or a justice order the sheriff to supply the deficit? Would 5 per cent. be deemed a reasonable compensation for such services? How could it be required of the judge to know that he has paid all the jurors, unless the record evidence is in his own court? We take it to be quite free from doubt that the Revised Statutes did not provide for paying any juror to whom the trustee of the jury fund was not to make the payment in person, in the court where the service was rendered, and as soon as he was discharged. There are no provisions except those for paying jurors.

The General Statutes do not change these provisions. The verbal change in section 3, article 6, chapter 62, making it the duty of the trustee to "attend the courts." was doubtless due to the fact that after the Revised Statutes was adopted, many criminal and common pleas courts were created, having standing juries, and administering part of the jurisdiction of the circuit ocurts; and does not mean that the trustee shall go to every court held in the county in which a jury may serve more than one day, and pay the jurors. So serious a change in the law can not be deduced from the use of the plural in lieu of the singular number. The fact that the jury fund is made up in part by fines and forfeitures which accrue by judgments of other courts, might have some value, if it were true that those courts, or the juries there, earned these fines and forfeitures. In that case, it might seem fair that they should be paid out of their own earnings: sic nos non nobis is not equitable. It is, however, a mere mode by which the State creates the fund out of its own resources.

Section 28 of chapter 21 of the General Statutes, says: "The word circuit court shall be construed to mean any court of any similar jurisdiction, either criminal, ordinary or equitable." This rule of construction was not in the Revised Statutes; when that revision was made there were no courts of general jurisdiction, except circuit courts and the Louisville Chancery Court, which was created in 1835, before any of the legislation we have been considering. As no jurors were paid when that court was created, and as thereafter provision for paying jurors in the circuit courts was made, omitting provision for that court, whose jurisdiction was equitable only, and, therefore, not to be exerted through juries, we do not think the rule of construction in the General Statutes ought to be applied to the provisions in regard to paying

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juries. As, for forty years prior to 1876, the State compensated jurors serving in courts having a standing jury, but made no provision for those who were casually called on to serve in county courts, justices' courts, or police courts, and not even for those who rendered the harder service as jurors in cases of forcible entry or detainer, we can not believe that the General Statutes, maintaining the same policy in regard to all these, intended to provide for the payment of jurors who might be called at intervals by the chancery court of Louisville in the few rare cases in which juries are required in that court. As we have not been favored by any argument for the appellant, and have only citations to the provisions of the General Statutes in the interest of the jurors whom Godshaw was ordered to pay, we are not advised at what time jurisdiction of any case requiring a jury was conferred on this court. If none existed when the General Statutes was passed, it would be very hard to believe that it was the purpose to include a court which had never been included, and whose jurisdiction did not permit a jury; but, even if it did exist at that time in respect to a few cases, it would not be much easier to believe that the purpose was to make provision for jurors casually called then, while other jurors similarly called in other courts were required to serve without pay. These suggestions are in harmony with, and are strengthened by section 12 and 13 of the Code, which intend that, in cases generally, the chancellor, after disposing of equity issues, shall transfer the case to a court having a jury.

The act of February 11, 1880, providing that juries in justices, police, city and quarterly courts may consist of six men, to be paid 50 cents in each case (but not more than $1 for each day), and to be paid by the party applying for the jury, and to be taxed as costs, sheds no light on the question as to what the General Statutes meant. Whether this act is merely permissive, leaving the parties free to demand a regular jury of twelve, or whether it was intended to deny their right to have such a jury, and whether the legislature has the power to do so, are questions not requiring consideration here. Whatever may be its meaning, it does not purport to repeal any law supposed to award them pay out of the jury fund, and for the reason that there was no such law. It is really a new contribution to statutory provisions, whereby the State, still refusing to pay these jurors out of its own resources, adopts the plan of the old occupying claimant's law, and provides that they shall be paid by the litigants themselves.

April 9, 1878, an act was passed providing that jurors serving under the act of March 18, 1876, conferring on quarterly courts jurisdiction in certain misdemeanor cases, should be paid out of the jury fund "$1 per day for each day they are so engaged," adding that "said persons shall be paid in the same manner that persons in the circuit court are now paid." This is a legislative opinion that the law, as it then stood, did not give such jurors a claim on the jury fund, for, while it may be that this act awards pay to a juror who serves one day only, which could not be claimed by a bystander serving in the circuit court, it still includes the case in which he serves more than one day, in which case he would have had a claim on the jury fund, independent of this act, if the existing law meant that all jurors, in whatever court serving, should be paid for service of more than one day.

In this case the appellant, Godshaw, trustee of the jury fund, was ordered by the Louisville Chancery Court to pay jurors who had served in that court in a proceeding to condemn a right of way for the use of a railroad company. It does not appear whether any one of the jurors had served more than one

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day; but the view we have taken makes that immaterial, since we are of the opinion that, if they had served more than one day, they would stand on the same footing with a jury rendering similar service in the county court.

In the case of Godshaw, Trustee, &c. v. G. Roberts, decided by the Court of Appeals February 3, 1881, 2 Ky. Law Rep., 215, the juror had served only one day in the Louisville Chancery Court. We have read the briefs and opinion in that case, and it seems to have been assumed, without investigation, that the provisions of the General Statutes, in regard to the pay of jurors, apply to juries in that court. But the court, in reversing, said that "if the chancellor was entitled to a regular panel, as in the circuit court, the juror, if a bystander and serving only one day, would not be entitled to compensation;" and then says that "a bystander is one who does not constitute a part of the standing jury." Under that definition every jury in that court is a jury of bystanders. It was, therefore, held that, even if the provisions of the General Statutes apply, these jurors, who served as bystanders only one day, were not entitled to pay. It was not necessary to decide that these provisions did not apply. The argument of the court may, therefore, be properly treated as merely conceding, for the purposes of that case, that jurors in the Louisville Chancery Court are to be paid under the same circumstances as are jurors in the circuit court, and then deciding that no pay is demandable even on that concession.

The judgment is reversed and the cause is remanded, with directions to discharge the rule against the appellant.

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SUPERIOR COURT ABSTRACTS.

SCHAFFER & MYER v. COORSEN, &c.

Filed December 12, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Jurisdiction of Superior Court—When a statute is so clearly valid as to admit of no reasonable discussion, and has been repeatedly construed and enforced without any question as to its validity, as in case of the exemption law of April 22, 1884, this court will not, upon the mere suggestion of its invalidity, surrender its jurisdiction of the case.

2. Garnishment—Counterclaim and cross petition—Appellants having sued C. upon a debt, attached certain money which, it was claimed, was owing to C. M., claiming that the greater part of the money garnished was due to him, and not to C., filed his petition and was made a party. In this petition, which was made his answer, M., in addition to setting up his claim to the attached funds, alleged that the attachment was sued out by collusion between appellants and the garnishee, and that he was kept out of his money and subjected to inconvenience and expense growing out of the attachment. He made his answer a counterclaim against appellants and a cross petition against the garnishee. Held—That M.'s claim for damages was not a subject either of counterclaim or cross petition, and was properly dismissed.

3. Exemptions—As C.'s debt to appellants was created, and his claim to the attached money, as exempt, asserted in this action while the exemption act of April 22, 1884, was in force, that act applies.

Kohn & Baker for appellants; Anton Kutzleb for appellees.

BROWN v. GILLESPIE.

Filed December 12, 1888. Appeal from Garrard Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Sureties—Contribution—A surety is presumed to have paid to the use of the principal debtor, whose insolvency, therefore, must be shown if the surety seeks contribution from a cosurety; but it is not necessary to sue the principal debtor before contribution can be demanded.

2. Corporations—Power to borrow money—Estoppel—The bare fact that it was not "necessary" for a turnpike company to borrow money, does not affect the liability of the company or its sureties to the lender, or of any surety to another for contribution. The right to borrow is not limited to cases of "necessity," but if it were, it would probably be held that those who borrow would not be permitted to deny that the necessity existed.

3. Instructions—An issue which neither party asked to have presented to the jury can not be considered. It is not the duty of the court in civil cases to give the whole law of the case; it is only bound to give proper instructions when requested.

4. Burden of proof—In this action by a surety against his cosurety for contribution, the answer did not deny that the money was paid by plaintiff, but only that it was paid on the day alleged. It was admitted that defendant was a cosurety, and that the principal debtor was insolvent. Held—That on these admissions the defendant was prima facie liable to contribute, and, therefore, the burden of proof was on him.

J. H. Brown for appellant; W. O. Bradley for appellee.

MONTGOMERY, &c. v. PROVANCE, &c.

Filed December 12, 1888. Appeal from Hardin Circuit Court. Opinion of the court by Judge Bowden, reversing.

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Recovery of money paid by mistake—In a settlement made by appellants with M., as agent for P., certain credits to which appellants were entitled were omitted by oversight. The balance erroneously found was paid to M. The omitted credits amounting to more than that sum, appellants sue M. to recover the entire amount paid him, P. being made a party to the action. M. claims the right to retain a part of the amount paid him, upon the ground that he has applied it to a debt which P. owed him under an agreement made with P. before the money was collected. Held—That appellants are entitled to recover the entire amount sued for.

James Montgomery and W. H. Marriott for appellants; Willson & Sprigg for appellees.

HOBSON & CO. v. HALL, &c.

Filed December 12, 1888. Appeal from Carlisle Circuit Court. Opinion of the court by Presiding Judge Ward, reversing; Judge Bowden, dissenting.

1. Atttachments—The fact that the defendant is insolvent is not sufficient to authorize an attachment under subsection 2 of section 194 of the Code. The allegation must be made that the defendant has not enough property subject to execution to satisfy the plaintiff's demand.

2. Same—Forthcoming bond—Appellants sued out an attachment against H. and had it levied on a lot of tobacco. H. executed a forthcoming bond, which was signed by B. & Co., as his sureties, on condition that H. would ship the tobacco to them to be sold, and the proceeds credited on an account which they had against him. H. did deliver the tobacco to them, and they sold it. Subsequently the plaintiffs (appellants) amended the grounds for their attachment for the purpose of curing a defect in their original affidavit, which was insufficient. The court sustained the ground relied upon in the amended affidavit, and directed a rule against the obligors in the forthcoming bond to produce the attached property or pay its value. To this rule they filed a response, which was held good; hence this appeal. Held—That B. & Co. had not, within the meaning of subsection 2 of section 208 of the Code, acquired a bona fide right to the attached property before the filing of the amended grounds of attachment. The bona fide claim referred to in that section must mean a claim acquired by a stranger to the attachment, or to liens acquired by due course of law, and not to those who interfere with the process of the court for the purpose and in the hope that they may secure an advantage thereby. Besides, B. & Co in this case had notice of an equity in appellants independent of the attachment, which was at least as valid as theirs, each firm having made advancements to H. under an agreement that he would ship his purchases of tobacco to them and allow them to reimburse themselves out of the proceeds.

3. Same—The execution of a forthcoming bond does not discharge the attachment or the levy, but the property levied upon is, in contemplation of law, in the court's possession or subject to its control.

J. M. Nichols for appellants; W. D. Greer for appellees.

WOLFSTEIN & CO. v. STEINHARTER.

Filed December 12, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Ward, affirming on original and cross appeal.

1. Evidence—Production of account books—Upon the trial of an attachment obtained upon the ground that the defendant had disposed, or was about to dispose, of his property with the fraudulent intent to cheat his creditors, the plaintiff gave notice and asked that the defendant be compelled to produce his private account books, claiming that the books, if produced, would show fraud. Held—That the court properly refused to compel the defendant to produce his books, but even if the court erred, there was nothing so tangible in the plaintiff's hope that the books would show fraud as to authorize the court to say that the error was prejudicial. Besides, the plaintiff had the benefit of the presumption arising from the defendants' failure to produce the books.

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2. Attachments—The fact that the defendant has not enough property to satisfy plaintiff's demand, is not a ground of attachment, unless the action is for the recovery of money "due."

3. Same—In determining whether this ground of attachment is made out, neither debts due to others, nor debts due plaintiff which can not be enforced by attachment, can be considered.

4. Pleading—Objection waived—While the petition in this action on a promissory note was defective in that it failed to allege a promise to pay the debt, yet as there was no demurrer to the petition, the grounds of attachment being controverted without question as to liability on the note, it is now too late for the first time to object to the petition because of this oversight in the pleader

Cleary & Hamilton for appellants; J. F. & C. H. Fisk for appellee.

CROMWELL'S ADM'R v. HUGHES.

Filed December 12, 1888. Appeal from Union Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. New trial—The issue is one of fact. There have been three trials, one resulting in a hung jury, and each of the others in a verdict for plaintiff. The evidence is conflicting. Held—That this court can not disturb the verdict.

2. Ex parte affidavit as evidence—Whether an ex parte affidavit should have been read as a deposition depended upon the agreement which counsel made. The lower court on evidence heard, decided that it should be read. Held—That this court can not say that it should have been rejected.

Spalding & Adair and Hughes & Hughes for appellant; Ken Chapeze for appellee.

BELL, &c. v. GREGORY & CO.

Filed December 12, 1888. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Champerty and maintenance—B. assigned to N. certain accounts against G. & Co., agreeing that if G. & Co. did not pay he would institute and prosecute a suit against them for N.'s benefit, N. agreeing to pay the attorney's fees. Held—That this is not such a contract as is prohibited by the law concerning maintenance and champerty. There is no law which prohibits the assignor of an account from rendering himself liable for the costs which may be incurred in the effort to collect it.

2. Res adjudicata—A plea of res adjudicata, which does not aver the judgment relied on as a bar is in force and unreversed, is not good.

N. McMercer and D. R. Murray for appellants; John Allen Murray for appellees.

SMITH v. SMITH, &c.

Filed December 19, 1888. Appeal from Hart Circuit Court. Opinion of the court by Judge Barbour, affirming.

Liability of surety in executor's bond—A testator and J., his son, had bought land jointly, the testator paying $4,500 of the purchase money and J. agreeing to pay the balance. The land was conveyed to J., he agreeing with his father to pay each of seven other children one-eighth of $4,500 at the death of testator's wife, and to allow testator and his wife the use of that part of the land, the $4,500 paid for during their lives and the life of the survivor. The testator by his will provided: "I give to my wife all my estate, consisting in $4,500, which has been invested in the farm upon which I now live, during her natural life, and at her death I will that the same be equally divided between my eight childrern." He then recited the fact that the title to the land was in J., who was to pay the balance of the purchase money, and to pay to each of his seven other children one eighth of the $4,500 at the death of his (testator's) wife. He then appointed J. executor of his will. In this action by one of the seven children on J.'s bond as executor to recover her share, the testator's widow being dead. Held—That the delin-

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quency of J. was that of a debtor, and there is no ground for holding his surety in his executor's bond liable for such delinquency.

P. F. Edwards for appellant; Boles & Martin for appellees.

THOMAS' ADM'R v. LOWE.

Filed December 19, 1888. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Distraint for sheriff's fees—Limitation—A sheriff rendered services in levying an execution September 12, 1877. This action to recover therefor was not instituted until May 11, 1888. Held—That conceding that section 19 of chapter 100, General Statutes, applies to plaintiff's demand, it is barred by the statute of limitations. He could have distrained on the 13th of December, 1877, and this right existed up to and including December 13, 1882. After that time the fee bill was put upon the footing of an open account and was barred after the expiration of five years from that time.

2. Limitation—Pleading—If, as matter of law arising on the facts stated in the petition, it appears when the cause of action accrued, as is the case here, the defendant, in relying on the statute of limitations, need not state when the right accrued.

3. Railroads—Execution—Sheriff's commission—The real estate of the railroad company (the defendant in the execution levied by the sheriff), used by it as indispensably necessary to the proper operation of its road, was not subject to levy under the execution, and, therefore, the sheriff was entitled to no commission for making a levy which could not have been of any benefit to the plaintiff in the execution.

A. C. Ellis for appellant; Tisdale & Gray for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. BLINCO.

Filed December 19, 1888. Appeal from Marion Circuit Court. Opinion of the court by Judge Barbour, reversing.

Liability of railroad company for medical services rendered injured employe while in the employe of appellant, was fatally injured by falling from a hand car. The day he was hurt the section foreman sent for appellee, a physician, who visited B. that day, and continued to visit him until his death, which occurred some fourteen months after. While waiting on B. appellee told the station agent that he would look to the company. After this, in an interview with the roadmaster, the latter told him that the company could not pay for the entire services. Appellee then asked if he wanted to notify that the company would not pay, and the roadmaster said: "No, wait until I can hear from the General superintendent." Appellee then said if the company did not pay he would insist on B.'s father suing the company for the injuries sustained. In this action by appellee against the company to recover for his services. Held—That there was no evidence upon which to base the instructions given, and that the verdict for appellee is clearly against the evidence.

W. J. Lisle for appellant; Thompson & McCord for appellee.

DUFFICY v. BRENNAN.

Filed December 19, 1888. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Ward, affirming.

1. Pleading—Defect cured—To entitle an employe, who has been wrongfully discharged, to recover, he must allege not only a breach of the contract, but also that he made reasonable efforts to procure other like employment, and failed either in the effort or in the amount of compensation, and that he did not otherwise have employment of any kind; or, if so, he must allege the wages earned. But looking to the evidence in this case, which was admitted without exception, and to the instructions given, the court is of opinion that the defect in the petition was cured by the verdict for plaintiff.

2. Inconsistent defenses—The defendants, in their answer, relied upon an implied warranty by the plaintiff by reason of his representations as to his capacity and experience as a salesman. By an amended answer they relied

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upon the fact that plaintiff bound himself to sell so many goods per month, and that the contract was based on that undertaking, and having failed to comply therewith, his discharge was proper. Held—That these allegations were inconsistent, and the court properly struck out the allegations as to an implied warranty.

Matt O'Doherty for appellant; Frank Hagan for appellee.

GALBREATH v. WILSON.

Filed December 19, 1888. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Malicious prosecution—In this action for a malicious prosecution the record of the prosecution shows that the indictment was returned at one term, and that the next term the accused demurred to the indictment, and the demurrer was sustained and the case referred to the grand jury then in session. More than two weeks thereafter an order was made showing that the grand jury had adjourned for the term without returning another indictment, and thereupon the court made an order discharging the defendant. Held—That the record supports the allegation of the petition that the plaintiff was put on trial and acquitted.

2. Same—Instructions—Probable cause was properly defined in an instruction given on motion of defendant (appellant); but if that definition was not sufficient, appellant can not complain, as he asked no other instruction on the subject.

3. Fraudulent sale of mortgaged property—The prosecution complained of being for fraudulently disposing of mortgaged property, the court properly refused to instruct the jury that the sale of any portion of the mortgaged property, without the consent of the defendant, the mortgagee, constituted probable cause for the prosecution, as it is not the selling of mortgaged property which constitutes an offense under the statute, but it is the intent and purpose to defraud the mortgagee or the public which constitutes the offense. The intent must be gathered from all the attendant facts and circumstances.

Cochran & Son for appellant; J. G. Hickman for appellee.

DANT v. HEAD.

Filed December 19, 1888. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Judgment for debt not due—Reversible errors—If a party institutes suit for a payment due for property, other payments to be made for the same property not having matured, and the defendant appears and makes defense upon the ground that he is not bound upon the contract or for any of the payments, a judgment for the plaintiff upon that question necessarily determines the right to recover on the contract, but the court can not grant any affirmative relief beyond a recovery of the payments due and sued for except in case of asserting a lien, as provided in section 135 of the Code. But so much of the judgment appealed from as attempts to do more is mere surplusage, being extra-judicial, and is not reversible error.

2. Sale of trade-mark—When a trade-mark is affixed to articles manufactured at a particular establishment, and acquires a special reputation in connection with the place of manufacture, and that establishment is transferred, either by contract or operation of law, to others, the right to the use of the trade-mark may be lawfully transferred with it.

3. Statute of frauds—Appellee being the owner of a lease on certain lands, on which was a distillery, sold his interest in the property to appellant, and at the same time sold appellant his interest in a trade-mark in use at said distillery. The deed conveying the lease recited the transfer of the trade-mark in consideration of $100 per annum during the time of the lease, which was eight years. The appellant accepted the property and made one payment. He resists the collection of the second upon the ground that the contract is within the statute of frauds, as it was not to be performed within a

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year. The vendor has fully performed the contract upon his part, and the vendee has done all he was to do except to pay for the property. Held—That, in the opinion of a majority of the court, in which the writer (Judge Ward) does not concur, the contract is within the statute and can not be enforced. The vendee may rely upon it to restrict the recovery to the amount and terms agreed upon, or the vendor may give it in evidence to show the value of the goods sold.

4. Fraud—The averment that the plaintiff had, by the manufacture of a large lot of whisky of an inferior quality, impaired the value of the brand, and that the fact that he had so made said whisky and destroyed the value of his brand was known to him at the time of its sale, but was fraudulently concealed from defendant, and that the brand was represented to be of good repute, when plaintiff knew it was not, constitutes a good defense.

Rountree & Lisle for appellant; Harrison & Belden for appellee.

HALL v. FERGUSON.

Filed December 19, 1888. Appeal from Boyd Circuit Court. Opinion of the court by Judge Barbour, affirming.

Sales of personal property—Waiver—The appellee having agreed to deliver to appellant a certain number of logs by a specified time, the appellant, upon his failure to do so, had a cause of action for the breach of contract, but appellant's agreement to waive this right, provided appellee would thereafter, within a reasonable time, deliver the logs, was based upon a sufficient consideration.

W. C. Ireland for appellant; Hargis & Eastman for appellee.

STACKMIER, &c. v. LOUISVILLE INSURANCE CO.

Filed December 19, 1888. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Ward, affirming.

Reformation of deed—The evidence being sufficient to support the judgment of the chancellor dismissing appellant's petition seeking to have a deed reformed upon the ground of fraud or mistake, that judgment is affirmed.

E. S. Waltz and A. E. Willson for appellants; Young & Trabue for appellees.

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KENTUCKY COURT OF APPEALS.

McDANIEL v. LANDRUM.

(Filed September 15, 1888.)

1. A married woman, no more than others, can take advantage of her own wrong; and while she is not absolutely precluded from recovering real estate which she has attempted to convey while under the disability of coverture, she can not be permitted to profit by her own fraud to the prejudice of a purchaser in good faith. Therefore, if she has received and invested the proceeds of such sale in other real estate for her use and benefit she should be put upon the terms of refunding the purchase money, and paying for such necessary improvements as may have been made in good faith.

2. Husband and wife—Limitation—The abandonment of the wife by the husband does not, ipso facto, remove her disability to sue. The statute authorizes the wife, in such cases, to sue and be sued only after being empowered to do so by judgment of a court of equity.

Although this action was brought more than twenty years after the cause of action accrued, and more than twenty-three years after the abandonment of the plaintiff by her husband, it is not barred, as it was brought within three years after the rendition of the judgment empowering plaintiff to trade as a feme sole, her disability being then, for the first time, removed.

Geo. C. Drane for appellant.

Warren Montfort for appellee.

Appeal from Gallatin Circuit Court.

Opinion of the court by Chief Justice Lewis.

In 1863 appellee, then under disability of both coverture and infancy, and her husband, W. H. Landrum, sold to her brother, W. H. Beal, at $1,600, a tract of 20 acres of land she had inherited from her father, and Beal immediately sold it at the same price to T. J. Turpie. But the latter, advised appellee could not make a good title, refused to pay the purchase money or accept a deed. Whereupon she and her husband instituted an action, making Beal and Turpie defendants, in which judgment was rendered for a sale of the land upon condition it brought as much as $1,600. At the sale made under that judgment Beal became purchaser at the

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sum mentioned, and having, as appears from the record of the action, paid it to plaintiff's attorney, a deed for the land was, in March, 1864, made to him by a commissioner of court. In April, 1864, Beal sold and conveyed it to Turpie, and the latter, in October, 1864, conveyed it to appellant, who has held and claimed it ever since. September 18, 1884, appellee instituted an action ordinary, subsequently transferred to equity, to recover of appellant the land and damages.

It is apparent, and seems to be conceded, that the judgment rendered in the action instituted by appellee and her husband in 1863 was not effectual to divest her of title to the land. But appellant pleaded as defenses, and it is contended for him on this appeal, that the action is barred by limitation, and that by her conduct in procuring the judgment of 1863, and appropriating, in her own name and for her use, the proceeds of sale made in pursuance of it, she is now estopped to claim the land.

1st. Section 2, article 1, chapter 71, General Statutes, provides that if at the time the right of any person to bring an action for the recovery of real property first accrued such person was a married woman, she may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed. It appears that appellee's husband abandoned her about ten years before the institution of this action, and they have not since cohabited, and hence it is argued her disability to sue having thus been, in the meaning of the statute, removed, she might have then brought this action, and not having done so within three years after the expiration of the period of fifteen years, she can not now maintain it. Abandonment of the wife by the husband does not, ipso facto, remove her disability. On the contrary section 5, article 2, chapter 52, General Statutes, as construed by this court in the case of Harmon v. Madden, 10 Bush, 664 authorizes the wife in such case to sue and to be sued only after being empowered to do so by judgment of a court of equity. It is stated in her petition, and not denied, that no judgment giving her such power was rendered until the September term, 1884, of the court, only a few days before the commencement of this action. And as the three years had not then elapsed the plea of limitation can not avail.

2d. It satisfactorily appears that the purchase of the land in the first instance by the brother of appellee was made at her urgent solicitation, and that the action to procure a judgment for the sale was brought with her knowledge and approbation; after the advice was given she could not effect a sale and collect the purchase price without such proceeding.

It further appears that the land was so situated, and in such condition, that it could not be cultivated by her husband and herself profitably, as neither of them then had any estate of much value, and a sale and reinvestment of the proceeds in her name was at the time really to her interest. The proceeds of the sale were not immediately reinvested in her name, but it clearly appears that in 1865 they were used to purchase, in her name and for her use, real estate in Madison, Indiana, where she and her husband removed.

It is a rule, founded upon justice and comomn fairness, that a married woman, no more than others, can take advantage of her own wrong, for, as said by this court, in Rusk v. Fenton, 14 Bush. 490, "coverture will not be permitted to be invoked and used as a cloak to fraud." It has been more than once decided by this court that a woman who, by her conduct, induces the belief on the part of a purchaser of real estate that she has no claim to

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dower in it, is equitably estopped from afterwards asserting it against him. (Craddock v. Tyler, &c., 3 Bush, 360; Connolly, &c. v. Branstler, Ib., 702.)

In the case of Stone and Wife v. Werts, 3 Bush, 486, is this language: "If a party having an interest in preventing an act being done, acquiesces in it so as to induce a reasonable belief that he consent to it, and the position of others is altered by their giving credit to his sincerity, he has no right to challenge the act to their prejudice (2 Story's Equity, 756); and, a fortiori, is this so where, as in this case, the party complaining of an act to his prejudice has procured it to be done by a representation of facts inconsistent with his subsequent claim; and married women are not exempt from the operation of this rule." The doctrine of estoppel, however, has not been so rigidly enforced in this State as to absolutely preclude recovery of real estate of a woman attempted to be conveyed during her coverture by defective or illegal conveyance, although she may have voluntarily joined in the deed or instigated the sale. In such case the rule is that a married woman can not be permitted to profit by her own fraud to the prejudice of a purchaser in good faith; and, therefore, if she has received and invested the proceeds of such sale in other real estate for her use and benefit, she should be put upon the terms of refunding the purchase money and paying for such necessary improvements as may have been made in good faith. (Heck v. Fisher, 78 Ky., 643; Hawkins v. Brown, 80 Ky., 186.) There is nothing in this record to show that either appellant or his two vendors, Beal and Turpie, acted in bad faith or paid less for the land, than a fair value. On the contrary, the proceedings for the sale were instituted by appellee and her husband. the sale was a judicious one, and appellee got the full benefit of the money for which it was sold. And having acquiesced for twenty years, we think if she be now permitted to dispossess appellant it should be upon the equitable terms of restoring the statu quo.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

RATCLIFF v. BELLFONTE IRON WORKS CO.

(Filed December 1, 1888.)

1. Ejectment—When the possession of the plaintiff in ejectment and the entry upon it by the defendant are shown the right of recovery can not be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title.

2. Same—Landlord and tenant—The attornment of a tenant to a stranger is void unless it be with the consent of the landlord or pursuant to a judgment of court. (General Statutes, chapter 63, article 1, section 16.)

In this action of ejectment it appeared that a tenant of the defendant had obtained possession by hiring the plaintiff's tenant to leave. Held—That it was proper to instruct the jury that if the tenant of the plaintiff "surrendered his possession of the land to the defendant without the consent of the plaintiff the same was void, and the legal possession was not changed by it, and the plaintiff was not divested of its possession by said surrender to the defendant." And it is not necessary to a recovery by plaintiff that he should either show a title to the land derived from the Commonwealth or an adverse possession for a period of fifteen years.

3. Estoppel—When a person encourages or induces another to buy an estate he is estopped from thereafter setting up any prior claim he may have had.

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The evidence tending to show that the plaintiff's vendor was induced to buy and pay for the land in controversy by reason of the defendant's statement that he did not claim the land, the court properly instructed the jury that if they believed that such was the fact they should find for the plaintiff.

Thomas W. Mitchell, J. D. Jones and W. H. Julian for appellant.

E. F. Dulin for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is an action of ejectment, upon the trial of which, resulting in favor of the plaintiff, neither party exhibited title to the land in contest, which was deduced from the Commonwealth. The plaintiff put in evidence a deed from Dulin, commissioner of the Greenup Circuit Court, on behalf of the heirs of Richard Graham, for 412 acres, described as part of Graham's 138,320 acres, to Hiram and William Pope, dated in 1873; and also a deed from the Popes, dated in 1874, to it, the plaintiff, for 354 acres.

It appears from the testimony that although the deed was not made by Dulin until 1873, the land was sold and a survey made of it in 1866, and in 1867 or 1868 the Popes built a cabin upon it, which was occupied by their tenants three or four years, when the house was burned, and the land was not occupied thereafter by them nor their vendee, the plaintiff, until November, 1881, when the latter leased it, in writing, for one year to Coleman, who went upon it as its tenant, another cabin having been built. But a short time thereafter a tenant of the defendant, Ratcliff, got possession by hiring Coleman to leave, and there is evidence tending to show that was done at the instigation and at the expense of the defendant. The defendant exhibited a deed from the sheriff of Greenup county, dated 1819, to James Ward for 138,320 acres, which, as recited in the deed, was sold under execution for small amounts against the estate of Henderson and Linton, surviving trustees of Richard Graham, deceased, and also a deed to himself, dated 1872, from Womack and wife, the latter a daughter of Ward, for a tract of land, the boundary of which, it is contended, covers the land in dispute.

There is testimony that, in 1853, one Gilbert leased a tract of land within the Graham survey from Ward, and in 1866 leased the same from Womack and wife; but though he cleared and cultivated a small portion, does not appear to have lived upon it; and one of the questions in this case is whether the land conveyed by Womack and wife in 1872 is part of that tract.

Though both plaintiff and defendant claim under the Graham patent, the evidence is not such as to directly connect the title of either of them with it, and the question is as to the superior possessory right.

The first instruction given by the court is as follows: "That the plaintiff has not made out a title deducible from the Commonwealth, but if the jury believe from the evidence that the plaintiff, or those under whom he claims, had purchased the land in controversy, and took a deed for same, and entered upon and took actual possession of said land before the bringing of this suit, then the jury will find for the plaintiff, the land in controversy." That

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instruction is not proper unless qualified and explained by other instructions showing all the conditions for such a recovery, and also saving the hypothetical rights of the defendant. The plaintiff in ejectment may recover on a bare possession when there has been an actual disseisin or ouster, and even when there has not been such ouster, and the defendant appears to be a trespasser without color of title. (Fowke v. Darnall, 5 Litt., 316.) The second of these conditions does not, however, exist in this case. It is also settled that when the possession of the plaintiff and the entry upon it by the defendant are shown the right of recovery can not be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title. (Sowder & Myers v. McMillan's Heirs, 4 Dana, 456.) For, as said in that case, the plaintiff "can no more be deprived, by the defendant's wrongful act, of the presumption or rights attaching to a peaceable possession than the defendant can acquire them."

The fact of the plaintiff being in the peaceable possession of the land under the deed from Popes, and claiming to the extent of the boundary defined by that deed, and also marked, is made in an instruction a condition of its right of recovery. There was no evidence the defendant himself had ever, previous to the alleged wrongful entry by him, been in the actual possession of any part of the land. On the contrary the possession, unless the Popes held it, was vacant from 1872, the date of the Womack deed. But as there was evidence tending to show that Ward, and after him Womack and wife, by their tenants, previous to the entry by Popes, occupied and put improvements upon several distinct parcels of land within the Graham survey, including the one leased to Gilbert, it was a proper and necessary subject of inquiry by the jury whether the Gilbert lease did in fact include the land in controversy, the evidence in regard thereto being conflicting. The fifth instruction is as follows: "That if the defendant and those under whom he claims did not take the actual possession of the land in controversy, that the several entries made by them was limited by them and tenants, or did not include the land in controversy, then the law does not require the possession of the plaintiff, as directed in the first instruction, to extend the period of fifteen years; and if they should so believe, and also believe that the plaintiff had the actual possession thereof under its deed by entry thereon, and making improvements, and the defendant or those in his employ entered upon the same before the bringing of the suit, they will find for the plaintiff the land in controversy." As said, substantially, in that instruction the plaintiff was entitled to recover unless the defendant and those under whom he claims had the actual possession by entry previous to that of the plaintiff, which involved the inquiry whether the tract leased to Gilbert included the land in controversy; and as the jury were, in another instruction, directed to find for the defendant in case they believe he and those under whom he claims had the actual possession, claiming to a well-defined boundary before the entry of the plaintiff, and such boundary included the land in controversy, they must have understood the fifth instruction as requiring a verdict for the defendant if it was included in the boundary of the tract leased to Gilbert.

The fifth instruction was rather prejudicial to the plaintiff in pretermitting an inquiry as to the effect of the possession becoming vacant as to the defendant in 1872, and in making a posses-

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sion by the plaintiff, and those it claims under, for fifteen years a condition in any case of its right to recover.

Section 16, article 1, chapter 63, General Statutes, provides that "the attornment of a tenant to a stranger shall be void unless it be with the consent of the landlord, or pursuant to a judgment of court." It was, therefore, proper to instruct the jury that if the the plaintiff "surrendered his possession of the land to the tenant of defendant without the consent of the plaintiff, the same was void, and the legal possession was not changed by it; and the plaintiff was not divested of its possession by said surrender to the defendant." The following instruction was also proper: "If * * * before Popes had obtained their deed from Graham's and Beatty's heirs for the land in contest, and before they had paid for the same, one or both the Popes went to Ratcliff and asked him if he had any claim on said land, and he told him, or them, he did not claim any land on the south side of Little Licking, and they were induced to take the deed and pay for said land by reason of said statement of Ratcliff, then Ratcliff is barred of now setting up claim to said land against their vendee, the plaintiff." It has been often decided by this court that when a person encourages or induces another to buy an estate he is estopped from thereafter setting up any prior claim he may have had. (Springle v. Morrison, 3 Litt., 55; Harrison & Gray v. Edwards, ibid, 350; Gerault v. Anderson, 2 Bibb., 543; Barclay v. Hendrick's Heirs, 3 Dana, 645; Sale v. Crutchfield, 8 Bush, 645.) And, in our opinion, the facts upon which that instruction is based, if true, are decisive of this case.

According to the views we have already expressed it was not necessary to a recovery by the plaintiff that it should either show a title to the land in controversy derived from the Commonwealth or an adverse possession for a period of fifteen years, and the instruction asked by the defendant, containing such conditions of its right to recover, was properly refused. Nor did the court err in refusing the one relating to champerty, for the question involved was whether or not the tract leased by Gilbert covered the land in dispute, and there was evidence justifying the finding of the jury it did not; moreover, as before said, the possession as to the defendant was vacant when the plaintiff entered.

As the converse of the proposition stated in each of the other instructions asked by the defendant was intelligibly stated in those given, the court did not err in refusing them; and, perceiving no ruling of the court by which the substantial rights of the defendant were prejudiced, the judgment must be affirmed.

CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO. v. HEAT'S ADM'R.

(Filed December 8, 1888.)

1. Objection to jurisdiction—Appearance—Where the defendant files an answer merely for the purpose of insisting that the court has no jurisdiction of his person for the want of proper service of process, he does not thereby enter his appearance to the action, and the court has no right to require him to answer to the merits if he has not in fact been served with process. And this is true whether the action be transitory or local.

This action against a railroad company to recover for the death of plaintiff's intestate, alleged to have been caused by the willful neglect of defendant, was brought in the county where the injury occurred, and process

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issued to that county, and returned executed on K., "the agent of the company." The defendant filed an answer stating that K. was not the agent of the company, and asking that the action be abated. A demurrer to this answer was sustained, and defendant then moved to quash the return on the summons. The court sustained this motion, but required the defendant, over its objection, to plead to the merits, upon the ground that the answer previously filed was an appearance to the action; and a trial resulting in a judgment for plaintiff, this appeal is prosecuted. Held—That there was no appearance, and the objection to the jurisdiction was not waived by the filing of the answer to the merits under protest.

2. Transitory actions—Such an action is both a local and a transitory action: it is transitory because it may be instituted in any county where the chief agent can be served, and is made local merely at the option of the plaintiff. But whether it is a local or a transitory action is not a material inquiry in this case.

3. Appeals—No service of process will be necessary upon the return of the case, the defendant being in court by the appeal.

Holmes Cummins for appellant.

L. D. Husbands for appellee.

Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Pryor.

If the preliminary motion made by the appellant in the court below, affecting the question as to the summons on the alleged agent, should have been sustained it dispenses with the necessity of investigating the merits of the controversy. This is an action by the personal representative of A. I. Heath to recover damages for the death of his intestate, caused, as is alleged, by the willful negligence of the defendant, the Chesapeake, Ohio & Southwestern R. R. Co.

The petition was filed in the circuit or common pleas court of McCracken county, where the injury occurred, causing, as is maintained, the death of Heath, and a summons, as in ordinary actions, duly issued, directed to the sheriff of that county, who returned it executed on A. Kirkland, the agent of the company. The company appeared by its attorney at the term succeeding the service of the summons on Kirkland, and filed the following answer:

"The defendant, Chesapeake, Ohio & Southwestern R. R. Co., states that it had no officer, agent or servant in this county at the time of the service of process herein on A. Kirkland, and that said Kirkland, at the time process herein was served on him, to-wit, February 15, 1886, was not the agent, servant or officer, or in the employ of defendant; that defendant's principal office and place of business at that time, and during the month of February, 1886, and now, is in the city of Louisville, Jefferson county, Kentucky; that defendant, at the time process herein was served as aforesaid on A. Kirkland, had no officer, agent or servant in the State of Kentucky, except in Louisville, Jefferson county, Kentucky, and its chief officer, agent and servant, John Echols, vice-president of defendant company, now resides in Louisville, Jefferson county, Kentucky, and resided there at the time of service of process herein on A. Kirkland; that this court has no jurisdiction of defendant. And defendant pleads and relies on the facts stated herein in abatement of this action, and asks that the process herein be quashed and this action be abated."

The plaintiff demurred to the answer and the demurrer was sustained, to which the defendant excepted. The defendant (appel-

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lant) then moved to quash the return on the summons, and, in support of the motion, filed the affidavit of Kirkland to the effect that he was not the agent, officer or employe of the company at the time the summons was served upon him, and this motion was sustained.

The court below, however, after sustaining this motion and adjudging, in substance, that no summons had been served, required the corporation to plead to the merits of the action over its objection, on the ground that the answer previously filed, asking that the action be abated because of the want of service, was an appearance to the action, and the motion to quash the return on the summons came too late. The defendant then, under protest, filed an aswer raising an issue that resulted in a trial on the merits, and in a verdict and judgment for the plaintiff.

Section 73, Civil Code of Practice, provides: "Excepting the actions mentioned in section 75, an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant, or either of several defendants, resides, or in which the contract is made, or in which the carrier agrees to deliver the property. An action against such carrier or an injury to a passenger, or to other person or his property, must be brought in the county in which the defendant, or either of several defendants, resides, or in which the plaintiff or his property is injured, or in which he resides if he resides in a county into which the carrier passes." Section 74 provides: "Every other action for an injury to the person of the plaintiff, and every action for an injury to the character of the plaintiff, against a defendant residing in this State, must be brought in the county in which the defendant resides, or in which the injury is done."

By section 51 of the Code the summons in a case like this "may be served in any county on the defendant's chief officer or agent, or it may be served in the county wherein the action is brought, upon the defendant's chief officer or agent who resides therein, or if the defendant operate a railroad it may be served upon defendant's passenger or freight agent, stationed at, or nearest to, the county seat of the county in which the action is brought."

In this case it is conceded, and the court below has so adjudged, that the summons was never served on any agent of the company, and the fact plainly appears that the defendant never pleaded to the merits of the action until he had previously filed the answer, setting forth the fact that no service had been had, and, therefore, the court had no jurisdiction of the defendant. The action was, in one sense, made local, at the option of the plaintiff or the party injured, that is, he might file his action in the county where the injury occurred, if he saw proper, and a service of process might have been had on the chief officer in any county in the State, or on the agent residing in the county, or if a railroad, on the passenger or freight agent stationed nearest to the county seat of the county in which the action is brought; but in this instance no effort was made to show that process had been served on any person representing the company as agent, either in the county or out of it. Where the action for the personal injury survives, or where the personal representative may recover for the personal injury, or for the death of the intestate, he may sue in the same manner and in the same jurisdiction that the party injured could have sued if he had survived the injury. The action, therefore, being both local and transitory, the common pleas court of McCracken county had jurisdiction of the subject matter, and could have rendered a personal judgment if there had been any service on the defendant, as provided by the Code.

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The plea or answer of the corporation asserted that the McCracken Court of Common Pleas had no jurisdiction of the defendant because no process had been served. No other question of jurisdiction was made, and whether the written statement by the defense is called an answer or plea is immaterial, for it was only an appearance for the purpose of insisting that the court had no jurisdiction over the person for the want of a proper service.

One of the grounds of a special demurrer under section 92 of the Code is that the court has no jurisdiction of the defendant or of the subject matter of the action. A special demurrer could not have been filed in this case because there was nothing on the face of the petition, or any part of the record, showing that there was a want of jurisdiction as to the defendant; but, on the contrary, the petition and the summons returned executed on the agent showed the court had jurisdiction of the person, and, having jurisdiction of the subject-matter, there was nothing to prevent a trial on its merits. The defendant, not having been served with process, but knowing the return made by the sheriff, had to make that fact known in order to stay the proceedings until process was served. The usual mode of proceeding under the general practice of the courts in such cases is to move to quash the return made by the sheriff, but the defendant in this case followed the provisions of the Code, section 118, and, by a proper pleading, set forth the facts showing that the court had no jurisdiction of the defendant. That section provides: "A party may, by an answer or other proper pleading, make any of the objections mentioned in section 92, the existence of which is not shown by the pleading of his adversary, and failure so to do is a waiver of any of said objections, except that to the jurisdiction of the court of the subject of the action."

In this case, however, the motion to quash was sustained; but the answer filed, showing why the court had no jurisdiction of the defendant, was held to be an appearance to the merits, or a waiver of the right to raise that question. We think, in filing the answer, the defendant was following the plain provision of the Code on the subject. This action is as much a transitory as local action, in fact is a transitory action because it may be instituted in any county where the chief agent can be served, and is localized merely at the option of the plaintiff who is injured. It is for his benefit, and the law enacted to prevent the mischief that often results in requiring the party injured to leave the place of the injury in order to bring his action, and to find some one on whom process may be served. It is not a material inquiry, however, whether it is a local or a transitory action; in either case the service must be had, and upon the proper person, in order to obtain a judgment. In an action on a note by A against B, where both live in the same county, the summons is served on C, and returned as on B, B finds that judgment is about to be rendered against him, and files a statement or answer that no judgment should be rendered because of the mistake on the part of the officer in his return, and asks that the action be abated. In such a case it will not be pretended that this was an appearance for any other purpose than to show the court had no jurisdiction to render a judgment against the defendant. Treating the action in this case as purely local, like the action for the recovery of real estate, and it is as much necessary to have an actual service as in the case of a note, the court, in order to render a valid judgment in personam, must have jurisdiction of the subject-matter, and also jurisdiction of the person. The jurisdiction of the person can be acquired only by an actual service, or by a voluntary appearance, and when jurisdiction is about to be exercised

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in a case where the service has been wrongfully made, it is not only the duty but the right of the defendant to appear and make the question of jurisdiction over him, by showing, if he can, that no process has been served; and in such a case it has never been held, where this was the only question raised, that it was an appearance to the whole action. Any other rule would enable a plaintiff, in either a local or transitory action, to acquire jurisdiction by a wrongful service, by claiming that the defendant, in making the question, had entered his appearance.

Counsel for the appellant are not insisting, as we understand them, that the common pleas court of McCracken has no jurisdiction over the subject-matter. This they admit, and their contention is that, in the absence of the service of process, the court of common pleas had no jurisdiction over the defendant, and, therefore, the action should abate. To enforce the jurisdiction over the subject-matter, jurisdiction must be obtained over the defendant, if a personal judgment is desired, for without it no personal judgment can be rendered, whether the action is local or transitory. In the case of Baker v. L. & N. R. R. Co., 4 Bush, 619, the company was sued and process served on the agent. The company pleaded to the merits, and, after doing so, attempted to raise the question of jurisdiction. This court said that, after such a defense, it was a waiver of the jurisdiction over the person of the defendant. This is the correct doctrine, and more aptly stated by Mr. Justice Field in Harkness v. Hyde, 98 U. S., 476, in which he says: "Illegality in a proceeding, by which jurisdiction is to be obtained, is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity, nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer." It is only when he pleads to the merits in the first instance, without insisting upon such illegality, that the objection is deemed to be waived. It is not a voluntary appearance by the defendant in making this obection, and when informed that the action is against him, and such a service made by the officer, instead of looking on and seeing a judgment rendered that he must necessarily assail as void when attempted to be enforced, he should stay the proceedings before judgment by making known the irregularity of the service, and, while his failure to do so might not amount to a confession of judgment in a case like this, where service is authorized to be made on the agent, the failure of those conducting the affairs of the corporation, with a knowledge of the illegal service, to apprise the court or plaintiff of that fact would be strong presumptive evidence, on the trial of a proceeding to set aside or vacate the judgment, of the legality of the service.

The appellant in this case has taken every step to prevent a judgment upon it without service, and has made no plea to the jurisdiction of the court as to the subject-matter, or entered any appearance to the merits by answer or otherwise until compelled to do so by the trial court. When required to plead the defense should have responded to the merits, and was not required to stand by its answer as to the jurisdiction over it by reason of the wrongful service, and thus risk the chances of the final decision upon the one question.

The judgment is, therefore, reversed and remanded, with directions to award the appellant a new trial. As the appellant is in court by the appeal, no other service is required, this court having repeatedly held that an appeal from a void judgment for the want of process placed the appellant in court on the return of

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the case for all the purpose of a trial. (Grace v. Taylor, 1 Bibb, 430; Graves v. Hughes, 4 Bibb, 84; Bradford v. Gillaspie, 8 Dana, 68; Salter v. Dunn, 1 Bush, 311; Wharton v. Clay, 4 Bibb, 167; Allen v. Brown, 4 Met., 343.)

We have given this question more consideration than we otherwise would because of the great confidence manifested by counsel for the plaintiff in support of the ruling below, his ability and candor in the discussion of legal questions, entitling his views to the greatest consideration.

HUNTER v. OWENS.

(Filed November 20, 1888—Not to be reported.)

Inadequacy of price is always a badge of fraud, and when the parties do not deal at arm's length becomes an actual fraud.

Appellee purchased of appellant a tract of land worth about $150, for which she paid $600 in cash. Appellee was an ignorant, dull woman, without business habits, and purchased the land upon the judgment of appellant, who was a shrewd business man, in whom appellee had confidence by reason of the fact that he was the friend and physician of her husband in his lifetime, and also because she believed that but for his aid she could not have succeeded in getting a pension, with a part of which she paid for the land. Held—That the parties were not dealing at arm's length, and that the inadequacy of price justified the chancellor in his inference of fraud, and authorized him to set aside the sale.

Hargis & Eastin, M. O. Allen and J. G. Graddock for appellant.

Sandidge & Sandidge and R. F. Spencer for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Bennett.

The appellee obtained a judgment in the Cumberland Circuit Court setting aside a conveyance of a small tract of land made by the appellant to the appellee, upon the ground that the appellee was defrauded into making the purchase of the land by the appellant. The appellant has appealed to this court. It is admitted that the appellee paid the appellant six hundred dollars in cash for a tract of land containing thirteen acres. A number of witnesses estimate the value of said land, including the improvements thereon, at one hundred dollars, others estimate its value at one hundred and twenty-five dollars, others at one hundred and fifty dollars, one at a hundred and fifty or two hundred dollars. The foregoing estimate is contradicted by no one except the appellant. He says that just a few days before he sold the land to the appelle he was offered five hundred dollars in cash for a part of it. But it is clear from the evidence of the person that expressed a willingness to give said sum that he had the utmost confidence in the appellant, and was willing to purchase the land at a price not fixed according to his own judgment, but at the price that the appellant placed upon it. From all the evidence in the case it seems clear that the price that the appellee paid for the land was greatly in excess of its reasonable value. The proof is overwhelming that the appellee was an ignorant and dull woman, without business habits, and wholly unacquainted with the value of said land, which, it appears, she purchased upon the judgment of the appellant. It is also clear that the appellant was an intelligent, shrewd, active business man. It also appears that

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the appellant was the friend and physician of the appellee's husband in his lifetime, and rendered him kindnesses when no one else would, for which the appellee was very grateful. It also appears that the appellee believed that she could not have succeeded in getting her pension (with a part of which she paid for the land) but for the aid of the appellant.

Gross inadequacy of price is always a badge of fraud, and sometimes when the disproportion between the value and the price given is very great the chancellor may, from that fact alone, infer fraud. We will treat in this case the inadequacy of price as a badge of fraud, and then inquire into the question of actual fraud.

The appellee was ignorant and dull, and wholly unacquainted with the value of said land, and relied upon the appellant to sell it to her at a reasonable price, and he had reason to believe that he had her confidence, and that she relied upon his judgment as to the value of said land and not her own; it was, therefore, his duty to deal, as to the price, fairly with her. They were not at arm's length, and gross inadequacy of price—always a badge of fraud—becomes an actual fraud when the parties do not deal with each other at arm's length. We are constrained to the conclusion that the chancellor was justified in his inference of actual fraud in this case.

The judgment is affirmed.

(Response to petition for rehearing—Filed January 19, 1889.)

The counsel, Judge Hargis, in his petition for rehearing, states that the "opinion does not deal with the evidence of the appellant and that which he offered in the case, but excludes it from consideration;" and, as proof of that fact, he says: "We point to the fact that not one word is said in the opinion about the proof that this land and improvements cost Dr. Hunter $337.00 exclusive of the five acres of bottom which he let her have, valued by Dr. Hunter at $40 per acre. The opinion omits this conclusive evidence of the value of the land, and takes up the opinions of witnesses as to that part." Counsel is gravely mistaken when he intimates that the whole evidence as to the value of the land was not considered by the court. Is it possible that counsel is serious in the contention that the price that Dr. Hunter chose to pay for the land is "conclusive evidence of its value?" If he had paid $10,000 for the land instead of $337, would the payment of such sum be conclusive evidence that it was worth that sum? Or, if he had paid but twenty-five cents for it, would it be conclusive evidence that it was only worth twenty-five cents? The rule, in a case of this sort, by which the value of the land is arrived at is to resort to the opinion of witnesses acquainted with the land sufficiently well to form an opinion as to its value, from which the court determines whether or not the price paid was adequate, inadequate or exorbitant.

But the price paid in a case like this may be given in evidence, not for the purpose of proving the value of the land, but for the purpose of showing that the person paying it believed that the land was worth what he gave for it, in order to repel any presumption of fraud that might arise from asking and receiving an exorbitant price for the land. As said in the opinion, many witnesses swore that the land and improvements were not worth exceeding one hundred dollars. A few fixed its value at from one hundred to one hundred and fifty dollars; and one or two fixed its value at one hundred and fifty or two hundred dollars. Now we assert most positively that no witness, not even Dr. Hunter, contradicts these witnesses as to the value of the land. All that Dr. Hunter swears, in reference to the value of the land, is his

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admission that he told Mrs. Owens that the land was worth six hundred dollars, and that a part of the land and the improvements cost him $337, which fact he did not communicate to the appellee. But we assert that he did not swear that he believed it was worth that much; nor did he swear that he believed the land and improvements were worth as much as he said he paid for them.

But counsel says that Tom Cheatham sustains Dr. Hunter as to the value of said land. Such is not the fact, for, as just said, Dr. Hunter does not swear that it had any value, and Cheatham says that it was worth a hundred or a hundred and fifty dollars only. Counsel also contends that G. W. Warren sustains Dr. Hunter as to the value of said land; on the contrary, it is a fact that Mr. Warren does not express an opinion as to the value of the land. What appears in reference to that matter is that Dr. Hunter said he would take five hundred dollars for a certain portion of the land, and Warren unhesitatingly agreed to give it, provided an adjoining tract could be purchased. It is evident that he formed no opinion of his own in reference to its value; but, as Dr. Hunter asked that sum for it, he seems to have taken it for granted that it was worth that sum. In this connection it is well to notice what counsel says in reference to the statement in the opinion that Warren relied on the opinion of Dr. Hunter as to the value of the land. After quoting the opinion upon that subject, he says: "There is not one thing in the testimony of G. W. Warren that shows that he was willing to purchase that land at a price not fixed according to his own judgment." This is bold language. Let us look into its truth. G. W. Warren says that "on one occasion he was in town, not for the purpose of buying land, and Dr. Hunter, doubtless knowing that he too had drawn a pension, for otherwise he was wholly impecunious, proposed to sell him this land; that he had never seen it; nor did he ever see it again after that day; that they went on horseback to look at it." He was asked: "Did you get off your horses and go over the place?" "No sir; we went on our horses up in the big road opposite a little spring on the left of the road." As just said, this was the only time that he had ever seen the land, which, except a small strip of bottom, is hilly and broken; and, according to the description that he gives of his examination of the land, he did not, and could not, have formed a reliable opinion as to its value; nor does he pretend to have formed any opinion as to its value, but relied upon the say so of Dr. Hunter, as his following answers clearly demonstrate: "We did not particularly examine the lines and corners. If he (Dr. Hunter) had have particularly told me where the corners and lines were, I would have trusted to his honor." He is asked: "In a land transaction, would you have left the matter to his word and trusted to what he said about it?" "Yes, sir." In addition to this Dr. Hunter was his physician, and had attended on him several months at a time, and had his entire confidence. So we repeat that Warren agreed to give him five hundred dollars for the land, not upon his own judgment as to its value, but relied upon the value that Dr. Hunter presumptively placed upon it by the price that he asked for it. So we repeat that the testimony introduced by the appellee as to the value of the land is not contradicted. But the evidence for the appellee as to the value having been taken before Dr. Hunter gave his evidence, and when he came to give his evidence his failure to contradict the appellee's witnesses by swearing to the

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value of the land, is a strong implied admission that the valuation of the land by said witnesses was as favorable to him as his own testimony would have made it.

Counsel has labored hard to convince us that the appellee is a shrewd, strong-minded woman. Well, Dr. Hunter does not agree to that proposition, for, in response to the evidence of appellee's witnesses that she "is a dull, unlearned, ignorant, easy kind of a woman, and can be easily persuaded into most anything," the Dr. says that she was a woman of only mediocre capacity, and, though pressed hard, he would not lift her one jot higher in the scale of intellectuality.

Again, in order that Dr. Hunter might be corroborated all along the line by Professor Childress, counsel would have us believe that the professor was present on the occasion of the execution of the deed and title bond. In this counsel is clearly mistaken, for the professor fails to state that he was present on either occasion; and Dr. Hunter says expressly that his recollection is that no one was present on either occasion except himself and the appellee.

Recurring to the question of value the counsel, in referring to the part of the opinion which states that no one contradicted the appellee's witnesses as to the value of the land except Dr. Hunter, etc., says that it is not a fair statement of the evidence introduced by Dr. Hunter. As the opinion does say that Dr. Hunter's evidence contradicted the appellee's evidence in reference to the value of the land, we plead guilty to the charge, and now say that the record shows that his evidence does not contradict the evidence for the appellee in reference to the value of the land. Having plead guilty, and having spoken correctly from the record, in order to make the amende honorable, we are not without hope of receiving clemency from counsel.

Again, counsel in his petition would have us believe that the witnesses for the appellee were "a lot of enemies of Dr. Hunter." Also in his oral argument he said that the appellee's witnesses and her counsel were influenced by political prejudice against Dr. Hunter, and that the chancellor had unintentionally, of course, fallen into line. Now there is not a scintilla of evidence in the record that tends directly, indirectly or remotely, to show that the witnesses were "a lot of enemies of Dr. Hunter." Nor is there an iota of evidence tending to show that the witnesses or attorney for the appellee were influenced by political prejudice, nor that the chancellor, innocently or otherwise, fell into line. Nor is there any evidence in the record tending, in the least degree, to show what the politics of any of the witnesses, attorneys or chancellor were. We say that if the record developed the fact that the action was instituted through political prejudice, or that it was promoted by evidence influenced by political prejudice, or that the chancellor, in coming to his conclusions, had been influenced in the slightest degree, even to the weight of a mustard seed, by political or other prejudice, we would, with one stroke of the pen, wipe out his judgment rendered in the case, and give the appellant a rehearing. But, as said, no such thing appears. It has always been a source of pride that Kentuckians, in their social relations with each other—when their sense of honor has been appealed to, when they have been called upon to deal candidly with each other, when they have been called upon to act in the affairs of each other involving questions of right, when they have been called to testify in reference to the affairs of others—are never influenced by political prejudice.

It seems to be conceded by counsel for the appellant that if the appellee's evidence is to be believed she made out a case of not

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only presumptive fraud, but actual fraud. It is certainly true that she, if her evidence is to be believed, made out a strong case of actual fraud on the part of the appellant. The appellant, in his testimony, flatly contradicted the appellee in nearly all the material points of her evidence, indicating fraud on his part. The chancellor, in deciding the case, was forced to give credence to the evidence of the one or the other; there was no way open to him of avoiding this duty; accordingly he gave credence to the evidence of the appellee. Is her evidence corroborated? We think so. First. The decided weight of the evidence is that the land was not worth exceeding one hundred dollars—five-sixths less than what she paid for it in cash. Second. No witness for the appellee places a greater value upon the land than one hundred and fifty or two hundred dollars, and the appellant does not swear that the land was of greater value. Third. The proof is clear and uncontradicted that the appellee was wholly unacquainted with the values of property—never having owned a piece of property of any consequence in her life—and totally inexperienced in business affairs; "dull, unlearned, ignorant, and easily influenced to do most anything" that one in whom she had confidence might desire her to do; that, as admitted by the appellant, she felt under great obligations to him on account of kindnesses he had rendered her husband in his lifetime. Fourth. The appellant was a shrewd, active business man, and he was evidently looking out to sell said land, for, knowing that Warren, who had been for years impecunious, and hardly knew the value of money or property, had received a pension, he proposed to sell the land to him; and the appellee being about to receive a pension, and having been penniless all her life, and dull, ignorant and wholly inexperienced, he, according to her testimony, proposed to sell the land to her at, according to the uncontradicted proof, an exhorbitant price, which price he assured her the land was worth, but when on oath he did not say that he believed it was worth that sum; this assurance of his the appellee indirectly believed and relied on as true. So it having been proven that the price paid for the land, upon the assurance of the appellant that it was worth that much, was grossly in excess of its true value, and the appellant having failed to sustain the value placed upon it by him, the conclusion of actual fraud is irresistible.

But it is contended that the evidence of Professor Childress corroborated that of the appellant; on the contrary it cuts both ways. After the terms of the purchase had been agreed on, and the bond for a title had been drawn up and signed, the appellant, in company with the appellee, took it to the drug store, where the professor was, and in the employment of the appellant's brother-in-law, and requested him to read the bond to the appellee, as she could not read. Afterwards, after the deed had been drawn up, the professor was invited to the appellant's office, where he and appellee had just been, to receive his instructions to pay for the land out of the check for the pension money. It was then made convenient for the appellant to say to the appellee that if she was not satisfied with the trade she need not take the land, and she, in return, expressed herself as perfectly satisfied with the trade, notwithstanding the advice of others that she ought not to make it. Of course she was satisfied. She evidently became satisfied by the representations of the appellant, which fact she complains of here as having been brought about by the fraudulent representations of the appellant. Now these things occurred after the negotiations had been carried on between the appellee and appellant alone, and after the terms of the agreement had been perfectly understood, therefore, the conclusion

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is justified that the appellant, knowing that he had drawn a shrewd, hard bargain with an ignorant, dull, inexperienced woman, wanted a witness by whom the fact could be established that the transaction was a free, voluntary and judgmatical act of hers.

We are satisfied that the evidence of the appellee was so thoroughly corroborated by the surrounding facts and circumstances of the case that the chancellor's conclusions were in accord with the weight of the evidence.

The petition for a rehearing is overruled.

WILKERSON v. COMMONWEALTH.

(Filed December 13, 1888.)

1. Change of venue—To entitle the defendant in a criminal case to a change of venue the onus is upon him to at least make a prima facie case. The mere filing of a petition, without either affidavits or oral testimony to support it, is not sufficient. Whether the filing of two affidavits is still required under the statute to make a prima facie case is not determined

2. Continuance—The refusal to grant a continuance because of the absence of a witness was not prejudicial as the evidence of the absent witness would have been merely cumulative.

3. Reversible errors—As no exception was taken at the time to the action of the court in allowing the jury to separate, and the question was first presented in the motion for a new trial, this court can not consider it.

4. Insanity—Drunkenness—As there was no pretext that the accused was insane, but his condition arose merely from temporary drunkenness, the court properly refused to instruct the jury that they must acquit if they believed "he was laboring under such a defect of reason as not to know the nature of his act, or right from wrong, or had not sufficient will power to control himself."

5. Evidence—Upon a trial for murder it is competent to prove drunkenness merely as bearing upon the existence or nonexistence of malice.

1. A counterclaim is allowed not only against the plaintiff, but against him and another.

Porter & McQuown for appellant.

P. W. Hardin for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Monroe Wilkerson, is under sentence of death for the killing of Berry Manion.

The deed was unprovoked and without excuse. The accused went to a Sunday-school exhibition intoxicated, and was there guilty of boisterous and bad conduct. The deceased reproved him for it, and tried, by words, to quiet him. He, however, persisted, and the deceased then threatened to go after an officer and have him arrested if he did not behave. This he failed to do, and upon Manion starting after the officer the accused shot him in the back, and killed him.

It is claimed that the lower court erred in these respects: First. In refusing to grant the appellant a change of venue. Second. In overruling a motion to continue the case. Third. In permitting four of the jurors, after they had been selected as such, but before they were sworn, and during an adjournment of the court

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for dinner, to go at large, and mingle with the crowd, instead of putting them in charge of an officer. Fourth. In misinstructing the jury.

Prior to April 1, 1880, the trial court was bound to grant an accused a change of venue to another county, provided he, after reasonable notice to the prosecuting attorney, presented his sworn petition, stating that he could not obtain a fair trial in the county where it was pending, owing to prejudice against him or his cause, and accompanied it with the affidavits of at least two credible persons, not of kin to nor of counsel for him, stating that they were acquainted with the state of public opinion in the county objected to, and that they believed the statements of the petition were true. This was all he was required to do; and when done, the trial court had no discretion in the matter. At the time above named, however, the law was amended by providing: "The court shall, on said motion, hear all witnesses that may be produced by either party, and, from the evidence determine whether or not the applicant is entitled to change of venue." This does not, in terms at least, dispense with the filing of the two affidavits by way of making a prima facie case. It is urged, however, that as the question is to be determined upon "the evidence" which may be offered, the reason is wanting for the production of the affidavits, and that, therefore, this much of the law fails, and they are not required. In other words, that the amendment to the law operated as a virtual repeal of this much of it. Undoubtedly, if an accused, under the law as amended, presents his petition, accompanied by the two or more affidavits, and no witnesses are introduced in court by either party, the change of venue should be granted. He then has a prima facie case. The question is not, however, presented in this case whether, if he presents his petition, but no affidavits, but supports it by the evidence of two or more witnesses in open court, whether the change of venue should be granted, because here the appellant merely filed his petition, and offered neither affidavits nor witnesses in support of it. The right to the change of venue is a statutory one. The onus is upon the accused to at least make a prima facie case; and while, in this instance, proper ground may have existed for it, it was not shown, and the lower court could not, therefore, grant it and regard the law.

The continuance was asked by reason of the absence of five witnesses. They were, however, all present at the trial save one Lucas. The affidavit for the continuance stated that he would testify, if present, that the accused and the deceased were friendly, and that the appellant did not know what he was doing at the time of the killing. It also stated, however, that he would prove the same by three of the other witnesses named in the affidavit, and they were present at the trial, and two of them testified. It was clearly proven that the deceased and the accused were friendly, and the testimony which was introduced showed the condition of the appellant at the time of the killing. The evidence of the absent witness would, therefore, have been merely cumulative, and its nonintroduction did not prejudice the accused.

No objection was made or exception taken to the action of the court as to the four jurymen at the time. The question was first presented in the motion for a new trial. We can not, therefore, consider it.

Proper instructions were given to the jury as to both murder and manslaughter. They were also properly instructed as to the reasonable doubt, and were also told that they could not convict

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the accused of murder unless they believed from the evidence, beyond a reasonable doubt, that he acted "with malice aforethought." This embraced in substance the instruction asked by the accused upon this subject, and which was, therefore, properly refused.

The court was asked by the appellant to also instruct the jury to find him not guilty if they believed from the evidence that when he did the killing he was laboring under such a defect of reason as not to know the nature of his act, or right from wrong, or had not sufficient will power to control himself. There was no claim or pretext that the accused was insane. The evidence showed, beyond all question, that his condition arose merely from temporary and voluntary drunkenness. It was competent to prove his condition, not because intoxication per se excuses crime, but because it, with other circumstances, may show an absence of malice. It is admissible in evidence merely as one fact bearing upon the existence or nonexistence of that deliberate intent essential to the crime of murder. Such an instruction was disapproved by this court in the case of Buckhannon v. Commonwealth, 9 Ky. Law Rep., 411, where the cause of the killing was similar to this one; and we see no reason for departing from the rule laid down in that case; but, upon the contrary the proper protection of human life, and the prevention of crime, require that it should be strictly followed.

Judgment affirmed.

GRIMES v. GRIMES.

(Filed December 13, 1888—Not to be reported.)

1. A counterclaim is allowed not only against the plaintiff, but against him and another.
2. A cross petition is not allowed against the plaintiff alone or against him jointly with a third person.
3. Parties to actions—In this action of divorce by the wife she alleged that she was the owner of a tract of land, in the enjoyment of which she asked the chancellor to protect her. The deed to said tract of land was to plaintiff and her children. The defendant, by his answer, alleged that he had paid for the land, and that the agreement was that the deed was to be made to him jointly with his wife and children, but that through fraud his name was excluded. He asked to have the deed reformed, making his answer a cross petition against his wife and children, but the children were not served with process. After the issue was made up the defendant dismissed his answer so far as it was sought to make it a cross petition, and it was thereafter treated as a counterclaim, a judgment being rendered reforming the deed as prayed. Held—That if the defendant had any right to have the question as to his interest in said land settled in this action his right was by counterclaim, and not by cross petition; but the children were necessary parties, and should have been summoned to answer the counterclaim.

Owen & Ellis and E. W. Hines for appellant.

Geo. W. Jolly for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, as the wife of the appellee, filed her petition in the Daviess Circuit Court against the appellee for the purpose of obtaining a divorce from him. She alleged in the petition that she was the owner of five acres of land in said county, and she asked

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the chancellor to protect her in the enjoyment of it, etc. The appellee, in one paragraph of his answer, alleged that he bought, in 1872, said tract of land from Mr. Hathaway; that he paid him for it; that he paid for the building of the residence thereon; that, by an agreement between him and the appellant, Hathaway was to make the deed to Owen Murphy, who was to hold the land in trust for the equal benefit of the appellant and appellee and their children by each other, and the child of the appellee by a former marriage; that by a fraudulent combination between Owen Murphy and the appellant, for the purpose of defrauding appellee and his child by the former marriage out of their interest in said land, he made the deed to the appellant and her bodily heirs, which was a conveyance to her absolutely. He asked that the answer be made a cross petition against the appellant and their children, and that the deed be reformed so as to conform to the foregoing facts. The allegations of the answer were denied. Sometime after the issue was made up in reference to said transaction the appellee dismissed said paragraph of his answer in so far as it was sought to make it a cross petition. He then proposed to treat the answer as a counterclaim. The chancellor, after granting the appellant a divorce from bed and board, seemed to treat the answer as a counterclaim; and upon the hearing of the cause judgment was rendered reforming the deed according to the prayer of the answer. From that judgment the appellant has appealed to this court.

Subsection 3 of section 96 of the Civil Code provides: "A cross petition is the commencement of an action by a defendant against a co-defendant, or a person who is not a party to the action, or against both; or by a plaintiff against a co-plaintiff, or a person who is not a party to the action, or against both," etc. So, by said section, a defendant may have a cross action against a co-defendant alone, or a third person may be joined with the co-defendant, or against a third person alone, but he can not have a cross action against the plaintiff alone, or jointly with a third person. Subsection 1 of said section reads: "A counterclaim is a cause of action in favor of a defendant and against a plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action."

So if the appellee had any right to have the question as to his interest in said land settled in this action, his right was by counterclaim, and not by cross petition; for, according to the section of the Code last quoted, the defendant's right to a counterclaim not only extends to the plaintiff, but to a person not a party plaintiff, if the said person's rights are connected with the subject-matter of the counterclaim. According to the facts stated in appellee's answer his child by his first wife and his children by the appellant were entitled to an equal interest in said land with himself and the appellant. Said children were, therefore, necessary parties to said action, first, because they, or any one of them, had the right to say whether they wished the deed reformed; second, the children by the appellant and appellee might wish to contest the right of the appellee and his child by his first wife to an interest in said land. For these reasons the children, not being parties plaintiff, ought to have been summoned to answer the counterclaim.

As the evidence now in the case can not upon the return of the case be used against said children, it is unnecessary to determine whether or not it is sufficient to sustain the alleged trust. The

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judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

BRASSFIELD, &c. v. BURGESS, &c.

(Filed December 15, 1888—Not to be reported.)

1. Judicial sales—Failure to execute bond—Where one becomes a purchaser under a chancery decree the court may order him to comply with the terms of the sale by executing a bond, or by paying the money into court, according to the conditions of his purchase, which is all the court has done in this instance, as it has taken no action upon the failure of the purchaser (appellant) to comply with the order requiring him to execute a sale bond.

2. Practice—While the court, by a single order, overruled the appellants' demurrer to the rule against him, and made the rule absolute, yet it is to be presumed that, between the overruling of the demurrer and the further action of the court, reasonable opportunity was offered appellant to plead, as the order recites his failure to do so. Moreover, it does not appear that there was any request or offer by him to plead further.

3. Appeals—Partial transcript—While the appellant may appeal upon a partial transcript, yet if upon the hearing it appears that portions of either the pleadings or the evidence bearing upon the question have been omitted from the transcript, this court must presume that they would sustain the action of the lower court, and the judgment must be affirmed.

R. S. Crawford for appellants.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Lewis Adkins, purchased some goods at a commissioner's sale under a decree in equity. Failing to execute bond for the price the lower court, upon the motion of the master commissioner, who had previously been ordered to collect the same, issued a rule against the appellant and another purchaser, upon whose part there had been alike failure, "to show cause, if any they have or can, why they shall not execute bonds for goods purchased by them at commissioner's sale in this case." The appellant demurred to the rule as too indefinite; also upon the ground that there was no judgment or commissioner's report authorizing it, nor was the master commissioner entitled to it by virtue of any order of the court. The demurrer was overruled, and the appellant failing, as the order recites, to answer further, the rule was made absolute and he given until 4 o'clock p. m. of that day to execute the sale bond. All this is embraced in one order, and from it this appeal has been taken. Nothing further was done by the lower court. It is true its action upon the demurrer, and in making the rule absolute, is all embraced in the same order, but we must presume that, between the overruling of the demurrer and the further action of the court, a reasonable opportunity was afforded the appellant to plead because the order recites his failure to do so. Moreover, it does not appear that there was any request or offer by him to do so. Where one becomes a purchaser under a chancery decree he thereby submits himself to the jurisdiction of the court in that suit as to all matters connected with the sale or relating to him as such purchaser. It may order him to comply with the terms of the sale by executing a bond, or by paying the money into court according to the

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conditions of his purchase. This is all the court has done in this instance. It has taken no action upon any failure to comply with the order requiring the appellant to execute a sale bond. It has not even intimated that it would attempt to enforce its order by the imprisonment of the appellant, as was formerly done when one could be imprisoned for debt. Undoubtedly if one purchases property under a decree he is so far subject to the order of the court in the suit that, in the absence of a sufficient reason, his estate would be made liable for the price of whatever he has thus obtained, or in case he refuses to take the property for the difference between his bid and what it might bring upon a resale. But no such question is now presented because the lower court has, in the absence of any excuse or defense, merely ruled the purchaser to execute bond for what he purchased.

The appellant has appealed upon a partial transcript. This he may do, but at his peril. If upon the hearing here it appears that portions of either the pleadings or the evidence bearing upon the question have been omitted from the transcript, we must presume that, if before us, they would sustain the action of the lower court, and the judgment must be affirmed as upon an appeal in an ordinary action when all of the evidence is not presented and it is not a question upon the pleadings merely. (Terrell v. Rowland, &c., 9 Ky. Law Rep., 258.)

In this instance, if the decree under which the sale was made, and the report of it were a part of the transcript, it would doubtless appear to whom the sale bonds were to be executed and the amount of the appellant's purchase.

Judgment affirmed.

GOEBEL, &c. v. PUGH.

(Filed December 15, 1888.)

1. Ejectment—Verdict—In this action of ejectment the jury returned a verdict finding "for the plaintiff the amount or quantity of ground described." Against defendant's objections the court thereupon directed counsel for plaintiff to formulate the verdict of the jury, which counsel did by setting forth the land in controversy by metes and bounds; and the verdict, as thus amended, was read to the jury and declared by them in open court to be their verdict. Held—That the action of the court was properly, or at least not prejudicial, as the court could, upon the verdict as originally returned, have rendered judgment describing the land by metes and bounds.

2. Adverse possession—The evidence is sufficient to support the verdict for plaintiff, who relied upon an adverse possession of fifteen years under a deed.

O'Hara & Bryan for appellants.

Hallam & Myers and Simmons & Schmidt for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Bennett.

The appellee brought an action of ejectment in the Kenton Circuit Court against the appellant to recover a strip of ground lying in the city of Covington, about twenty-one inches wide and fifty feet long. The appellant did not rely upon a paper title deducible from the Commonwealth, but relied upon an adverse possession

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under his deed of fifteen years as perfecting his title to said land. The jury having found for the appellee, and the court having overruled the appellant's motion for a new trial, and having rendered judgment in conformity to the verdict of the jury, the appellant has appealed to this court.

The appellant and appellee own adjoining lots, Nos. 3 and 4, the appellant owning the former and the appellee the latter. The appellee's contention, which the jury sustained, is that the appellant, M. Goebel, in 1882, removed the division fence between them about twenty-one inches over on the appellee's land, and thereafter held and claimed said strip as his own. The appellant contends, which contention the jury rejected, that the removal of the fence to its location was upon the true dividing line between himself and the appellee.

The appellee, A. J. Francis, —— Pearce, M. Schneck, Mrs. Stronk, Joe Pugh, Ben. Pugh, Mr. Stronk, Mr. Logennan, Edward Pugh, Daniel Pearce, Mr. Fritz, Mr. Barnes and Mr. Perkins prove one or more of the following facts: That the appellee purchased his lot in 1844, and shortly thereafter took possession of it; that in said year he and Pearce, the owner of the lot now owned by the appellant, agreed upon the diving line, and that the north side of the house is on said dividing line, as was thus agreed upon; that a division fence was built shortly after said agreement upon the line agreed upon by the appellee and said Pearce; that the appellee held the possession of his lot and claimed it as his own for more than fifteen years next before the removal of the fence up to said fence; that the north wall of appellant's house was on said line, and the fence ran straight from the corner of the house to the stone wall, which the appellee built on his land; that about two feet of the south end of the wall had been removed in the last few years; that in 1876 the appellee swore, in a case between him and Goebel, that the north wall of his house was on the division line between him and the appellee. Each of the foregoing facts is sworn to positively by one or more of the above-named witnesses. The appellant and a few other witnesses swear to facts which, if uncontradicted, would establish the line at the place contended for by the appellant.

The appellant also swears that he and the appellee, in 1882, agreed that the true line was at the place contended for by him, and he, pursuant to said agreement, and with the consent of the appellee, removed the fence and set it where it now is. The appellee flatly contradicts this statement. The jury, after hearing the evidence, found for the appellee. We think that their finding was in accordance with the weight of the evidence.

The exceptions taken to the instructions given at the instance of the appellee are, as we understand, not seriously urged here, for the counsel for the appellants doubtless regard them, as we do, as a full and fair exposition of the law as applicable to the facts proven by the appellee. The same may be said in reference to the instructions given at the instance of the appellant.

The written verdict of the jury was: "We, the jury, find for the plaintiff the amount or quantity of ground claimed." The court, against the objections and exceptions of the appellant, directed the attorney for the appellee to formulate the verdict of the jury, which the counsel did by setting forth, in writing, the land in controversy by metes and bounds, which was signed by the foreman and read to the jury, and the jury thereupon declared it to

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be their verdict. It is not contended that the verdict, as formulated by the attorney, embraced more or less land than was embraced by the verdict of the jury; and the formulation occurred in open court, and in the presence of the jury, and they so sanctioned it in open court. It is to be presumed that they, as intelligent men, understood whether or not the verdict as formulated included more or less land than they intended the appellee to recover; and, if it did, they, as honest men, would not sanction it. Also if the court had received their verdict as it was originally returned, and admitted it to record, it will not be questioned that, by any unsatisfactory indicia contained in the record, fixing the boundary of the land in dispute, and in accordance with which it appeared that the jury acted in fixing the quantity that the party was entitled to recover, the court could have formulated said verdict in the judgment; instead, however, the court directed the attorney to formulate it by satisfactory indicia contained in the record in the presence of the jury, which formulation was sanctioned by the jury as having been done in accordance with their finding. We think that either way of formulating the verdict is equivalent to the other, the difference, if any, being in favor of the latter, as it has the express sanction of the jury, and either way is valid.

The judgment is affirmed.

PHALAN v. LOUISVILLE SAFETY VAULT AND TRUST COMPANY.

(Filed December 13, 1888.)

1. Sale of Infants' real estate—In an action by appellee, as guardian, against the widow and heirs of a decedent, its ward being one of two infant heirs, and against the guardian of the other infant heir, asking a sale of land of the decedent lying in several different counties for the purpose of reinvestment, the petition alleged that no division could be had without impairing the value of the interest of the children, and that a sale would be to the interest of its ward. The widow and adult children filed an answer consenting to the sale, and asking a division of the proceeds. The guardian who was made a defendant filed his answer, asking a sale and reinvestment for the benefit of his ward. The evidence sustained the allegations of the petition. Held—It was proper for the court, under sections 489 and 490 of the Code, to sell the property and make investments for the infant defendants.

2. Same—It was not necessary that the guardian who filed an answer asking a sale and reinvestment for his ward should make his ward a defendant to his pleading, she being a defendant to the original action.

3. Same—Jurisdiction—It was not necessary for the guardian to institute separate suits in the several counties in which the land was situated. The action was properly instituted in the county in which the ancestor died, the children all lived, and much of the real estate was located, which was the jurisdiction to order a partition if a partition could have been had; and that court had power to grant complete relief, the subject of the action being the division of the proceeds of the land between the heirs.

4. Same—In such a case it is not necessary for the plaintiff to execute bond; but if bond was necessary, a bond executed by the plaintiff in the name of its president was sufficient under its charter without personal security.

Wm. Carroll for appellant.

John C. Russell, J. C. Dodd and Dodd & Grubbs for appellee.

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Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The statutory guardian of Eliza Sutfield filed its petition against its ward, Eliza, and her infant sister, Florence, and her statutory guardian, John H. Leathers, the widow and two adult children of the decedent, all of whom are made defendants, asking the sale of two tracts of land owned partly by the defendants, lying in Henry, Oldham and Hardin counties, and the sale of some city lots in Louisville, for the purpose of reinvestment, alleging that the sale of all the property will redound greatly to the interest of its ward. The adult heirs and the widow file an answer, in which they consent to the sale, and ask a division of the proceeds, the widow agreeing to accept the value of her dower in money, and joining in the prayer of the petition. Leathers, the guardian of Florence, both being served with process, filed his answer, asking a sale of the entire property for the benefit of his ward and an investment of the proceeds, so as to produce an income. His ward, Florence, is not made a defendant to his pleading, but is a defendant to the original action. The testimony in this case makes out a much stronger reason for selling the property than is alleged in the petition. It appears that the decedent and ancestor of these parties owned an estate valued at about $120,000, with an indebtedness of $40,000; that liens existed on some of the property for the purchase money; that the family dwelling in Louisville was worth about $20,000, and no sufficient income to keep it up and maintain the family. Under such circumstances, the widow and adult heirs consenting, it was proper to sell the land in Henry and Hardin counties, and make other investments that would produce an income and prove more beneficial to the parties in interest. The object is to sell and reinvest the money, and this is expressly authorized by subsection 5 of section 489, Civil Code. It is said, however, that Leathers, the guardian of Florence, failed to make her a defendant, and although a defendant to the original petition filed by the guardian of her sister Eliza, it was necessary that Florence should be made a defendant to the answer of her guardian, who consents to the sale. We think not. Section 490 of the Code authorizes a sale where the property can not be divided without materially impairing its value or the value of the plaintiff's interest therein. Here is a joint interest where it is evident that a sale is for the benefit of all, not only to pay the debts, but to afford an income, as well as to divide the proceeds of sale between those interested.

The widow and two adult children all ask for the sale, and both of the infants are before the court. Should the chancellor, under the circumstances, make such an allotment as would compel the widow to retain the dwelling, and with the balance of the estate pay off the indebtedness, leaving nothing upon which to support the children? The adults are entitled to a division of the land. The suit for partition must have been instituted in Louisville, where the father lived at his death, under an express provision of the Code. (Civil Code, section 66.) Now no division can be had without impairing the value of the interest of the children. It is so alleged by the guardian of Eliza, and that fact established by the proof. Such being the case, it was proper for the court, under sections 489 and 490 of the Code, to sell the property and make investments for the infant defendants. The only question is, had the Chancery Court of Louisville jurisdiction of the entire realty, with the power to sell the land in Henry county (a part being in Oldham)? We think the subject of the action was

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the division of the proceeds of the land between the heirs on the ground that no allotment in kind could be made without impairing the value of such interest. That no step could have been taken in but one jurisdiction, so as to give complete relief. In that jurisdiction the ancestor died, the children all lived, and much of the real estate was located. It was the jurisdiction to order the partition, and none other could have made the allotment. Now we perceive no reason why the petition was not properly instituted in the Louisville Chancery Court, setting forth the fact that no division could be made without impairing the value of the property, and asking a sale for reinvestment. The court provides, concerning real property, that "actions must be brought in the county in which the subject of the action, or some part thereof, is situated." Now the subject of the action here is the partition of the lands, or its proceeds, between these heirs, or rather a sale, as no division could be had without impairing the value of each child's interest, a part of the subject of the action being within the jurisdiction in which the relief is sought by the plaintiff against others equally interested.

The jurisdiction was properly entertained, and it was not necessary for this guardian to have instituted separate suits in Hardin, Henry and Jefferson counties, alleging the same state of facts, in order to a division of the estate. This case is different from enforcing a mortgage lien, or bringing an action of ejectment for the recovery of real estate, or the ordinary sales of infants' real estate.

It is objected by the appellant that no bond was executed by the guardian of the infant as required by the statute. A bond was executed by Leathers as the guardian of Florence, with sureties, and a bond executed by the Louisville Safety Vault and Trust Company, the guardian of Eliza, under a provision of its charter that provides: "The capital of said company shall be taken and considered as the security required by law for the faithful performance of its duties, and other security shall not be required upon its appointment to any of the offices or duties mentioned herein." (Acts 1883-84, volume 2, page 280.) Now if the bond is good, executed by its president alone as guardian when he qualifies, it should be held good as to all the duties required or permitted to be performed by the guardian on account of his appointment. The company, or corporation, has appeared and executed its bond in the name of the president as required by the statute authorizing the sale of infants' real estate. Its capital stock is bound; and the legislature, having seen proper to invest the corporation with this power, and deeming the capital stock safer than individual security, we can not interfere with the judgment on that account. Besides, in a case like this, as held in Kendall v. Briggs, 81 Ky., 119, no bond was necessary, but if it was the bond was executed.

The judgment below overruling the exceptions to the commissioner's report is affirmed.

STIRMAN v. SMITH.

(Filed December 18, 1888—Not to be reported.)

1. Exemptions—Housekeeper—A debtor who was a housekeeper with a family, having determined to remove to another State, had sent his wife and children there, he remaining at his old home for the purpose of winding

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up his affairs. Held—That he was still a housekeeper with a family, within the meaning of the exemption statutes.

2. Liability of officer for seizing exempt property—The debtor owned a cow and her calf and two heifers. The statute then exempted from execution "two cows and calves." A constable levied an execution upon the cow and calf and sold them, and the debtor seeks by this action to recover of him their value, claiming that they were exempt. Held—That while the heifers would have been exempt if the debtor had owned no cow and calf, yet as he did own a cow and her calf, they were primarily exempt, and it was not necessary that he should make an election, therefore, the officer is liable.

3. Same—The act of May 3, 1880, providing for an appraisement and sale where the debtor selects as exempt a cow and calf worth more than $60, was intended to apply only where the debtor had more than two cows and calves.

Weir, Weir & Walker and Owen & Ellis for appellant.

R. W. Slack and Edward W. Hines for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

Prior to November 5, 1884, the appellee, W. T. Smith, had been, for many years, a bona fide housekeeper, with a family, of this Commonwealth; but at the time named he determined to move to Florida, and accordingly sent his wife and children there, he remaining at his old home for certain purposes, but intending to soon follow them. While thus situated he was the owner of a cow and her calf and two heifers. Neither of the latter had ever been bred, and on November 21, 1884, the appellant, J. S. Stirman, as a constable, levied an execution upon the cow and calf, and subsequently sold them. The appellee did not know of the levy when it was made, but although informed of it before the sale, he never offered to deliver either of the heifers or other property to the officers in lieu of the cow and calf. He now sues to recover their value upon the ground that they were exempt.

It was held in the case of Anthony v. Wade, 1 Bush, 110, that an avowed intention of a debtor to leave the State, and a packing up for that purpose, does not deprive him of the character of a bona fide housekeeper, if he had it before; and he is still entitled to his exempt property, and that this right continues, even while he is in transit. This construction accords with the liberal legislative spirit in which the exemption statute was enacted; and although given to it over twenty years ago, it has been acquiesced in ever since without legislative amendment. The appellee had not, therefore, deprived himself of the character of a housekeeper, and hence was entitled to the exemption incident thereto.

It is insisted, however, that under the case of Winfrey v. Zimmerman, 8 Bush, 587, the exemption statute must be construed as equally applicable to the heifers as to the cow, and, as all three were not exempt, the officer had the right, according to McGee v. Anderson, 1 B. M., 187, to seize any one of them before an election by the debtor; and that the latter could not thereafter elect to keep the one levied on, unless he either tendered to the officer one of the other two, or enough other property to satisfy the debt, or as was at least equal in vendible value to the one then held by the officer. The two cases cited were, however, unlike in circumstance to the one now presented. When the last-named one was decided the statute then in force exempted one work beast or a yoke of oxen. The debtor in that case was the

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owner of two horses and a yoke of oxen. They were all of the character named in the statute. One came as fully within its description as the other. They were all of a character to supply the then need of the debtor and his family. One was not primarily exempt any more than either of the others. No reason existed why it should be so regarded, and upon this state of case this court held as above indicated. In Winfrey v. Zimmerman the statute which then exempted, as it does now, "two work beasts or one work beast and one yoke of oxen," was construed in a case where the debtor had only a mare and a colt to include them both. This was upon the idea that the legislature, by the terms used in creating the exemption, intended to embrace an animal of the horse kind which could be rendered fit for service, as well as one then in actual use. It was not a question whether, if the statute had exempted one "work beast," it would have been as equally applicable to the colt as the mare.

The reasoning in that case as to the construction to be given to the term "work beasts" applies also to the exemption of "two cows and calves;" the term "cow includes heifer" (section 11, chapter 21, General Statutes), and the debtor, who does not own a cow and calf, but owns two heifers, would, if a resident of this Commonwealth, with a family, be entitled to claim them as exempt, although they may never have been bred or milked. The object of the statute must, however, be regarded in construing it. Its purpose was to provide the debtor and his family with milk cows. Its language is (as then in force): "The following property shall be exempt from execution, attachment, distress or fee bill against a bona fide housekeeper with a family resident within this Commonwealth, viz., two work beasts, or one work beast and one yoke of oxen; * * * two cows and calves." * * * (General Statutes, 1883 ed., page 431.) It looks to their support, and evidently regards their present need. The cow is, therefore, designated by the statute. It also exempts her calf because it is an incident to her as the giver of milk, or the purpose of the exemption. The need of the debtor will continue, however; and hence, looking to the future support of the family, if there be no cow, a heifer is exempt in lieu of her. Plainly, however, this does not give the debtor all that the statute intended. It looks to the future only, and does not provide for the present. It is, therefore, unreasonable to suppose it was intended that, where a debtor has a milk cow and two heifers, an officer may, at his own will, and even with the knowledge of the debtor, seize the cow and leave the heifers, thus depriving the family of their present need, and forcing them, even as to future support, to wait upon the course of nature, however uncertain. This can not be so if the main object of the statute was to provide for the present daily wants of the family. In such a case the cow is primarily exempt; and being so, the officer must take notice of it without word from the debtor. He can not seize the property which is exempt for a particular purpose—that which falls within not only the spirit but the very letter of the statute—because the debtor has other property, which perhaps will, in the course of time, supply the wants of his family. Such an exemption would often be a mere mockery to the needy, and utterly fail to fulfill the object of the statute. If a man has two cows and calves, and also two heifers, by the very terms of the statute, as well as the spirit and purpose of it, the cows and calves, and not the heifers are exempt; and if he has but one cow and her calf, and also two heifers, the officer can not seize that which is primarily not liable, and which is exempt by the express terms of the statute.

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If he could, then, where the debtor has two work horses and two colts, he could seize the horses and leave the colts. It can not reasonably be contended that this is the law; and yet this presents the appellant's case.

If, in this case, the officer had levied, as he should have done, upon one of the heifers, and the debtor had elected to keep that one and had so notified the officer, then the rule laid down in the case of McGee v. Anderson would have applied; and, according to it, he would have been bound to surrender to the officer the other heifer for sale, or sufficient property to pay the debt, or equal in value to the one held by him under the levy. In that case the right of the debtor to substitute one horse—one "work beast"—for another was involved. They were "two of a kind;" both falling within both the letter and spirit of the statute and specifically alike. Such would be the case here if the controversy related to the two heifers.

When the debtor has the property which is capable of supplying the present need contemplated by the statute, the officer must take notice that it is what is exempt by the spirit and letter of the statute, and act accordingly, or otherwise he will be treated as a trespasser ab initio. It must be regarded by him as at least prima facie exempt.

The question whether, where a debtor has two cows and two heifers, he may elect to keep the two heifers is not presented in this case. Undoubtedly he may make an election where the property is specifically alike, by doing so in the proper manner if it has already been seized by the officer.

Prior to May 3, 1880, two cows and their calves were exempt to the debtor housekeeper without regard to their value. At the time named, however, the legislature provided that, if the debtor should select a horse worth more than one hundred and fifty dollars, or a cow and calf worth more than sixty dollars, the officer levying thereon should have the same appraised, and, if appraised at more than the value above named, he should then sell the same and pay the debtor out of the proceeds the sum above named. (General Statutes, ed. 1883, page 931.) It is now contended that as it was admitted in this case that the cow and calf were worth one hundred dollars the officer had the right to make the sale, and that under the statute the debtor must make a selection. It, however, in our opinion, looks to a case where he has more than two horses or two cows and their calves, and if he has but the two of the specific kind named, and which are primarily exempt, then the law makes the selection, and the officer must regard it and proceed according to the statute or he is liable. In this instance there was no appraisement; the property was sold for less than sixty dollars, and no offer even to pay what was realized to the appellee. The officer failed to obey the statute, and however honestly he may have acted he did so at his peril, and individual right requires remuneration.

Judgment affirmed.

ENTERPRISE IMPROVEMENT COMPANY v. UNDERWOOD.

(Filed December 18, 1888—Not to be reported.)

Dower—The widow is entitled to dower in land of which the husband was seized in fee during the marriage.

H. L. Stone and T. D. Theobald for appellant.

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E. F. Dulin for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Pryor.

On this appeal we find nothing that precludes the widow from asserting her right to dower. If dower was improperly assigned there is nothing in this record establishing that fact. The husband was seized in fee during the marriage and died, and no question can arise as between the widow and the purchasers from her husband as to her right. It is in fact admitted, and, therefore, there is no case here for revision.

Judgment affirmed.

MERIWETHER v. MERIWETHER, &c.

(Filed December 18, 1888—Not to be reported.)

Remainders—A creditor purchased the life estate of his debtor in land, agreeing with the wife of the debtor to convey to her and her children after the debt for which he purchased had been satisfied. The debt was paid and the conveyance made. Held—That under the agreement the children do not take as joint tenants with the mother, but she holds the life estate of her husband as long as she lives, remainder to her children should the husband and father survive her.

L. A. Weakley for appellant.

Gilbert & Force for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

The question involved in this case is whether Mrs. Meriwether holds as long as she lives the life estate of her husband, with remainder to her children should the husband survive her, or are they joint tenants, each having the same interest. The court below held that the mother took the estate, and the children were entitled after her death if their father survived their mother.

The agreement with Sherley, who purchased the life estate of Wood Meriwether, the father, in the land, was made with Mrs. Jane Meriwether, in which he agrees to convey unto her and her children the life estate of the husband and father after the debt for which he purchased it had been satisfied. The debt was paid and a conveyance made.

This court, in Webb v. Holmes, 3 B. Mon., 404; Davis v. Hardin, 80 Ky., 672; Rogers v. Payne, 14 B. Mon., 167, and other cases, held that, under such an agreement, the children took in remainder.

Judgment affirmed.

BOTTS, &c. v. SIMPSONVILLE & BUCK CREEK TURNPIKE COMPANY, &c.

(Filed December 18, 1888.)

1. Consolidation of corporations—In the absence of authority in the charter of a corporation the legislature has no power to provide for its consolidation with another corporation created for a different purpose unless by

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the unanimous consent of the stockholders; and any one or more of the stockholders may sue to prevent such a consolidation attempted by the directors under legislative authority. It is not necessary that the action should be in the name of the corporation.

The consolidation of one turnpike road company with another, created for a different purpose, was void, although made under legislative authority unless done by the unanimous consent of the stockholders, there being no authority therefor in the charter of the corporation. And this action in equity was properly brought by certain stockholders to prevent the consolidation, the two corporations and the directors in both being made defendants.

2. Same—Pleading—The averment of the answer that the consolidation had been made, and was ratified by the stockholders, must be taken to mean that it was ratified by a majority, as the act authorizing the consolidation provides that it shall take effect when ratified by a majority of the stockholders.

G. G. Gilbert for appellants.

J. C. Beckham for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

The appellants are members and stockholders of the Simpsonville and Buck Creek Turnpike Company. On the 20th of February, 1884, the legislature of the State passed an act authorizing the consolidation of the corporation of which they are members with another company, styled the Simpsonville and Fisherville Turnpike Company. The appellants, in order to prevent a consolidation of the two companies, filed their petition in equity against the directors of both corporations and against each corporation, asking for an injunction preventing the merging of the two companies into the consolidated company. An injunction was granted and afterwards dissolved on the answer filed by the defendants, to the effect that the consolidation had been made as provided by the act by the two boards of directors and ratified by the stockholders, and nothing remained to be done but the election of directors for the consolidated company. The appellee maintains that this answer or its averments not being denied, a dissolution of the injunction on the pleadings necessarily followed.

The act under which the consolidation was made provided that when the agreement between the board of directors of each company was entered into and ratified by a majority of the stockholders of the two companies the consolidated company is to have all the powers heretofore enjoyed by both companies. The answer nowhere alleges that these appellants ever consented to the consolidation, and the statement that it was ratified by the stockholders must be taken as the act of a majority and not the whole.

The stock of the appellants in one company has been transferred to another, or both merged into one, and the court will not imply, from an averment that it was ratified by the stockholders, that it was by the unanimous consent of all; for, if so, it should have been so pleaded, and the statement made must be construed as meaning that a majority voted for the consolidation; in other words, that the provisions of the act were complied with.

It is further argued that these stockholders have no right to maintain the action because the suit is for the corporation itself, and must, therefore, be brought in the name of the corporation, or some legal or equitable reason given for making the corpora-

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tion defendant instead of plaintiff. We do not understand, in a case like this, that the stockholders, or any one of them, are denied the right to sue. The action of the board of directors in this case is alleged to be ultra vires, beyond the authority conferred on them by the charter, and in all such cases the stockholder may bring his action without consulting those who manage the legitimate affairs of the corporation. This is the rule recognized in Hawes v. Oakland, 104 U. S., 450, and in Shawhan v. Zinn, 79 Kentucky, 300. Here the directors are attempting to transfer the stock of these appellants, by a majority vote of the stockholders, to a corporation of which they are not members, or to blend the stock and make one corporation out of both. This can not be done without the consent of the stockholder, and is in plain disregard of his contract rights when he becomes a member of the corporation. There is no authority in the charter of the company to which he belongs authorizing a consolidation with any other company, and in such a state of case there is no authority holding that his property or rights in one company can be transferred against his will to another company. The clause in the charter that the company, "in matters not expressed in the charter, shall have the rights and privileges granted to the most favored turnpike companies," will not be construed as affecting rights that are fundamental, and under it power conferred or implied that will compel a stockholder to abandon his contract already entered into and make a contract with others against his will. The stock in the one company may be worth greatly more than the stock in another company, or, if worth the same, the joint enterprise might be such as would deter the stockholder from taking his investment from the one company and placing it in a joint stock company. Mr. Morawetz in his work on Private Corporations, when treating of the consolidation of companies, says: "This can never be effected without the unanimous consent of the members of each company, and such consent can not be inferred as an implied condition of their charter or articles of association." (Section 197, page 198. See note to the text with numerous adjudged cases.)

Whether a consolidation could be authorized under a general power reserved by the legislature to alter or amend the charter is not necessary to be decided. It is certain that it can not be done when it affects the rights of the stockholders by increasing their liability as such or diminishing the value of their stock, and with such a radical change the burden would be placed on the consolidated company to show that no harm could be done the stockholder entering his protest. Whether the appellee would be injured by this change does not appear in this record, and if it did this court would be reluctant to hold, in the absence of authority in the charter, where one has become a stockholder in a turnpike road of a certain description and for a certain purpose, the legislature could unite him as a stockholder in another corporation and for another or additional objects in view than are to be found in his original contract. In so doing his contract is destroyed and another made for him against his consent. In our opinion the act of consolidation in this case is void unless made by the unanimous consent of the stockholders.

Judgment reversed and remanded for proceedings consistent with this opinion.

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MILLER, &c. v. COMMONWEALTH.

(Filed December 20, 1888—Not to be reported.)

1. Evidence—Uncommunicated threats—Where it is a material inquiry, upon a trial for murder, whether the accused or the deceased began the difficulty, it is competent, upon this issue, to prove threats by the deceased against the accused, although they had not been communicated to the accused.

2. Evidence—Facts having been gotten prominently before the jury which were calculated to induce the suspicion that an absent witness had been improperly induced to absent himself because he would, if present, have testified to facts prejudicial to the defense, the court erred in refusing to permit the father of the absent witness to state that one of the defendants advised his son not to go.

W. O. Bradley for appellants.

P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Lewis.

Henry Miller and John Bosse having been jointly indicted for the murder of Larkin Bird and convicted of manslaughter, prosecute this appeal.

It appears the deceased, whose reputation was proved to have been that of a quarrelsome and dangerous man, had, a short time before getting to the place he was killed, drawn his pistol on these men and fired at another. Unless the result of the aimless wandering of a restless, drunken man, for he was under the influence of liquor, there is nothing to satisfactorily show why the deceased stopped at the particular place he did, which was about 150 yards from the dwelling house of Bosse. The evidence is that soon after getting there he, being alone, commenced to fire his pistol, some of the shots, of which there were three or four being fired in the air, or at random; one of them, as a witness states, was fired at his own hat, which he threw up for the purpose. Another shot struck in the yard of Bosse, and, as his wife stated at the time, came near hitting her. There is also evidence that he called the name of Bosse in a disrespectful manner. Immediately after his wife cried out she was near being struck Bosse went into his house and got two guns and a pistol and started with them towards the deceased, intending, as he testified, to give one of the guns to his son. But Miller took one of them, and together they approached the deceased, and when they got near to him Bosse, as he states, presented his gun and commanded the deceased to lower his pistol, and it being done, he then lowered his gun also. Either just before or after Miller and Bosse arrived, about which there is some conflict in the testimony, a man named Williams, who had previously been in company with the deceased, and was also offended at him, appeared and took his pistol from him, and, according to the testimony of Bosse and Miller, snapped it at him. But Williams' horses just at that time becoming frightened, he left the place in pursuit of them, and in a short time thereafter Miller shot and killed the deceased. No one was at the place when the shot was fired except Bosse, Miller and the deceased, though several witnesses testify they had a clear view of the parties at the time. The evidence is uncontradicted that the deceased, after the pistol was taken from him, still had a knife, the blade of which was open. Both Bosse and Miller testify that when shot the deceased

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was approaching Miller with his open knife held in a threatening position, and making an effort at the same time to seize Miller's gun. They are corroborated by other witnesses as to the deceased having his knife opened and approaching Miller. But one or more witnesses stated the deceased was, at the time he was shot, making no movement or demonstration towards Miller. Appellant, during the trial, offered to prove and announced that the witness, if permitted to answer the question propounded, would state the deceased told him the day before the homicide he intended to kill appellant Miller on sight. But there being no proof that or any other threat against him by the deceased was previously communicated to Miller, objection to the question was sustained, and it was not permitted to be answered. In the process of forming an opinion, in the absence of positive and convincing evidence as to what has been, as well as in conjecturing what will be, the conduct of a particular person in a given state of case, the first and most natural inquiry is, what motive had or has he for doing it? Thus, in determining, in the absence of eyewitnesses, or where the evidence is contradictory and uncertain as to who of two persons began a conflict, resulting in the death of one of them, it is not only material, but often of vital importance to ascertain which one of them, if either, was actuated by motive of gain or revenge. And it is often sufficient to discredit the positive testimony of witnesses to show that a person charged with an offense had no motive for committing it, or a strong motive for not doing it.

In this case the guilt or innocence of Miller materially depends upon whether, at the time he shot, the deceased was advancing upon him with a drawn knife, and consequently whether he had reasonable grounds to believe, and did believe, he was then in danger of losing his life or suffering great bodily harm, or whether he shot wantonly and without legal excuse. In determining that question of fact, about which the contradictory testimony of the witnesses was calculated to create some doubt that might have been resolved against the accused, it seems to us it was entirely pertinent to show threats by the deceased against the accused, for if the former was possessed of a feeling of hatred towards the latter, and had formed a determination to take his life, the inference would be at least reasonable that he was the aggressor.

There is a distinction between the inquiry whether the slayer of his fellowman was induced to do the deed by a reasonable apprehension, founded upon threats made by the deceased, communicated and known to him, and the question of fact, whether the one or the other communicated the conflict, for in the latter case the inference the deceased began it may arise from the existence of his hatred and revenge, whether known to the other or not. The competency of such evidence has been expressly recognized by this court in Hart v. Commonwealth, 8 Ky. Law Rep., 714.

One of the witnesses made the following statement obviously in answer to questions by the Commonwealth's attorney: "My son was standing near me when the killing took place. He is going on 21 years of age. He is in Arkansas. He bought his own ticket to go. He worked under me and another man, and I was employed by the Star Coal Company, of which defendant, Bosse, is a member, and we paid him. He did not go away to keep from being a witness. He had been talking of going away for a year before the killing, and was waiting to make money to go on. He was a witness on the examining trial of this case." The answers of the witness show that the Commonwealth's attorney was per-

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sistent in his endeavor to show the witness had been, by bribery, or in some other improper way, induced by Bosse to leave the State to prevent his giving damaging testimony against himself and Miller. And, although the witness protested his son left voluntarily, still the facts that Bosse was a member of the coal company; that Miller was an inmate of his family; and the father of the absent witness was his employe, all being got prominently before the jury, were calculated to induce the suspicion, if not the belief, that the witness had been improperly induced to absent himself because he would, if present, have testified to facts prejudicial to the defense. We, therefore, think the court erred in refusing to permit the witness, Hammons, to state, as he would have done, that "Bosse advised his son not to go," and that Kentucky was a better state than Arkansas.

For the errors indicated, which we think were prejudicial to the substantial rights of the defendants, the judgments as to both of them are reversed and cause remanded for a new trial.

HENNING v. BARRINGER, &c.

(Filed December 20, 1888.)

1. Sale of infant's real estate—Under section 490 of the Code real estate held jointly may be sold, although the plaintiff be an infant, where a division would materially impair the value of the land or the value of the plaintiff's interest.
2. Same—The infant in such a case can sue by his guardian or next friend, and the fact that he sues by both is only the subject of special demurrer, and can afford no ground for a reversal unless the rights of the infant have been prejudiced by the proceeding.
3. Same—Suit by next friend—In this case the mother sued as guardian and next friend of her infant children. She was the guardian of all but one, who had no guardian. She did not file the affidavit required by the Code, to the effect that there was no guardian. After the sale, but before confirmation, the fact that there was no guardian for one of the infants appeared, and the mother was appointed guardian, and came into court and asked that the sale be confirmed. Held—That the filing of the affidavit is not a jurisdictional fact, the omission of which renders the judgment void, and where the existence of the right to sue appears, as in this case, before the purchaser acquires the title, his title is good.
4. Same—No bond was necessary to be executed before the sale. The law creates a lien for the purchase money, and before the guardian can obtain the money bonds must be executed, as seems to have been done in this case.

Barnett, Miller & Barnett for appellant.

Brown, Humphrey & Davie for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

The widow and children of Frederick Barringer, who died intestate, filed their petition in the Louisville Chancery Court, seeking to sell some unimproved real estate in the city of Louisville, for the reason that no division could be had between them without materially impairing the value of the property, as well as the value of each interest. The action is brought under section 490 of the Civil Code.

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The mother was the statutory guardian of all the infant children but one, and united them as plaintiffs with her in the petition, making some of the adult children defendants. The intestate left at his death nine children and his widow. One of the children, Frederick, was born after the death of his father, and it seems that he had no statutory guardian until after the sale of the land, one having been appointed (his mother) before the sale was confirmed. This infant is united also as a plaintiff with his mother and his brothers and sisters, counsel, in drafting the petition, supposing that the mother was the statutory guardian of all of the infants.

The mother sues not only as the guardian, but as the next friend of all the infant plaintiffs, including Frederick, who had at the time no guardian. This appeal is by the appellant, who was the purchaser, questioning the validity of his title under this proceeding.

Section 490 provides two states of case in which land held jointly may be sold, not only on the application of adults, but by a plaintiff, although of unsound mind or an infant, that is, where the share of each owner is worth less than one hundred dollars. 2d. Where the division, if made, would materially impair the value of the land or the value of the plaintiff's interest. In this case it appears that each child's interest would not exceed ten or twelve feet front of the realty, and that no division could be had without materially impairing the value of each one's interest, and, upon the proof, the chancellor properly ordered the sale, and if the parties were before the court the title passed to the purchaser. They were all before the court, because, in this particular state of case, an infant may bring the suit for the sale, and under the Code can sue by his guardian or next friend, and that he sues both by his guardian and next friend would only be the subject of special demurrer, and could afford them no ground for a reversal unless it appeared that the rights of the infant had been prejudiced by the proceeding.

It is said, however, that the mother had no right to sue as the next friend of the infant because she had not made the affidavit as required by section 37 of the Code. The affidavit is to the effect that there is no guardian—no one else to sue—but in this particular, when the fact is made to appear of the existence of the right to sue, before the purchaser acquires the title, it is not a jurisdictional fact, such as would destroy the judgment, and render it void, but would be held bad on demurrer at the instance of parties to the action. In this case the fact appeared before confirmation that no guardian had been appointed, and the mother was appointed guardian, and then comes into court, before confirmation, and asks that the sale be confirmed.

No bond was necessary to be executed before the sale, and the law created the lien for the purchase money, and before the guardian can obtain it bonds must be executed, as seems to have been done in this case.

All the parties were before the court, and no error exists of which the purchaser can complain.

The judgment is, therefore, affirmed.

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BAILEY, &c. v. TYGART VALLEY IRON CO.

(Filed December 22, 1888—Not to be reported.)

1. Ejectment—Adverse possession—As neither the plaintiffs in this action of ejectment nor those under whom they claim have any possessory title, they can not recover the land of defendant, who is in possession, without showing a connected chain of title from the Commonwealth, and the defendant can successfully resist a recovery by showing a superior and elder outstanding patent or a continuous, adverse claim and possession under his title and deed, or by showing he was in the adverse possession of the land in dispute when the sale and conveyance were made to plaintiffs. And as the defendant pleaded a possessory title, and also raised the question of champerty by his answer, the court erred in refusing to instruct the jury as to these defenses, there being evidence tending to sustain them.

2. Same—Instructions—The court erred in assuming, in its instructions to the jury, that the plaintiffs had made out a proper paper title, for, although a patent was referred to by witnesses, none was filed or offered in evidence. Besides, the defendant read in evidence a patent from the Commonwealth to his ancestor, under whom he claims, prior in date to the patent under which the plaintiffs claim, if any such patent was ever issued.

3. Same—The court erred in referring, in its instructions to the jury, to the recovery from the defendant of a tract of land not in controversy, especially when the manner in which it was referred to authorized the jury to infer that the recovery in that action involved prima facie the right of plaintiffs to recover in this.

W. H. Julian and J. D. Jones for appellants.

E. F. Dulin for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Lewis.

The lower court, assuming it to be true, instructed the jury in this case that the plaintiff, appellee, had made out a proper paper title to the land described in the patent for 284 acres to C. S. Counts, dated January 2, 1860, and to find for the plaintiff the land in contest if they believe from the evidence the defendant entered within the boundary of said Counts' patent, or the forty-three acres referred to in the case of Bayse v. Grahn, &c., the record of which was read in evidence. It seems to us that instruction is erroneous and misleading in several particulars. The suit of Bayse v. Grahn, &c., was instituted to recover judgment on notes given by Grahn to Bayse for five several tracts of land containing in the aggregate 403 acres. Grahn resisted payment of the notes upon the ground the present appellant, Bailey, was in possession of one of the tracts containing forty-three acres, the same tract mentioned in the instruction; and Bailey having been made a party defendant, judgment was rendered in favor of the plaintiff, Bayse, against him for the land, and against Grahn for the amount of the notes sued on. The tract of forty-three acres, the title of which was involved in that action, seems to have been included in a patent to Gabriel Scott, though no such patent was then produced, and the recovery of it against Bailey, the present appellant, was by Bayse, who is in no way connected with Counts, under whom appellees claim the land in contest in this action. As, therefore, the right of appellees to recover the land in contest in this action does not necessarily, or at all, follow the right of Bayse to recover the forty-three acres in the action instituted by him, and as, moreover, the title to the forty-three acres was not in

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issue in this action, it was erroneous and misleading to refer to it in the instruction to the jury, especially when the manner in which it was referred to authorized the jury to infer that, in the opinion of the court, the recovery by Bayse involved, prima facie, the right of appellees, claiming under Counts, to recover the land now in controversy, which it never patented to Counts at all, was under an altogether different grant from Scott's. But the court, as this record stands, was in error in assuming appellees had made out a proper paper title, for, though referred to by witnesses, no patent to Counts was filed or offered in evidence. Besides, as the record shows, appellant read in evidence a patent from the Commonwealth of Kentucky to James F. Bailey, of date February 22, 1855, anterior to the date of the patent to Counts, if there was ever one issued, and appellant, as a witness, testified the patent to James F. Bailey, of whom he was one of the heirs at law, covered the land in contest. Although that patent is not part of the record before us, for the reason stated by the clerk in a note, it could not, when he made out the transcript, be found amongst the papers, still it was put in evidence, and ought not to have been, as it was, ignored by the court altogether, for it is difficult to see how appellees, the plaintiffs, in the face of that patent, could, in the language used in the instruction, "have made out a proper title to the lands described in the patent for 284 acres to C. S. Counts, of date January, 1860," if the land in contest was covered by both patents.

Appellant proved the purchase in 1852 of the land in controversy from one Thompson, who then executed to him a title bond, and the execution by the latter in 1868 of a deed for all but about two acres, and the continuous possession and claim by him under the deed and bond from the first-named date to the commencement of this action in 1883. But the court gave no instruction to the jury in regard to the possessory title alleged to have been thus acquired, as ought to have been done. The question of champerty was raised by appellant in his pleading, but the court, though asked improperly, refused to instruct in regard thereto.

As appellees, nor those under whom they claim, have no possessory title, they can not recover the land from appellant, who is in possession, without showing a connected chain of title from the Commonwealth, and appellant can successfully resist a recovery by showing a superior and elder outstanding patent, or a continuous, adverse claim and possession under his title bond and deed, or by showing he was in the adverse possession of the land in dispute when the sale and conveyance were made to appellees.

For the errors indicated the judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

LOUISVILLE & NASHVILLE R. R. CO. v. ORR.

(Filed December 12, 1888.)

1. Railroads—Limitation—As soon as it is apparent that the operation or construction of a railroad unreasonably abridges the enjoyment of abutting property the owner has a cause of action, and if he rests upon his rights,

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the required period (five years), the statute of limitation will defeat his right to recover for any damages growing out of the prudent construction and operation of the road. But for injuries growing out of the unlawful, improper or negligent construction or operation of the road, or the failure of the company to keep its road in repair, the injured party has a cause of action whenever the act or omission occurs, and as often as it occurs, but can not recover, when the statute is interposed, for the damage which has been done more than five years before the commencement of the action.

As the petition in this case authorizes a recovery for damages growing out of the lawful and proper construction and operation of the road, and also for those sustained by reason of its improper and negligent construction and operation, and the plea of limitation was interposed, the plaintiff should be required to state his causes of action in separate paragraphs.

2. Same—Purchase of one road by another—When a railroad company purchases the road and franchises of another company it does not become liable to persons who have been damaged by the improper and negligent operation of the road by its vendor, therefore, the defendant in this case is not liable for damages done by the improper and negligent operation of the road prior to the time of its purchase from another company. But if the plaintiff had a cause of action growing out of the prudent operation of the road, it exists against the defendant unless barred by limitation.

3. Res judicata—A judgment for the railroad company in an action by plaintiff and others to enjoin it from building the road is no bar to this action.

Lyttleton Cooke, J. C. Wright and George Washington for appellant.

C. L. Raison, Jr., for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Barbour.

The appellee, the owner of a house and lot abutting on Saratoga street, in the city of Newport, brought this action to recover damages caused by the construction and operation of appellant's road. He complains that by the laying of the track in the street, and the operation of trains upon it, the ingress and egress to his property was obstructed, and that the walls of his house were cracked, and smoke and soot were thrown into his house by passing trains. The petition authorized a recovery for damages growing out of the lawful and proper construction and operation of the road, as well as for those sustained in consequence of its improper and negligent construction and operation. While the evidence tended to sustain both causes of action, in the instructions to the jury the distinction was lost sight of.. The railroad was constructed and put in operation in 1870. This action was begun in 1884. The principal question presented is as to whether the five years' statute of limitation was a defense to the action, and if so, to what extent. The company acquired from the city council and had the lawful right to use the street, but notwithstanding this right, if it unreasonably interfered with appellee's easement in the street, or subjected his property to other injuries, the company is liable in damages.

It is a contradiction of terms to say that the lawful existence and operation of a road is a nuisance. It must result from the company having the right to use and operate its road, as railroads are ordinarily used and operated, that it has the necessary incidental right to injure adjacent property, in the manner and to the extent that such ordinary use and operation will necessarily

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to the right of the owner to have compensation
I. R. R. Co. v. Loeb, 5 West. Rep., 891.)
ner to the easement in the street, and other
f his property, is a property right, and to
by the operation of the railroad, it is in
ty, for which he is entitled to com-
action he in effect consents that
nue for all future time to use the
as a consideration therefor to
e rendered. (J., M. & I. R. R. Co.
hen, then, does his cause of action

. other States, where the identical question
cause of action is held to have accrued when
acted and put in operation. But in those States,
proprietor of the soil, the use of the street or high-
purposes of a steam railroad is an additional burden,
nder the constitutions of the different States, can not be
d by the legislature without compensation to such proprie-
or the new servitude. That is not the case here. The mere consequential damages resulting from the location and operation of the road adjacent to the lot constitutes no cause of action to the owner. (Newport & Cincinnati Bridge Co., 9 Bush, 273; L. & O. R. R. Co. v. Applegate, &c., 8 Dana, 301.) But it is otherwise where the owner's rights are peculiarly or unreasonably abridged. When the road begins operations it may not unreasonably interfere with the abutting lot owner's enjoyment of his property, but in the course of time, as the traffic upon it increases, necessitating a multiplying of the number of trains run upon it, his rights may be very materially and prejudicially affected. Whenever this occurs, he has a cause of action. The railroad being permanent, the injury must be deemed as equally permanent, affecting the property from the time of the existence of the condition.

It may be assumed that the road will be used to the full measure of its capacity, and when this condition arises the damages to the property, which will result from the operation of the road, the extent of the interference with the easement to the street, the vibration to the adjacent property, and the casting of smoke, soot, etc., upon it, by the ordinarily prudent operation of the road, can then be foreseen with reasonable certainty. We are, therefore, of opinion that as soon as it is apparent that the operation or construction of the road unreasonably abridges the enjoyment of his property the owner has a cause of action, and if he rests upon his rights the required period the statute of limitation will defeat his right to recover for any damages growing out of the prudent construction and operation of the road. We do not wish to be understood that if new tracks should be laid, or the road, as it is constructed, should be subjected to a new and more burdensome use, not within the authority conferred by the city council when the road was constructed, and adjacent property holders should be injured by such new track, or the new use, they could not recover for the damages resulting therefrom.

For injuries growing out of the unlawful, improper or negligent construction or operation of the road, or the failure of the company to keep its road in repair, the injured party has a cause of action whenever the act or omission occurs. As against such acts the company is not protected by the license or authority of the city council. Unlike the case of injury occurring from the prudent operation of the road, the damages the owner of the prop-

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erty might thereafter sustain could not be estimated because it could not be assumed that the company would continue to allow its tracks to remain out of repair, or to improperly operate its trains. He could, therefore, sue at any time for the damages he had sustained by the unlawful acts of the company, and as often as they occur, but could not recover when the statute is interposed for the damage which had been done more than five years before the commencement of the action. We have examined the authorities cited by counsel, and have found no case in conflict with these views; on the contrary they are fully sustained by them. (Wood on Limitations; Railroad v. Loeb, 5 Western Reporter, 891; Railroad v. McAuley, 8 Ib., 458; Haesch v. Railroad, 33 Northwestern Reporter, 126; Pratt v. Railroad, Ib., 666; Frank v. Jackson, 30 Federal Reporter, 399.)

The court properly refused to allow the amended answer pleading the judgment in the action instituted by the appellee and other property owners along Saratoga street to enjoin the L., C. & L. R. R. Co. from building the road. Though the injunction was dissolved the only effect of the judgment was to determine that the railroad company had the right to build the road. It in nowise affected the right of the appellee to recover the damages which he might sustain by the construction or operation of the road.

The defendant is not liable for damages done the plaintiff's property by the improper or negligent operation of the road prior to November, 1881, when it was owned and controlled by another company. "When one corporation sells to another all its property, franchises, etc., under authority conferred by its charter, the bona fide purchaser for value takes the property free from the claims of the creditors of the vendor, who has no lien upon the property, just as if it were an individual transaction." (C., O. & S. W. R. R. Co. v. Griest, 9 Ky. Law Rep., 177.) A fortiori, the appellant, when it became the purchaser of the road and franchises of the L., C. & L. R. R. Co., did not become liable to persons who had been damaged by the improper and negligent operation of the road by its vendor. Therefore, to the extent that the amended answer presented a defense to the cause of action growing out of the improper operation of the road the court should have allowed it to be filed. But if the appellee had a cause of action growing out of the prudent operation of the road, it existed against whoever operated the road, unless it was barred by the statute of limitation.

In the view of the case we have presented the instructions given to the jury were erroneous. Upon the return of the case the pleadings should be reformed and the plaintiff should be required to state his cause of action growing out of the proper operation of the road, and that growing out of its improper or unlawful operation, in separate paragraphs, so that the issues may be intelligibly presented to the jury.

The judgment is reversed and the cause remanded with instructions to grant the appellant a new trial and for further proceedings.

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SUPERIOR COURT ABSTRACTS.

GORDON v. YOUNG'S ADM'R.

Filed December 19, 1888. Appeal from Fayette Circuit Court. Opinion of the court by Judge Bowden, reversing, Judge Barbour, dissenting.

Gifts—Delivery—While there can not be a gift inter vivos without the delivery of the thing intended to be given, yet delivery is a fact to be proved, as any other fact, and, as between the donee and the donor's representative, it may be proved by declarations of the donor.

Y. signed and delivered to B. a writing, in which he recited that he thereby gave and transferred to G., who was his housekeeper, and the mother of his illegetimate child, which he had adopted, certain horses and cows owned by him, and then on his farm where he resided, and, after describing them, added: "And I do by this instrument transfer the possession to her, and deliver this paper to her as an evidence of said transfer." One of the cows was described as a white cow, "now pointed out to B." The stock described remained on the place until Y.'s death, or until disposed of by him, the cows having been sold by him during his life. The proceeds of one of the cows was paid by Y. to G. It appears that she claimed this cow, but upon what her claim was based does not appear. It does not appear that she knew of the existence of the writing until it was delivered to her by B. immediately after Y.'s death. In this action by G. to recover of the administrator of Y. the value of the progeny of the cows, admitted to have been born after the execution of the writing, and against the sale of which she protested, Held—That it is a fair inference that B. acted as the agent of G., and a delivery of the writing to him was a delivery to her. And, under the circumstances, the parties living together, the writing is sufficient evidence of the delivery of the stock, being an explicit declaration by the donor that the possession was delivered.

Judge Barbour, dissenting, holds that as it is shown that the writing was not delivered to plaintiff, and it does not appear that it was delivered to B. for her, the gift was not consummated, whatever might have been the effect of the writing if it had been delivered to her.

Geo. Denny, Jr., for appellant; T. N. Allen for appellee.

EVANS v. COMMONWEALTH.
NORRIS v. SAME.
WEIS v. SAME.

Filed December 19, 1888. Appeal from Lawrence Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Local option—Indictment—An indictment under the local option law, or under the act of May 5, 1880, regulating the sale of liquor by druggists, need not allege, in order to show that the local option law was in force, that the county court had, upon the petition of twenty or more voters of the district, ordered the vote to be taken. It is sufficient to allege that the vote, resulting in a majority against the sale, was taken, compared and certified to the county court, and the certificate thereof entered upon the order book.

2. Same—At the time of the amendment of the charter of Louisa the local option law was in force. That amendment requires the trustees to take a vote at the succeeding August election, and every two years thereafter, for or against the sale of liquor, and provides that if the vote is for the sale, the trustees are authorized to grant license, etc. It does not appear that any vote has ever been taken. Held—That the right of civil district, of which Louisa is a part, to prohibit the sale of liquor is not taken away by the amendment to the charter.

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3. Punishment at hard labor for nonpayment of fine—The act of April 10, 1878, providing for punishment at hard labor on the county roads for the nonpayment of fines, applies only to penalties imposed by chapter 29 of the General Statutes. It was, therefore, error in this case, under the act of May 5, 1880, regulating the sale of liquor by druggists, to adjudge, upon the verdict of the jury, that the defendant should be thus punished if his fine should not be immediately paid or replevied.

Alex. Lackey and G. W. Castle for appellants; P. W. Hardin and S. G. Kinner, for appellee.

ELIZABETHTOWN, LEXINGTON & BIG SANDY R. R. CO. v. BEAM.

Filed December 19, 1888. Appeal from Boyd Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Railroads—Negligence—Evidence—To appellee's action against appellant to recover damages for injuries to two horses, alleged to have been negligently run over on a public crossing in a town, the company pleaded the contributory negligence of the driver of the team, and denied the negligence imputed to it. Held—That on this issue it was competent for the company to prove that the driver was drunk.

2. Same—An ordinance of the town regulating the speed of trains passing through it could not render negligent a course of conduct which was not negligent, and was, therefore, not competent evidence.

3. Same—The running of a train along the streets of a town at a greater rate than six miles per hour is not conclusive evidence of negligence. Whether negligence or not depends on the circumstances; as, for instance, whether it was a street through the populous part of the town.

4. Same—The record of the appraisers of the stock was not competent evidence. Whether the statute providing for an appraisement and the penalty of 25 per cent. applies in a case like this is not determined.

5. Same—Instructions—An instruction ignoring the existence of any duty on the part of the employes, except that of preventing collisions at crossings, was erroneous.

Breckinridge & Shelby for appellant.

CITY OF NEWPORT v. VAN VOAST.

SAME v. ROOT.

Filed December 19, 1888. Appeal from Campbell Circuit Court. Opinion of the court by Judge Bowden, reversing.

Municipal taxation—The city of Newport has the power under its charter to tax closes in action. (City of Newport v. Ringo's Ex'ors. Opinion of Court of Appeals, December 6, 1888.)

E. W. Hawkins for appellant; O. W. & A. T. Root for appellees.

WASHINGTON COUNTY COURT v. McKEE.

Filed December 19, 1888. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, reversing, Presiding Judge Ward, dissenting.

Allowances by county courts—Interest—Appellee, as an attorney under the employment of numerous taxpayers of Washington county, instituted a suit to relieve the county from a large subscription made by the county court to the capital stock of a railroad company. The suit having resulted in a judgment exonerating the county from liability, an act of the legislature was passed authorizing the county court to levy a tax to pay the costs incurred by its citizens in the prosecution of this suit, including attorneys' fees. The act provided that the county court should pay over to the several persons entitled the money arising from the tax, or pay the indebtedness out of any funds it might then have on hand, or, with the consent of said attorneys' agents, issued the bonds of the county, payable to such agents or attorneys, with interest from date, the time of payment and the rate of interest to be agreed on by the parties. Under this act the county judge and justices, as a court, made an order of record, whereby they assumed for the county to pay the attorneys' fees, among others a fee of $6,000 to appellee,

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and to pay the same a tax was levied; and it was further ordered that if said levy should not be sufficient the court could make an annual levies until the required sum should be raised. Although the appellee has been paid $6,000, he is asking a mandamus to compel the county court to make a levy to pay an alleged balance, claiming that he was entitled to interest from the date of the order of the county court. Held—That the order of the county court is in no wise different from any other allowance made by the county court, and such allowances do not bear interest unless the court, by its order, assumes to pay interest. Parol testimony is not competent to show that interest was agreed to be paid.

Presiding Judge Ward, dissenting, holds that the order of the county court was a contract, made pursuant to the act of the legislature, whereby the county assumed to pay the debt of the taxpayers to appellee, and as that debt bore interest the county, by its contract, assumed to pay interest.

C. C. McCord and J. W. Lewis for appellant; W. D. Harrison for appellee.

HUBBARD v. COMMONWEALTH.

SAME v. SAME.

Filed December 19, 1888. Appeal from Carter Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Local option—The character of an election under the local option law can not be affected by an expression in the order of the county judge which would seem to limit or extend the questions to be voted on, as it was never intended that he should prescribe the terms or the conditions of the election, or determine the questions to be voted on. It was, therefore, immaterial in this case that the order of the county judge directed the vote to be taken as to whether spirituous or vinous liquors should be sold, omitting malt liquors.

2. Same—It is not necessary that any special words should be written at the head of the columns of the poll-book. Any word or words which indicate how the voter voted is sufficient. Nor is it material whether or not the words at the head of the different pages are the same.

3. Same—The statute does not require the officers of the election to make a certificate as to the result of the election—at least no form is prescribed. And the fact in this case, that they certified that the vote for the sale of "spirituous" liquors was so much, and the vote against so much, does not exclude the idea that the voters voted either for or against the sale of "spirituous, vinous or malt" liquors.

4. Same—The time of the election is immaterial, provided the vote has been taken, and the law was in operation at the time of the sale of the liquor.

5. Punishment at hard labor for nonpayment of fine—The act of April 10, 1878, providing for the punishment at hard labor for the nonpayment of fine applies only to penalties imposed by chapter 29 of the General Statutes, and as the local option law is not a part of that chapter it was error to allow the jury to apply the statute in this case.

T. W. Mitchell and R. D. Davis for appellant.

MORRISON v. MORRISON.

Filed January 16, 1889. Appeal from Christian Circuit Court. Opinion of the court by Presiding Judge Ward, affirming in part and reversing in part, Judge Barbour dissenting.

1. Divorce and alimony—This court has no power to review or reverse the judgment of divorce from bed and board granted to appellee, but may review, and, if erroneous, reverse the judgment granting appellee alimony.

2. Same—In actions for divorce the facts as to residence must be proved by witnesses certified by the officer taking depositions to be personally known to him as worthy of credit.

3. Same—Pending an action for divorce the court should allow the wife maintenance until she has an opportunity to prepare her case for trial; and as the affidavit of the wife for a continuance in this case presented a good

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reason for not having her case ready for trial at the time to which an allowance had been made without objection, it was proper to continue the allowance to another term.

4. Same—If the husband's conduct is such as not to endanger the peace and comfort of the wife, even though it may not reach her conception of affection and love, it is her duty in law to remain with him, and if she leaves him he is without legal fault, either in the original abandonment or in its continuance, provided he "keeps the door open to her return during the time within which the law says that overtures of reconciliation must be received in the same spirit in which they are offered," and, therefore, the wife is not entitled to alimony.

Judge Barbour, dissenting, holds that if a proud, sensitive wife—a woman whose honor and virtue is above suspicion—in a fit of anger leaves her husband's home without due cause, he can not accept the situation, and indicate to her in a manner more forcible than any words he could utter, that the doors of his home are closed to her, and yet say that her continued abandonment is without fault on his part. And while the wife's leaving in this case may have been her own fault, yet, as she was then pregnant, the husband, upon hearing of her subsequent confinement, should have gone to her, as he should have done also upon hearing of the death of the child. But as he did not visit her or send her one message of sympathy or kindness, she could not believe that the door of his home would open to her, and the continuance of the abandonment was his fault.

W. F. Browder for appellant; John Feland for appellee.

McDOWELL v. POOL.

Filed January 16, 1889. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

Affirmance as delay case—As no exceptions were reserved to any of the rulings of the court, and there were no grounds of complaint upon the part of the appellant on account of any of the rulings of the court, this court is constrained to believe, in view of the failure of the appellant to perfect the appeal granted by the lower court, and his delay in perfecting the appeal subsequently granted by the clerk of this court, that the appeal is prosecuted for delay merely.

R. T. Colston for appellant; J. B. & R. C. Kinkead for appellee.

ROWLAND v. DOOLIN'S ADM'R.

Filed January 16, 1889. Appeal from Madison Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Decedents' estates—Consideration for contract—Upon the death of one to whom a debt is due the debt passes to his administrator, who alone has the legal right to collect it, and an undertaking by the debtor to pay to the widow or children of the creditor is without consideration, and does not affect this right of the administrator.

2. Contract for benefit of third person—A person with whom or in whose name a contract is made for the benefit of another is the proper person to sue, and the beneficiary is neither a necessary or proper party; therefore, the obligor discharges his undertaking by a payment to the person with whom, or in whose name, the contract was made.

An obligation which recites that there is "due" to R. by the obligor a certain sum, and after stating the consideration for the obligation states that it is executed to secure to R "and her three children" the payment of the sum named, is a promise to pay to R. for the benefit of herself and her children, and the payment to R. of the sum promised discharged the undertaking, and the children of R. have no right of action thereon.

C. F. & A. R. Burnam and J. A. Sullivan for appellant; W. B. Smith, T. J. Scott and C. H. Breck for appellee.

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KENTUCKY COURT OF APPEALS.

RUGLES v. FANNIAN.

(Filed October 2, 1888—Not to be reported.)

1. Boundary—In this case, which involves the question whether a fence, which appellee has removed, was on appellant's land, as the appellant's deed, by the calls of which he is bound, calls to commence at a known and well defined corner, and to run thence so many feet and inches to appellee's corner, and it appears that to run said distance from the first-named corner the fence in controversy will not be reached, but will be left on appellee's land, the appellant has failed to manifest a paper title.

2. Adverse possession—Although appellant has been in possession up to and including the fence in controversy for more than fifteen years, yet, as the evidence shows that his possession has been amicable and not adverse, he has not acquired title by possession.

Coleman & Son for appellant.

Samuel J. Pugh for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Bennett.

The appellant and appellee desire this case to be settled by this court on its merits rather than on technical grounds. Is the fence in controversy on the appellant's or the appellee's lot of ground? Said lots adjoin each other, and the appellant's and appellee's vendors derived their respective titles from the same vendor.

The deed under which the appellant claims calls to commence "at the corner of Burley's stone house, and running thence down Second street 41¼ feet to the appellee's corner." It is clear, from the surveyor's report, that to run said distance from said corner the fence in controversy will not be reached, and will be left on the appellee's land. There is nothing in the record showing that the surveyor made a mistake in running said line. The appellant's deed calls to commence at a known and well-defined corner, and to run thence so many feet and inches to the appellee's corner, and by the calls in this deed the appellant is bound, at least so far as a manifestation of a paper title is concerned.

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But the fence, which the appellant claims to be on his land, was built as far back as 1860 by the appellant's vendor, which fence has been kept up by said vendor and the appellant ever since. And if it be true that the appellant and his vendor have held the strip of ground to said fence all of the time, claiming it as their own, then, the same having been so held for fifteen years and more, the appellant's title to said strip of ground, including said fence, was perfected, and the appellee had no right to remove any part of said fence.

The appellant's vendor, Tell, says that he built said fence upon the dividing line between him and the appellee's vendor. The appellee's vendor says that Tell built his house nearly or quite on said line, and afterwards, when he came to build the fence, he found that to build it on the line he would not have a passway around his house, so he obtained the consent of his, the appellee's, vendor, Ingram, to build the fence over on his lot so as to give a passway around the house, said Tell agreeing that the land belonging to Ingram, inside of said fence, should be held amicably with the right of Ingram to the house. In this ngram is corroborated by another witness. Tell is not corroborated. Also the appellee testifies that, after he purchased the Ingram lot, Tell paid him a nominal sum as rent for the strip of ground inside of said fence as a recognition of the appellee's right to the same. The appellee also testifies that after the appellant's purchase from Tell he and the appellant had some dispute about the division line, and they agreed that it should be about midway between the corner of the appellant's house and said fence. The appellant says that there is no truth in said statement. But the appellee is corroborated by other witnesses, and the appellant is not. These agreements show that said strip of ground was held by the appellant and his vendor amicably with the right of the appellee and his vendor, and, such being the case, the appellant could acquire no right to the same by possession, for the reason that it takes an adverse, and not a friendly, holding of land to acquire a title thereto by possession. The circuit court fixed the line between the appellant and appellee at the place that they agreed upon, which is fully as favorable to the appellant as the facts of the case justified, and, as the line thus fixed does not include said fence, but leaves the same on the apellee's land, it follows that he had the right to remove the same.

The judgment of the circuit court is affirmed.

FOX v. MT. STERLING NATIONAL BANK.

(Filed January 10, 1889—Not to be reported.)

Conclusiveness of judgment—In an action instituted for that purpose, the land of a married woman was subjected to the payment of a note executed by her and her husband, which recites on its face that it was given for necessaries furnished the family. The wife attacks the judgment rendered in that action, setting up the fact that the note was procured by fraud. The only reason assigned for failing to make the defense in the original action is that she was ignorant of what the note contained and of the nature of the proceeding against her. Held—That this affords no ground for attacking the judgment. The defense should have been made in the original action.

T. H. Hines and V. B. Young for appellant.

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Lewis Apperson for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

The facts alleged in the petition might have been presented as a defense to the original action, but it is too late, after judgment has been rendered and the land of the wife subjected to the payment of the note, to set up, for the first time, the alleged fraud on the part of the bank in procuring the note and obtaining the judgment. The note is signed by both husband and wife, and recites on its face that it was given for necessaries furnished the family.

Suit was instituted on the note, and the land of the wife subjected to its payment. Whether a mortgage was executed by the wife to secure the debt, or the proceeding was simply to subject the wife's estate to the payment of the debt, does not appear, but that her land was subjected in a proceeding to which she was a party is admitted, and in an action on the note that she now alleges was obtained by fraud.

There is no reason whatever assigned for her failure to make the defense in the original action, except that she was ignorant of what the note contained and the nature of the proceeding against her. This affords no ground for attacking the judgment in an independent proceeding. The defense could and should have been made when the bank was attempting to subject her land. The note was the basis of the action. The wife signed it, and an inspection of the record would have shown its contents, and that the property of the wife was sought to be subjected to the payment of the debt.

The judgment dismissing the petition was proper, and is affirmed.

Judge Holt not sitting.

ROWE, EX'OR OF HINTON v. FOGLE, &c.

(Filed January 10, 1889.)

Attorney's lien—When a plaintiff in good faith dismisses his action, whether in contract or tort, receiving nothing from the defendant, the attorney for the plaintiff has no lien for his fee, and, therefore, must look to the plaintiff and not the defendant.

E. D. Walker and E. W. Hines for appellant.

T. H. Hines and J. E. Fogle for appellees.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Pryor.

The lien asserted or allowed an attorney for his services in this State is purely statutory. Where the demand arises out of contract and is placed in the hands of an attorney to be collected by suit or otherwise, the attorney has a lien, or where the claim is reduced to judgment, whether in contract or for a tort, or the property is recovered, the attorney has his lien. (General Statutes, chapter 5, article 1, section 15.) The payment by the debtor to the creditor of a claim arising out of contract, with notice that it is in the hands of an attorney for collection, will not deprive the attorney of his

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lien, and an action brought by the attorney would be deemed sufficient notice. Suppose, however, that no action is brought, and the plaintiff regards his claim as worthless, and proposes to withdraw it from the attorney, or to dismiss it after suit has been instituted, is the statute giving the lien to be so construed as to prevent an abandonment of the claim, if done in good faith, and not with a view of defeating the lien? Such a construction would result in useless litigation, and compel the payment by the defendant to the attorney of the plaintiff of his fee, or submit to a litigation, upon an alleged cause of action, when both parties, plaintiff and defendant, agree that no recovery can be had.

When the defendant has paid, or agrees to pay, the plaintiff for withdrawing the suit, or the claimant receives a consideration for forbearing to sue when the claim is in the hands of the attorney, and so known to the defendant, the rule would be different. In cases of tort before judgment this court has held, and still holds, that the statute under which such liens are asserted does not prevent the parties from settling the litigation, and in such a case the attorney must look alone to his client for compensation. In this case both the parties, plaintiff and defendant, agreed that the action in which the lien is asserted should be dismissed, each party paying his own costs.

Nothing was recovered by the defendant from the plaintiff, and no recovery had by the latter, and there is nothing in the record showing that the object to be accomplished was to defeat the claim of the attorneys for their services. The plaintiff, in good faith, dismissed the action, and there was no reason for compelling the defendant to pay the attorneys of the plaintiff $100, or any other sum for their services. They must prosecute their claim against the plaintiff, and not the defendant.

The judgment below is reversed, with directions to discharge the rule.

WOOLFOLK, &c. v. RICHARDSON.

(Filed January 10, 1889—Not to be reported.)

1. Husband and wife—R. entered upon land under a bond for title from F., his wife's father. F. had no title, and R., in order to acquire the title from hostile claims, paid as much for the land as it was worth when he entered. R.'s wife having died, he married a second time, and afterward conveyed this land to the children of the second marriage. In this action by the children of the first marriage against the children of the second marriage to recover the land the plaintiffs claim that their father entered upon the land in right of their mother under a gift to her from her father, and that they are entitled to the land as her heirs, their father, who, they claim, had only a life estate, being dead. Held—That under the circumstances the chancellor properly refused to permit a recovery by the plaintiffs upon the testimony, by no means satisfactory, that their father entered on the land in right of his wife, their mother.

2. Limitation—The plaintiffs' cause of action, if any they had, did not accrue until the termination of their father's life estate.

H. T. Kendall and E. Butler for appellants.

Lewis & Farleigh for appellee.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Pryor.

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O. C. Richardson was twice married, and died in the year 1882, leaving children surviving him, the offspring of each marriage.

His first wife was the daughter of Daniel Fulton, and her children are suing the children of the second wife to recover a tract of land in the possession of the appellee, alleging that it belonged to their mother, and their father, being tenant by the curtesy only, the land passed to them at his death. O. C. Richardson, the father of these litigants, had been in the continued possession of the land for nearly half a century, and then sold and conveyed it to the children of the second marriage in the year 1875, and they have been in possession since that time.

This possession, however, was not adverse to the claim of the appellants (the children of the first wife), if their father entered upon the land in right of his wife under a gift to her from her father, Samuel Fulton. Holding under the title of his wife, these appellants could not sue until the termination of their father's life estate, and he lived until the year 1882. There is some testimony of a slight character conducing to show that the father went upon this land under the title of his wife's father, Samuel Fulton, and that it was a gift from Fulton to his daughter; but, on the other hand, it is made manifest that Fulton had no title to this land, and that O. C. Richardson, after he took possession, purchased the title of the elder grant, and obtained a conveyance from the commissioner, and while such a purchase might be held to enure to the benefit of his wife, the testimony further shows that O. C. Richardson held the bond of Daniel Fulton for title, and that this was the inducement for him to settle on this land. When he entered upon it the land was of but little value, and he evidently paid more, or as much, for the land in order to acquire the title from hostile claims than it was worth when he entered.

So with no title in Daniel Fulton, or if with a title, the ancestor of these litigants having entered under a bond from Fulton to make him the deed, and Richardson having in fact obtained the title by purchasing these conflicting claims, the chancellor very properly refused to permit a recovery by these appellants upon testimony, by no means satisfactory, that their father entered on this land in right of his wife (their mother).

Besides, Richardson, the father, made to these appellees, children by the last wife, a general warranty deed for the land in controversy, the consideration being love and affection, and as an advancement to them of so much of his estate. He had made advancements to these appellants, and was endeavoring to make such a disposition of his estate between his children as he deemed just and equitable, and under the facts of the record we perceive no reason for holding that the father was so unjust to the children by his first wife as to deprive them of their patrimony that he might enrich the children of his last wife.

Judgment affirmed.

CLARK v. MILLER.

(Filed January 10, 1889.)

1. The husband is liable for the wife's debts contracted before marriage to the extent of the value of personal estate which he has received by her; and it is immaterial that the personal estate which he has thus received was exempt from seizure for debt when held by the wife prior to her marriage, and

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is still exempt in the husband's hands. Notwithstanding this fact, he is personally liable to the extent of the value of the personal estate received.

2. Affidavit for attachment—The affidavit for an attachment may be made by the plaintiff's attorney when the plaintiff is absent from the county, and if the petition sets forth the grounds of attachment the attorney's verification of the petition is a sufficient affidavit. He thereby makes the statement of the client his own affidavit.

3. Same—The statement: "He says statements in the foregoing petition are true," is a sufficient verification to authorize an attachment, being a substantial compliance with the statute. It is manifest that the omission of the word "the" was a mere oversight of the draftsman.

Chas. Carroll for appellant.

Farleigh & Straus for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Holt.

The appellee, W. H. Miller, sues to recover a personal judgment against the appellant, L. W. Clark, upon a debt created by the wife of the latter prior to her marriage to him, upon the ground that he received by her personal property greater in value than the debt.

A recovery is resisted upon the ground that before and at the time of their marriage she was a bona fide housekeeper with a family, of this Commonwealth; that all the personal property then owned by her, and received by her husband from her, was, under the law, exempt from seizure for debt, and that upon their marriage he at once became, and has ever since remained, a housekeeper with a family, owning no personalty save that received from his wife.

Section 4, article 2, chapter 52 of the General Statutes provides: "The husband shall not be liable for any debt or responsibility of the wife contracted or incurred before marriage, except to the amount or value of whatever he may receive by her independent of real estate."

It is urged that his liability should be confined to the value of such property derived by him from the wife as was liable for her debts prior to the marriage; that this is the proper construction of the statute, and that it would be unreasonable to hold him responsible to her creditor for the value of property which, when it was held by her, could not be reached for her debt, and, as is now claimed, can not now be taken from him by reason of the exemption. In other words, that the change of ownership by reason of the marriage has not prejudiced the creditor.

The language of the statute is quite comprehensive. It makes the husband liable for the value of whatever he receives by the wife, aside from real estate. Its terms certainly include property which was exempt to the wife prior to the marriage. In arriving, however, at the proper construction of a statute the words are not alone to be considered; but the intention of the law maker, as well as the reason for its enactment, and indeed the spirit and purpose of it, are rather to be regarded. The language employed is but an aid to their ascertainment.

By the strict rule of the common law the husband is liable, during coverture, for all the debts of the wife contracted prior to their marriage, although she may come to him entirely portionless. This rule was not only unjust, but inimical to the creation of the marriage relation. Our legislature, therefore, changed it, and made the husband responsible only to the extent of the value of the property received by him. The only reason for,

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and the only test of, this liability furnished in the act by the law-making power is the reception of the property, and to it we must look in determining the extent of this innovation upon the common law instead of the condition of the wife's creditor before and after her marriage. Prior thereto she was personally liable for the debt. Her right to say that the property was exempt from seizure for its payment was personal to her, arising out of her condition. She might have paid it, if she had chosen to do so, through means derived from this property. She might have pledged it for its payment, or, if she had ceased to be a housekeeper, it would have been liable. By her marriage, however, it became the property of her husband, and in truth, it may be properly said that her creditor is prejudiced by the change, or at least may be, unless the husband can be held liable for its value. The reason for this statutory liability is that his estate has been increased to the extent of the value of the wife's property. This much has been added to it, and whether the identical property thus received be exempt or not to him as the head of a family, yet we see no just or sufficient reason why he should not be personally liable to the extent of its value. Indeed a different rule would lead to injustice. Here the creditor has attached a debt owing to the husband, and claims the right to subject enough of it to satisfy his claim, created by the wife, because the husband received more in value by the marriage than the amount of it.

Now suppose A has $10,000 owing to him. He marries B, who, at the time owes C $200, and gets by her property worth $500. It becomes absolutely his by the marriage. He sells it, and his estate then amounts to $10,500, and all opportunity of payment to C is gone unless A is to be held personally liable. In such a case there is no good reason why the husband should not be personally liable for this antenuptial debt of the wife. His estate has been increased that much and more; he has received the property; and this is the ground upon which the legislature, and justly, in our opinion, based his personal liability. It should not be made to depend upon the amount of property he owns at his marriage; nor upon its previous status, but upon its value when he obtains it. He is not to be regarded as a donee or a purchaser. The common law made him liable during the coverture for all of the antenuptial debts of the wife, whether he received property by her or not, upon the score of duty to discharge all of her obligations. He was not liable as a debtor, but as the husband. Our legislature, recognizing the hardship of this rule, restricted this liability to the value of what he might receive by her. The limitation as to the liability was for his benefit, and in conferring it the legislature have seen proper to say, as they had a right to do, that he shall be liable to the extent of the value of all the property derived from her.

The law upon marriage vests the title to the wife's personalty in the husband absolutely. The common law made him pay all of her debts if enforced during the marriage without regard to what she might bring him; and the statute has merely narrowed this liability, based upon duty, to a certain limit. In our opinion the language of the statute, the history of the law upon this subject, as well as justice and reason, demand this construction.

The grounds of the attachment in this case were set out in the petition. It, of course, purported to be the statement of the plaintiff. It was verified, however, by the attorney, the verification stating that the plaintiff was absent from the county. Section 196 of the Civil Code authorizes the making of an order of attachment upon the filing of an affidavit of the plaintiff, set-

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ting forth certain grounds for it, and section 550 provides: "Any affidavit which this Code requires, or authorizes a party to make, may, unless otherwise expressed, be made by his agent or attorney, if he be absent from the county." It is admitted that the attorney may, in the absence from the county of his client, make the affidavit; but it is insisted that a statement purporting to be that of the client, and then a verification of it by the attorney, is not sufficient. In other words, that the statement or affidavit of the latter must set forth the grounds of the attachment. He, however, verifies the statements of the petition. He says they are true. He makes the statement of the client his own affidavit. It has frequently been held that if a verified petition contains a statement of all the grounds necessary to the issual of an attachment it will be regarded as supplying the place of a separate affidavit, and that it may be verified by the attorney in the absence from the county of the client. (Savings Institution v. Bank of Wheeling, 1 Met., 156.)

It is also contended that the verification is defective upon the ground that the word "the" is omitted in the statement: "He says that statements in the foregoing petition are true." It is manifest it was a mere omission of the draftsman; and as it is, it is substantially sufficient.

These two objections to the sufficiency of the order of attachment are quite technical. It is true the remedy is an extraordinary one, born of the statute, and its provisions must be substantially complied with; but mere technical objections should not be allowed to defeat their operation.

The judgment of the lower court conformed to the views above expressed and is, therefore, affirmed.

Judge Pryor delivered the following dissenting opinion:

The husband is not liable in this case for several reasons: First, the creditors of the wife had no right to subject the exempted property to the payment of their debts; second, the wife had the right to give or sell this property to another without making the purchaser or donee responsible to the creditors of the wife, and the contract of marriage vesting the title in the husband as against creditorrs, he, like any other purchaser, is not liable for its value to satisfy the debts of the wife; third, the husband owning no property but this obtained by the marriage, and it being exempt by law, and he a housekeeper, the exemption followed the property; fourth, there can be no such rule in law or equity that would forbid the creditor from selling the property because it is exempt, and at the same time make the debtor liable for its value; fifth, in no case can a purchaser for value from the debtor be held liable to the creditors of the debtor for property purchased, where the consideration has passed, if that property, at the time, was exempt from seizure and sale under execution. Whether the consideration was that of marriage or the payment of money is immaterial.

ALEXANDER, &c. v. NOLAND.

(Filed January 17, 1889.)

1. Caveat—Practice—The filing of a caveat with the register of the land office is to prevent that officer from issuing a patent for vacant and unappro-

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priated land; and as the plaintiffs in this case rely upon a patent issued by the Commonwealth as the foundation of their title to the land in controversy, the land was not vacant or unappropriated, and, therefore, they had no right to enter a caveat, and the circuit court no jurisdiction to try it, and the proceeding on it should have been dismissed. But the case having been tried by a jury who found for the defendant, this court would, ordinarily, affirm the judgment, the plaintiffs having gained nothing by the proceedings; but as the verdict may hereafter embarrass the rights of the plaintiffs, this court will take hold of an error of the court in instructing the jury, for the purpose of reversing the judgment and directing the circuit court to dismiss the case without prejudice, the plaintiffs (appellants) to pay the costs in this court and the costs of dismissal.

2. Same—Instructions—The court, in instructing the jury, required them to believe that the land in controversy was set out and described in appellants' caveat. The caveat, in attempting to give the boundary of the land as set forth in the patent, described one of the lines as running "S. 50 E. 170 poles," when it should have been, in order to correspond with the patent, "S. 50 W. 170 poles." Held—That it is probable the jury understood the instruction to mean that the caveat should correctly describe the land, and if it failed to do so the appellants could not recover, therefore, the instruction was erroneous. The description given in the patent and deeds should have controlled the court in giving instructions.

Riddell & Fluty for appellants.

John Bennett, H. C. & W. H. Lilly and J. B. White for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Bennett.

The appellants, in August, 1883, entered a caveat with the register of the land office to prevent the issuing of a patent to the appellee for seventy acres of land lying in Estill county, Kentucky. A copy of the caveat, certified by the register, was, within sixty days from the time it was entered, lodged with the clerk of the Estill Circuit Court, and the appellee, having been duly served with summons, filed his answer, controverting the appellants' right to the said land. Section 473 of the Civil Code, under which the proceedings were had, provides: "If any person obtain a survey of land to which another claims a better right, such other may enter a caveat with the register to prevent the issuing of a grant until the right be determined. The caveat shall state the plaintiff's claim and the reason why the grant should not issue. It shall be verified by his affidavit, or by that of his agent, and declare that it is entered in good faith, with the intention of procuring the land for the plaintiff, and not for the benefit of the person against whom it is entered."

The filing of a caveat with the register of the land office is to prevent that officer from issuing a patent for vacant and unappropriated land to a claimant who is not entitled thereto by reason of a prior entry and survey by another, or by reason of some other fact that gives him a prior right to a grant from the Commonwealth. That the foregoing is the correct construction of the section supra is made manifest by the fact that it must appear from the affidavit that the caveat "is entered in good faith, with the intention of procuring the land for the plaintiff." If, at the time of entering the caveat, he has a patent for the land, he can not make the affidavit that the

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caveat is entered with the intention of procuring the land for himself, for the patent presumably invests him with all the Commonwealth's title to the land. (Preston v. Preston, &c., 8 Ky. Law Rep., 633.)

The appellants rely upon a patent issued by the Commonwealth to Shirley's heirs as the foundation of their title to the land in controversy. This being true, the land was not vacant or unappropriated, therefore, the appellants had no right to enter the caveat, and the circuit court had no jurisdiction to try it, and the proceeding on it should have been dismissed. The case, however, was tried by a jury, who found for the appellee. The court, in instruction No. 1, required the jury to believe that the land in controversy was set out and described in the appellants' caveat. The caveat, in attempting to give the boundary of the land as set forth in the patent, described one of the lines as running "S. 50 E. 170 poles," when the description should have been, in order to correspond with that given in the patent, "S. 50 W. 170 poles." It is probable that the jury understood the instruction to mean that the caveat should correctly describe the land, and, if it failed to do so, the appellants could not recover. The patent and deeds under which the appellants claimed all gave the same description of the land, and they were put in evidence before the jury; and the description therein should have controlled the court in giving the instructions instead of the description contained in the caveat, as it is manifest that the misdescription was the result of a slip of the pen.

Ordinarily, as the circuit court had no jurisdiction of the caveat, and as the appellants gained nothing by the proceedings, we would affirm the judgment, but as the jury, influenced doubtless by an erroneous instruction, have returned a verdict against the appellants, which may hereafter embarrass their rights, we will take hold of the error of the court in instructing the jury, for the purpose of reversing the judgment and directing the circuit court to dismiss the cause without prejudice; but the appellants must pay the costs in this court and the costs of dismissal.

The judgment is reversed at the costs of the appellants, and the circuit court is directed to dismiss the cause without prejudice at the costs of the appellants.

WEDEKIND, &c. v. HALLENBERG, &c.
KOMP'S EX'OR, &c. v. SAME.

(Filed January 12, 1889.)

Construction of devise—The law favors that construction of a will which will render estates vested and not contingent, therefore, an estate devised vests at once upon the testator's death, although the possession be postponed, if it is apparent, from the entire will, that the postponement of payment or possession is merely for the convenience of the estate.

A testator, by his will, gave to his sister, D., the sum of $500 a year, to be paid by his executors to her annually until July 1, 1882; and if she should die before that time this annuity to be paid to her daughter, M. On the 1st day of July, 1882, if D. should be still living, the executors were to set apart $5,000, and invest the same in mortgage notes, the interest to be paid to D. as long as she lived. Upon her death the executors were to invest $3,000 of said sum in real estate for M., "the title to the same to be made to her with a restriction that she shall not have power to sell or encumber the same in any way, but may rent, use or occupy the same, and upon her death to de-

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scend to her heirs." Said investment was not to be made in any event until after July 1, 1882. M. died prior to that time, leaving a child, which died in infancy. D. died in 1885. There are three sets of claimants to the estate devised to M.—the heirs of the testator, the brothers and sisters of M., and the heirs of the father of M.'s child, the father having survived the child. Held—

1. The devise to M. vested upon the testator's death, it being apparent from the entire will that the enjoyment of it was postponed merely for the convenience of the estate.

2. M. took the fee, and not merely a life estate with remainder to her children, the words "and upon her death to descend to her heirs" being words of inheritance, and not words of purchase. Therefore, upon her death her child took the estate as her heir, and not under the will, and the child dying in infancy, the estate descended, under the statute, to the brothers and sisters of M.

L. C. Woolfolk and C. B. Seymour for Wedekind.

Bacon & Stites for Komp's executor.

O. A. Wehle for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

Ernest Wedekind made his will in 1872, and died in August, 1873, unmarried and without issue. These appeals involve the right to the $3,000 named in the twelfth clause of his will, and which reads as follows:

"I give to my sister, Mrs. Diedrich Wedekind, the sum of $500 a year, and my executors, hereinafter named, are to pay the same to her annually until the 1st of July, 1882. If she dies before said 1st day of July, 1882, my executors, hereinafter named, are to pay said sum of $500 per annum to Mary Wedekind, provided she is unmarried; and if said Mary is married, or does marry, then said annuity is to cease from the time of her marriage. On the 1st day of July, 1882, if the said Mrs. Diedrich Wedekind is still living, I direct that my executors, hereinafter named, to set apart $5,000, and invest the same in mortgage notes, interest payable semi-annually, and the proceeds thereof to be paid to her as long as she lives. If she marries, the said annuity is to be paid to her, but the said $5,000 is to remain in the hands of my executors until her death. Upon her death my executors, hereinafter named, are directed to invest $3,000 of said sum in real estate for said Mary Wedekind, the title to the same to be made to her with a restriction that she shall not have power to sell or encumber the same in any way, but may rent, use or occupy the same, and, upon her death, to descend to her heirs. The remaining $2,000 of said $5,000 shall be invested by my executors, hereinafter named, in real estate for Minna Wedekind, sister of said Mary Wedekind, the title to the same to be made to her with a restriction that she shall not have power to sell or encumber the same in any way, but may rent, use and occupy the same, and upon her death to descend to her heirs. Said investments are not to be made in any event until after July 1, 1882, and the annuity therein provided is to cease at that time unless the said Diedrich Wedekind is living, and has remained unmarried."

She survived the testator, and also the 1st of July, 1882, and the $5,000 was

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thereupon invested in notes as directed by the will, and the interest paid to her until her death in April, 1885, she having also received the annuity of $500 bequeathed to her for the time from the testator's death until July 1, 1882. Her daughter, Mary Wedekind, married John B. Komp in 1877, and died in 1878. They had one child, Lulie, and she died in July, 1878. The father died in 1881, all of his estate being devised by him to his executor in trust for his children by a former wife. Mary Komp left surviving her a brother and a sister, Frank and Minna Wedekind.

There are three sets of claimants to the fund of $3,000: First. The appellees, Hallenberg and others, who are heirs of Ernest Wedekind, claim that the devise of $3,000 to Mary was contingent upon her living until July 1, 1882; that it never vested, by reason of her death, prior to that time, but lapsed and became undevised estate. Second. The devisees of John B. Komp assert that the devise took effect at Ernest Wedekind's death, Mary taking a life estate only in the fund; and that at her death it passed under the will to Lulie in fee, and at her death to her father, and then under his will to his children by the former marriage, who are appellants in one of these appeals. Third. The appellants, Frank and Minna Wedekind, claim that the devise took effect upon the death of the testator, the period of enjoyment merely being postponed until Diedrich Wedekind's death; that the direction in the will for investment was an equitable conversion of the fund into real estate; and upon Mary Komp's death it descended to her child, and upon the latter's death, she being an infant, and without issue, passed to her next of kin upon the mother's side.

The first question to be determined is whether the devise ever vested in Mary Wedekind. If so, then secondly, did it pass to her child under the will or by descent?

It is well settled that the law favors that construction which will render estates vested, and not contingent. The law so inclines because it is nearly always the intention of the testator that his bounty shall be transmitted to the family of the beneficiary. If it be doubtful whether a legacy be vested or contingent the law treats it as vested. It is, however, a question of intention upon the part of the testator. If this be plain we need look to no rules of construction. It is only where it does not appear, or is doubtful, that resort is to be had to them. If the testator has annexed futurity to the substance of his bounty, and it is of the essence of the gift, then its vesting is suspended; but if it merely relate to the enjoyment or payment of it, then it vests in presenti unless this be made to depend upon an event which may never happen. The language is to be regarded as vested or contingent, according as the time when it is to take effect is annexed to the enjoyment of the gift or the gift itself. If there be no substantive gift, and it is only implied from a direction to pay, then the devise is contingent unless a contrary intention may be collected from the words or context, or the payment be postponed for the convenience of the property or estate, or to let in some other interest. (Williams on Executors, side page 1069.)

Prima facie it is to be presumed that a testator did not intend any estate disposed of by his will to lapse, and slight circumstances will, therefore, be regarded as showing that he intended the right to it to vest in the donee, although the possession of it may be postponed. In this instance the testator was interested in some mercantile firms. He also owned real estate jointly with others, and his will, therefore, provided that his estate should not be settled or distributed under it, saving a few small annuities, until July 1,

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1883. In fact the first nine clauses of it relate to the continuance of the mercantile business until that time and the settlement of his estate. It is contended that where the only legatory words consist in a direction to do something with a sum of money in futuro for the legatee's benefit, and the sum is not to be separated from the estate until that time, the legacy does not vest unless the legatee survives that period. If, however, this be done for the convenience of the estate, as appears in the case now in hand, and not by reason of any incapacity of the devisee to take, then the rule contended for does not control, as indeed no rule controls if the testator's intention be plain. (Vandyke v. Vanderpool, 14 N. J. Eq., 198.)

The seventeenth clause of the will disposed of the residue of the testator's estate; and after providing, in the succeeding clause, for the sale by his executors of his real estate, he says: "The money arising from my estate is to be held by my executors hereinafter named, and invested by them in good mortgage notes, bearing interest, the interest payable semi-annually until the 1st day of July, 1882; and at that time, or as soon thereafter as possible, all the legacies and specific devises above mentioned shall be settled, and my estate wound up as far as practicable." The fund was to be separated from the balance of the estate at a certain time. It was not made to depend upon any uncertain event. The testator knew the 1st of July, 1882, would come, and that Diedrich Wedekind would die; and it is perfectly certain that he directed his estate to be kept intact until the time named for its benefit and convenience. The testator disposed of his entire estate. This circumstance tends to show that he did not intend the disposition of any of it to be contingent, since this would have defeated his purpose. It was said in the case of Roberts' Ex'or v. Brinker, 4 Dana, 570: "Prima facie it may be presumed that a testator did not intend that any interest bequeathed in his will should lie dormant or undisposed of after his death, or should ever lapse, therefore, a slight circumstance may be sufficient for showing that a legacy is vested and not contingent." In this instance additional force is given to this fact because it is evident the will was drawn by one skilled in such matters; and the devise to the testator's sister in Germany, under the eleventh clause of the will, expressly provides: "In the event of her death at any time, either before or after the 1st day of July, 1882, said annuity is to cease, and the money herein directed to be set apart shall belong to my estate," showing that where he intended a devise in a certain event to lapse he expressly said so, and this he did not do as to the one in question. The will abundantly shows that its draftsman knew how to express contingency in appropriate words. The fifteenth and sixteenth clauses of the will direct that, on July 1, 1882, the sum of $5,000 each be set apart from his estate and invested in real estate for Louisa and Rosa Buckel, they to have the use thereof, but no power to sell or encumber it. These devises as to contingency are quite similar to the one in question; and it can hardly be supposed that the testator intended the disposition of so much of his estate to be contingent, and especially when he evidently intended to dispose of all of it. He, in the main, gave his estate to his brothers and sisters and their descendants, and all of the provisions of the will being considered, it is manifest that he expected and intended, with one exception, where he expressly provided otherwise, that each portion so given was to remain in that particular branch of the family.

Our conclusion is that the gift and enjoyment under the clause of the will in question were not one and the same; that they were not both suspended

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until 1882, and that the testator did not intend the devise to Mary to be contingent upon her surviving that period; but that it vested upon the testator's death, the enjoyment of it being postponed for the convenience of the estate.

When the will was made the conventional interest law allowing 10 per cent. was in force, and it is quite likely that the testator regarded the annuity of $500 a year given by the clause in question as equivalent to the interest upon the $5,000; and if so, its payment confirms our view that the legacy was not contingent. It having vested in Mary Wedekind, then as the will provided that the title to the land in which it was to be invested should be made to her, but with the restriction that she should not sell or encumber it, "and upon her death to descend to her heirs," did her daughter, Lulie, take as a purchaser under the will or by descent as the heir of her mother?

It is contended that the expression "descend to her heirs" is equivalent to a direction that it should, at her death, go or pass to them. This must depend upon the sense in which it was used by the testator. It is to be gathered from the entire instrument. The words are those of inheritance. If the estate passed by devise and not by descent, then it goes to those who are not of the testator's blood. This fact does not, of course, authorize a court to make a will for the testator, but it may be considered in determining what was intended by the use of the language employed. Certainly the testator did not intend his bounty to pass to strangers; and as the will was drafted skillfully, why, if the testator intended that at the death of Mary his bounty should go to her children, did he not say so?

The tenth clause of the will gave an annuity to one of the brothers of the testator until July 1, 1882, or to his wife in the event of his death; and directed that at the time named $5,000 should be invested for their benefit, and "after their death the said $5,000 is to be paid to the children of my said brother Henry, share and share alike. If my said brother Henry and his wife both die before the 1st day of July, 1882, the said $5,000 is not to be paid until said 1st day of July, 1882, at which time, if they both are dead, the said children shall be entitled to the same."

The clause last cited tends to show that the expression "descend to her heirs," used in the one in question, was not employed by way of words of purchase, or to express a devise, but merely that the testator expected and intended his bounty would, upon Mary's death, pass by descent to her heirs. If he did not so intend, why did he use the words "descend to her heirs?" If he intended the estate should pass by purchase under the will, then the language imports what he did not mean. It seems to us that they were used in a different sense, and as words of inheritance only; that the testator intended to vest the fee in Mary, subject to the restriction upon her right of alienation, and that if he had intended to limit her interest to a life estate, he would have said so in express terms, as he did in the same clause as to the interest of Diedrich Wedekind in the fund.

Our conclusion is that Mary's child took the estate by descent and as the heir of her mother, and not as a purchaser under the will. The language employed does not bring the case within the operation of section 10, article 1, chapter 63 of the General Statutes. This being so, and the direction to invest the fund in real estate being an equitable conversion of it into that character of property, it, upon the death of Lulie, passed, by virtue of sec-

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tion 9 of chapter 31 of the General Statutes, to the next of kin upon the side of her mother.

The judgment upon the appeal of John B. Komp's executor, etc., is affirmed, but reversed upon that of the appellants, Minna and Frank Wedekind, and cause remanded for further proceedings consistent with this opinion.

BRADLEY v. BURGESS.

(Filed December 8, 1888.)

Limitation—Thirty years' statute—The right to bring an action for the recovery of real property can not be extended beyond thirty years from the time the cause of action first accrued, even to a person laboring under disability when the cause accrued.

The husband executed a deed purporting to convey the absolute title to the wife's land. The grantee acquired possession and, claiming the absolute title by virtue of the husband's deed, continued to hold the land for over thirty years before this action was brought by the grantor's wife to recover the land. Held—That the action is barred.

W. R. Ross for appellant.

W. A. Sudduth for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Chief Justice Lewis.

In January, 1878, her husband having died a few years before, appellant instituted this action to recover of appellee an undivided tenth of a tract of land containing about 102 acres, of which her father, Henry Walker, died the owner in 1833. In 1834, under an order of the county court of Fleming county, where it lies, an allotment of dower and division between his children were made of the land, though no deeds of partition appear to have been executed. In 1836 a deed was made by Daviess Bradley and his wife, Nancy Bradley, the appellant, purporting to convey to John Bright an undivided tenth of the tract. About the same time Bright purchased the interests of five others of the children of Henry Walker, and Fitzgerald acquired the interests of the remaining four. And from them, by conveyances which seem to have been regularly made, appellee obtained the title and possession of the entire tract.

The evidence shows that at the time this action was commenced appellee and those under whom he holds had the previous actual, continuous possession of the whole tract, claiming by purchase from the heirs of Henry Walker for about forty years. And the first, and we think, only question necessary to consider is whether section 4, article 1, chapter 71, General Statutes, applies to this case. It is as follows: "The period within which an action for the recovery of real property may be brought shall not, in any case, be extended beyond thirty years from the time at which the right to bring the action first accrued to the plaintiff, or the person through whom he claims by reason of any death, or the existence or continuance of any disability whatever."

It appears that in the division of the land between the children of Henry Walker the lot which should have been given to appellant was set apart in

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the name of her husband by the county court commissioners, who stated in their report it had been sold to John Bright.

Although appellant, as well as her husband, was a party to, signed and acknowledged the deed made to Bright in 1836, it is now contended her title was not conveyed thereby. But we do not deem it necessary to determine whether it was or not effectual to pass her title; nor whether she is now estopped by the proceeding in the county court, to which she was a party, to question the title of appellant, for if the interest which her husband undertook to convey, and by the terms of the deed did convey, was the absolute title, and not merely his life estate, and John Bright acquired possession and claimed such title in virtue of the deed, her right to bring an action for the recovery of her interest in the land, in the meaning of the statute, then accrued, and could not be extended beyond thirty years from that time, although she then labored under the disability of coverture, and so continued during that entire period. (Medlock v. Suter, 80 Ky., 101: Mantle v. Beal, 82 Ky., 122.) That by the terms of the deed, and according to the manifest intention of the parties to it, the fee simple title was conveyed, or attempted to be conveyed, clearly appears; and it also appears John Bright soon thereafter took possession, and he and his vendees thereafter held and claimed the land as absolute owners, which, as heretofore held by this court, was an adverse holding, and afforded appellant a cause of action when he first so entered and claimed. And as the section quoted was clearly intended to prescribe the period of thirty years as the limit beyond which the right to bring an action for the recovery of real property should not be extended, even to a person laboring under disability when the cause first accrued, it follows appellant is barred of recovery in this action.

Judgment affirmed.

MEADE, &c. v. STAIRS, &c.

(Filed December 20, 1888.)

1. Husband and wife—Proceeds of wife's land—Rights of husband's creditors—Husband and wife united in a sale of the wife's land, the proceeds being paid to the husband with the wife's knowledge and consent, under a verbal agreement by him to invest the money in a home for her. The husband afterward engaged in the business of trading in tobacco, investing a part of the money received by him from the sale of his wife's land in his business with the knowledge of his wife. He afterward quit trading in tobacco and purchased a mill. This property he sold, and assigned the notes for the purchase money to his wife. He was then involved in debt. It does not clearly appear whether any of the proceeds of the wife's land was invested in the mill property. While the husband owned this property the wife united with him in a mortgage upon it. In this contest between the wife and attaching creditors of the husband as to the right to the assigned notes, Held—That the wife having acquiesced in the conversion of her money by the husband to his own use, and having recognized as his the property in which she now claims it was invested, her claim to the proceeds of this property is unsupported by any equity which can prevail against the rights of the husband's creditors.

2. Same—While the statute provides that the proceeds of the wife's land shall be hers unless otherwise provided in the conveyance or obligation of the purchaser, yet if she permits her husband to convert and use the proceeds as his own, she can not thereafter assert a claim therefor against his estate to the prejudice of his creditors.

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A. Duvall and J. A. Donaldson for appellants.

Masterson & Gaunt and John W. Rodman for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Holt.

January 11, 1883, G. S. Stairs sold and conveyed to George T. Thompson a mill property, to which he had the title and undisputed right. He was then involved in debt. Thompson executed to him two $1,000 notes, payable in one and two years respectively, for that much of the purchase money. January 12, 1883, he assigned them to his wife, the appellee, N. M. Stairs, and immediately left the country and never returned. Soon after doing so his creditors, the appellants, sued out attachments against the fund owing by Thompson. The wife upon her petition was made a party, and claimed the notes under the assignment to her upon the following state of case: Her father conveyed to her in 1881 a tract of land situated in Bracken county, in this State, and then worth $10,000, for the recited consideration of $3,000, reserving a lien upon it for the payment of the last-named sum, and thus giving her, as was then estimated, $7,000 in land. She and her husband sold a part of the land in 1877, and the remainder in 1879, there being a verbal agreement between them that he would reinvest the proceeds, less the sum necessary to discharge the lien upon the land, in a home for her. In this way he received as net proceeds something over $4,000. It was paid to him with her knowledge and consent. They removed from the land in 1877 to the town of Carrollton, in this State, and there lived in rented property, the husband engaging in buying and selling tobacco until 1879. In this business he used at least a portion of the proceeds of the sale of her land. How much the record does not disclose. This he did with her knowledge. In 1879 he quit trading in tobacco, and purchased a mill site, which he improved by the erection of a mill containing valuable machinery, and which property is the same purchased by Thompson.

It is not shown, unless inferentially, that any portion of the proceeds of the wife's land was invested in this property. It is true there is some testimony tending to show that when they moved to Carrollton the husband did not have any large amount of means derived through himself; but how much he made while engaged in the tobacco business does not appear. He seems to have made something. The title to the mill property was taken to him. This was in 1879. The wife knew of it soon after, and then complained to him of the noninvestment of the proceeds of her land in a home. He thereupon purchased one at the price of $2,200; had the title made to the wife, and appears to have represented to her that the most of the purchase money had been paid, although in fact but $750 had been paid. She acquiesced in the title to the mill property remaining in her husband, and took no steps to have any equity or right of her own established in it, even admitting that a portion of the proceeds of her land had been invested in it; and thus the matter rested from 1879 until 1883. In the interim her husband sold an interest in the property, and then repurchased it. He also mortgaged it, and his wife united in the mortgage. She now claims that her husband held the proceeds of her land in trust for her under the agreement between them above recited; that by way of its execution, in part at

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least, he transferred to her the two Thompson notes, amounting to $2,000; and as he had never invested for her of the $4,000 and over received by him but the $750 paid on her home, that she is entitled to hold the notes.

The creditors of her husband, whose debts were created in 1881-2 and 3, in response, assert, first, that the transfer of the notes to her was without consideration, and fraudulent; but, secondly, that if this were not so, then she was but a creditor of the husband, and the transfer was a forbidden preference of her by the debtor, and operated as an assignment of his estate for the benefit of all his creditors. The notes were adjudged to Mrs. Stairs, and the creditors have appealed.

Our duty, however unpleasant, is to look at the question, divested of all sympathy for her and her children. There has evidently been upon her part no fraud, and whatever loss results to her comes from that trusting confidence which, while it ennobles the true wife, yet when misplaced, brings misfortune. Satisfied of her honesty and truthfulness, we have, in the main, based the above statement of the case upon her own testimony; but admitting that she is in no respect mistaken, yet the agreement, if it may be recalled such, between her and her husband as to the reinvestment of the proceeds of her land, was of a very general character. It fixed no time or place or particular property for the reinvestment. No property was purchased for two years thereafter, and it does not satisfactorily appear that any of the money arising from the sale of her land was then used in paying for or improving it.

The circumstances above recited distinguish this case from Latimer v. Glenn, 2 Bush. 535; Miller &c. v. Edwards, 7 Bush, 394, and Campbell, &c. v. Campbell's Trustee, &c., 79 Ky., 395. Here there was no loan to the husband of the money arising from the sale of her land, but she allowed him to receive it upon a proviso of reinvestent for her; he converted it to his own use, and she sanctioned the conversion. It is uncertain how he used it; but if any of it was invested in the mill property, yet the title was taken to him, and although she learned of it soon thereafter, she not only acquiesced in it for several years, during which the debts of the appellants were created, but joined in a mortgage of it as his property.

By the common law contracts between the husband and wife were void in toto. They were considered as one person. The rule is otherwise in equity. For many purposes it treats them as distinct persons, and contracts between them will, under some circumstances, be enforced even against his creditors. To do so in a case like the one now presented would, however, be extending the rule to an unwarrantable and dangerous extent. Not only did one deed divest the wife of title, and another vest the title to the property thereafter purchased in the husband, with acquiescence on her part after it came to her knowledge, but it is utterly uncertain whether any of the proceeds of her land were invested in the property so purchased.

This is a much stronger case against any equity upon the part of the wife than existed in the case of Pryor, Assignee, &c. v. Smith, &c., 4 Bush. 372. There a tract of land was in part paid for with the land of the wife. She refused to part with it unless its value was secured to her in the tract purchased, and to this the husband consented. The title was taken to him, however, and subsequently in a contest with his creditors she was denied relief, this court saying: "These transactions constituted a complete con-

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version and reduction of her estate in the land by her husband to his possession; and generally, where this is done, a court of equity will not interpose to provide for the wife to the exclusion of the claims of creditors."

In the subsequent case of Darnaby v. Darnaby's Ass'ee, 14 Bush, 485, and where the circumstances were calculated to appeal still more strongly in behalf of the wife, the same rule was announced; and, in our opinion, to hold otherwise would not only be unjust to the rights of innocent creditors, but would open a door to fraud and perjury. It would, moreover, give the husband a delusive credit, and enable him to deceive those dealing with him upon the strength of appearances, which, in this instance, were known to the wife and acquiesced in by her. Indeed she was not only silent as to any claim or interest in the mill upon her part, but she said to the world, by uniting in the mortgage of it as belonging to her husband, that she had no right or equity in it. She first permitted her husband to obtain the proceeds of her land under a promise of reinvestment. Subsequently she acquiesced in his converting the same to his own use; and not only is its identity gone, but it does not appear what use he made of it. This conduct made it his own. The mill property was indisputably his, and the notes were also. Under such circumstances their transfer to the wife was unsupported by any equity which can prevail against the rights of his creditors.

It is true section 3, article 3, chapter 52 of the General Statutes provides that the husband and wife may sell and convey her land, but in such case "the proceeds shall be hers unless otherwise provided in the conveyance or the obligation of the purchaser." This statute, adopted in 1873, changed the law theretofore existing, and which provided that, in such a case, "the proceeds shall be his unless otherwise expressly provided in the conveyance or the obligation of the purchaser." (2 Revised Statutes, chapter 57, article 2, section 2.) But this change should not be construed to make the wife the creditor of the husband to the prejudice of creditors in a case like this one, where she has not only permitted the husband to reduce her estate to his possession, although under a promise of reinvestment for her, but has subsequently allowed him to convert the proceeds to his own use and benefit, thus making them, by her consent and in law, his own. Such conduct upon her part, however innocent, would operate as a fraud upon innocent parties, if she could still assert a claim to the prejudice of their rights. In such a case, if either is to suffer, she must bear the loss. She could have secured herself at the proper time and in the proper way, and can not now be allowed, when in fault herself, to say that third parties, who have been misled by not only her silence when she should have spoken, but by her positive acts in recognizing the property as her husband's, shall suffer instead of herself. The present statute declares that the proceeds of a sale of her land shall be hers in the absence of the deed or obligation of the purchaser providing otherwise, thus affording her an opportunity to have the same settled upon her or to hold it. This was the object of the change in the law. If, however, she does not avail herself of this right, but permits her husband to convert and use it as his own, then she can not thereafter assert a claim therefor against his estate to the prejudice of his creditors.

The appellants are entitled to be first paid their debts out of the proceeds of the Thompson notes. Whatever may remain Mrs. Stairs will be entitled to, and the judgment is reversed for further proceeding in conformity to this opinion.

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KENTUCKY CENTRAL R. R. CO. v. COMMONWEALTH.

(Filed December 13, 1888.)

Exemption from taxation—A provision in the charter of a railroad company regulating the mode of assessing its property, and thus exempting it from the general law applicable to other railroad companies, confers a mere personal privilege not transferable by sale or succession. And where a railroad company, whose charter confers such a privilege, sells to another company its property and franchises, an act of the legislature investing the purchasing corporation "with all the powers, privileges, rights, immunities and franchises" of its vendor does not confer upon it the privilege possessed by its vendor as to the assessment of its property.

Hallam & Myers for appellant.

P. W. Hardin for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is an appeal from a judgment rendered in two actions tried together, which the Commonwealth of Kentucky instituted against the Kentucky Central Railroad Co., to recover the amount of taxes alleged to be due and unpaid for the years 1884-'85 '86, according to returns made by the officers of the company to the auditor of public accounts of the State, and the valuation made by the board of equalization as provided by an act approved April 3, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing same."

As appears from a copy of the returns made to the auditor the defendant owns and operates, as parts of its system, the following roads: The Covington and Paris road, the Maysville & Lexington road, southern and northern divisions, the Paris & Livingston road, and the Richmond branch of the Louisville & Nashville road.

We think there is no room for controversy about the liability of the defendant to pay taxes in some mode upon all of those roads, for it not only controls, has the possession and operates each one of them, but they were all returned to the auditor as subject to taxation. And the only question is as to the mode in which they ought to be taxed, and the amount of taxes the company is liable for.

In 1847 the Licking & Lexington Railroad Co. was incorporated with the right to construct a road from Covington to Lexington, it being provided in the charter that a tax of twenty-five cents on each share of stock of $50, owned and held by any stockholder, should be annually paid into the State treasury by the president and directors of the company.

In 1849, by amendment to the charter, the name of the corporation was changed to "Covington & Lexington Railroad Company." And March 3, 1851, an act was passed further amending, section 4 of which is as follows:

"That on the 1st day of January next, after the first declaration of dividends on the capital stock of said railroad company, and on every 1st day of January thereafter, it shall be the duty of the president and directors of said company to pay into the treasury of the Commonwealth a tax on each one hundred dollars' worth of stock in said railroad company equivalent to the rate of tax on each one hundred dollars' worth of property for State revenue

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and no more, and resident stockholders shall not list their stock in said company for revenue tax, nor be liable to payment of tax on the same in any other mode whatever."

But February 22, 1871, "An act to incorporate the Kentucky Central Railroad Co." was passed, the first section of which is as follows: "That George H. Pendleton, John W. Stevenson, Wm. Ernst, J. C. Gedge, G. Bowler and E. H. Pendleton, their associates and successors, be, and are hereby, created a body-corporate and politic under the name and style of the Kentucky Central Railroad Co., for the purpose of operating the Covington & Lexington railroad, of which they are the owners by purchase under judgment and order of sale of the Fayette Circuit Court; and shall have, and are hereby invested with, all the powers, privileges, rights, immunities and franchises, subject to the restrictions and limitations contained in the original charter of incorporation authorizing the construction of said railroad, and the various acts amendatory thereof: Provided, Nothing in this act shall be held to subject the said powers, rights, immunities and privileges purchased under judgment and order of sale of the Fayette Circuit Court, and thereby vested in the corporation by this act created, to the operation of the act, entitled 'An act reserving the right to amend or repeal charters or other laws,' approved February 14, 1856, but the same are exempted therefrom," etc.

It is contended that, according to a proper construction of section 4 of the act of April 3, 1851, quoted, the defendant is not liable to pay taxes on the stock, according to its face, but only according to its actual value. But it is not material how that section should be construed, unless it be determined that the Kentucky Central Railroad Co., in virtue of its purchase at the judicial sale mentioned, and of the act of incorporation passed in 1871, is exempt from the operation of the act of April 3, 1878, applicable to railroad companies generally. It appears that at the time the property of the Covington & Lexington Railroad Co. was sold under the judgment mentioned it had constructed and was operating under its charter only so much of the road, it was authorized thereby to build, as extended from Covington to Paris, where it connected with the Maysville & Lexington road, which was constructed and operated under the charter of another corporation. And all the other roads reported to the auditor as owned and controlled by the Kentucky Central Railroad Co. have been constructed or acquired by it since 1871. We, therefore, think no part of the system belonging to the defendant, if any at all, is exempt from the general law prescribing the mode of assessing and taxing railroad property in the State unless it be that portion between Covington and Paris, and it was so decided by the lower court. (L., C. & L. R. R. Co. v. Commonwealth, 10 Bush, 43.)

There are two propositions of law which have been so often announced by this court and by the Supreme Court of the United States, and are so just and necessary to the sovereignty and dignity of the State and the general welfare, that they can not be now called in question. The first is, that immunity from taxation is a mere personal privilege pertaining alone to the corporation or natural person originally invested by the legislature with it, and as a consequence not transferrable by sale or succession. Second. That the taxing power of a State is never presumed relinquished unless the intention of the legislature to relinquish is declared in clear and unambiguous terms. (Morgan v. Louisiana, 93 U. S., 221; Willson v. Gaines, 103 U. S.,

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417; L. & N. R. R. Co. v. Palmes, 109 U. S., 250; Memphis Railroad Co. v. Commissioners, 112 U. S., 617; E., H. & N. R. R. Co. v. Commonwealth, 9 Bush, 439; L., C. & L. R. R. Co. v. Commonwealth, 10 Bush, 43; Commonwealth v. Masonic Temple Co., 10 Ky. Law Rep., 325.)

This is, it is true, not a case where entire immunity from taxation is claimed, but it does involve the claim by one corporation of exemption from the mode provided by a general law of assessing and taxing the property of similar corporations, whereby it will be practically relieved of paying its fair and equal share of taxes. And, in our opinion, the same principle is involved and the same rule of construction should be applied in this case as if the claim was for entire exemption from taxation.

In fact, while under certain conditions, an exemption may be granted, we do not know upon what principle a corporation, the power to tax it being conceded, can claim an exemption from tax laws made applicable to all other similar corporations, and a consequent invidious preference to it, in respect to the amount imposed. The Kentucky Central Railroad Co. did not acquire, by its purchase at the judicial sale, the privilege now claimed, which is, in its nature, partial and exclusive. Nor does the language used in the act of incorporation passed in 1871 clearly, and in express terms, confer it, for the terms used in that act import nothing more than the rights, privileges and immunities usually granted, and such as are necessary to the corporate existence and ordinary conduct of the business of railroad companies. Certainly the language used does not clearly express an intention to grant to the company the extraordinary and exclusive privilege of exemption from conditions and burdens imposed upon railroad companies generally, and which are deemed necessary for the support of the government.

In our opinion section 4 of the act of March 3, 1851, intended alone to regulate the mode of assessing the the property of the Covington & Lexington Railroad Co., which no longer exists, is now obsolete, and the Kentucky Central Railroad Co. is subject to the general law applicable to other railroad companies in the assessment and collection of taxes, and the lower court consequently erred in fixing the amount of taxes due from it upon the basis of an assessment of stock.

Wherefore, the judgment is affirmed on the appeal and reversed on the cross appeal of the Commonwealth of Kentucky, and remanded for further proceedings consistent with this opinion.

MITCHELL v. SIMPSON.

(Filed January 15, 1889.)

Construction of devise—"Bodily heirs"—A testator devised to his daughter his land, lying in and around the town of C., and also 200 acres of land in another county, adding: "The said land is willed to my daughter and her bodily heirs, except the 200 acres, which she is to have the right to dispose of as she wishes." Held—That the words "bodily heirs" were used in the sense of children, and that the testator's daughter takes a life estate in the lands lying in and around the town of C., remainder to her children.

Russell Mann for appellant.

McMillan & Talbott for appellee.

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Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Bennett.

The sole question in this case is, what is the proper construction of the third clause of Jesse Hall's will, which reads as follows: "I give to my daughter, Anna Simpson, 160 acres of land lying in and around Centreville, Ky. Said land is allotted to her, and valued at $50 per acre. I also will her 200 acres of land in Scott county, Ky., off of what is known as Sheep Farm. Said land is allotted and valued to her at $18.50 per acre. The said land is willed to my daughter and her bodily heirs, except the 200 acres in Scott county, Ky., which she is to have the right to dispose of as she wishes."

The fourth clause of the will contains a devise to his daughter, Paulina Henry, in which is this language: "Said lands I will to my daughter, Paulina, and her bodily heirs, excepting the last two-named tracts, which she may sell if she wishes."

The estate which he devises to his son, James F. Hall, is devised to him absolutely.

It is well settled that the words "heirs of the body," "heirs lawfully begotten of the body," and other similar expressions, are appropriate words of limitation, and must be construed as creating an estate tail, which, by our statute, is converted into a fee simple unless, from the entire will, it reasonably appears that the testator used said words, not in their technical sense, but as synonymous with the word "children." If said words are used in the latter sense, then they are construed as words of purchase, and not in the technical sense, as words of limitation, which are construed by our statute as conveying a title in fee to the immediate devisee.

In construing the language of this will it appears, at first blush, that the testator was endeavoring to create a life estate in his daughter, Mrs. A. Simpson, with remainder to her children, in the land lying around Centreville; and that he used the words "her bodily heirs" as synonymous with the word "children," as expressive of that intention.

The question in the case of Righter v. Forrester, &c., 1 Bush, 278, arose on the construction of a will similar to this in the particulars above mentioned, in which it was held that the words "bodily heirs" were used by the testator in the popular sense of children, and that they took under the will as purchasers. Said case clearly distinguishes the case at bar from the case of Johnson v. Johnson, 2 Met., 331. We think that the words "bodily heirs" were used by the testator, Hall, in the sense of children, and that Mrs. Simpson took a life estate in the land lying around Centreville, and her children took a remainder interest therein.

The judgment of the lower court sustaining the demurrer to the appellant's answer is reversed and the cause is remanded for further proceedings consistent with this opinion.

KYLE v. O'NEIL, &c.

(Filed January 15, 1889.)

Fraudulent conveyances—A creditor can not sue to set aside as fraudulent a conveyance made by his debtor, or by a third party at the debtor's instance to property really belonging to the debtor, unless he has obtained a judg-

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ment against the debtor and return of "no property," or sues out an attachment against the property.

Lane & Burnett for appellant.

Matt. O'Doherty for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

This action is brought upon the promissory note of the husband alone. It assails a conveyance made to the wife by a third party subsequent to the creation of the debt, and seeks to subject the land to its payment. The averments of the petition must be taken as true upon demurrer. The material ones to the question presented are that the husband is insolvent; that he paid the grantors for the land, and had it conveyed to his wife to defraud his creditors. The demand is purely a legal one, and in such a case the creditor can not invoke the aid of a court of equity to assail as fraudulent a conveyance made by his debtor, or one made by a third party at the debtor's instance to property really belonging to him, save in two ways, to wit: He must first obtain a judgment and a return of nulla bona; or, if he desires to proceed against the property at the outset, then he can only do so by suing out and prosecuting an attachment as provided by the Code of Practice. This rule is now so well settled in this State that its propriety is not open to question. Both its existence and its wisdom have been declared by repeated decisions of this court.

It has long been the rule that actions to annul voluntary conveyances and those made to defraud creditors can not be maintained without first having judgment and a return of "no property." (Napper, &c. v. Yager, &c., 79 Ky., 241; 2 Ky. Law Rep., 260.) The reason is that a resort to the legal remedy may satisfy the demand. Moreover, the conveyance can not be questioned by the parties to it; and if the legal remedy be first pursued, third parties, whose rights may be entirely well founded, may never be involved in what may prove to be vexatious and prolonged litigation. In order, however, to give a more speedy remedy, the Code authorizes the creditor to proceed, in the first instance, against the property by suing out an attachment. This, while it affords the creditor an ample remedy, protects both the debtor and the grantee. The latter, if it appear he purchased in good faith, may sue for a wrongful seizure of his property, while the debtor, if the attachment be discharged, may look to the bond for indemnity. In this mode of proceeding a lien is created and the court subjects the property by virtue of its seizure under the attachment, provided it be sustained.

If the creditor could, at the outset, and without either a return of nulla bona or suing out an attachment, assail the conveyance, third parties would be involved, when the legal remedy, had it been pursued, might have proven ample; and this, too, however wrongful might be the proceeding, without any bond being executed to the debtor, or any seizure of the property, although a lis pendens would be hanging over it, however protracted might be the litigation. Former decisions have, however, presented the reasons for the rule so fully and forcibly that further discussion of the matter would be but repetition, and it is sufficient to merely redeclare the rule. (Barton, &c.

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v. Barton, &c., 80 Ky., 212; 3 Ky. Law Rep., 746; Martz v. Pfeifer, &c., 80 Ky., 600, 4 Ky. Law Rep., 592.)

It matters not whether the debtor is the grantor, or whether, having paid the consideration, he causes another to make the conveyance to a third party. In the one case the statute declares the conveyance to be void, and in the other fraudulent. The reasons for the rule apply equally in each case.

In this instance the creditor had obtained no judgment and return of nulla bona against the husband, who was the debtor, nor had he sued out any attachment against the property, and the lower court properly held that the averments of the petition were insufficient to authorize any relief against the wife, who was the grantee.

Judgment affirmed.

HANEY v. McCLURE, &c.

(Filed January 17, 1889.)

1. Supplying lost records—When a commissioner has been appointed to take proof as to the contents of lost records, as provided by section 4 of chapter 72 of the General Statutes, and has made a report, the court has no authority to substitute the papers accompanying his report for the originals unless the affidavit required by section 5 of chapter 72 was filed, and the testimony upon which his report is based was taken in writing.

2. Same—In addition to the inherent power which every circuit court has to supply its lost or defaced records, the court is authorized by section 1 of chapter 72, General Statutes, to re-enter a judgment, the record of which has been lost or destroyed, without the previous appointment of a commissioner to take testimony, and, while it does not appear in this case that the notice required by that section was formally given, yet, as defendant did have notice that the records and papers of the action had been destroyed by fire, and that the plaintiff had moved to supply the lost papers and re-enter of record the judgment, and was present in court when the order was made, the court had the power upon satisfactory proof, which it is to be presumed was made, to re-enter the judgment.

3. Same—While a state of case might exist where it would be erroneous and prejudicial to give full effect to and execute such judgment in the absence of properly-authenticated pleadings and papers belonging to the case, yet, as the judgment in this case was rendered by default and the time for an appeal had elapsed, and the debts for which the judgment was rendered are set out and the land directed to be sold fully described, there is no reason why the re entered judgment should not be executed as if the record of the original had not been destroyed.

4. Judicial sales—As the commissioner's report of sale does not show for what price the land sold, nor that he offered to sell less than the whole tract to pay the two debts, the court erred in overruling the exceptions to the report.

V. B. Young, Z. T. Young and H. L. Stone for appellant.

Appeal from Rowan Circuit Court.

Opinion of the court by Chief Justice Lewis.

The papers and records of this case having, in November, 1880, been destroyed by fire, the commissioner appointed to take evidence relative thereto at the April term, 1881, of the court where the action was pending filed a report, in which it was stated the attorney for the plaintiff presented substi-

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tutes for the petition and answer filed in 1868 and the judgment rendered in 1869, and testified they were correct copies of the originals which had been burned. The deposition of the clerk of the court was taken, wherein he testified the petition and judgment were correctly copied. The papers accompanying the report show the action was instituted by appellee McClure to enforce the satisfaction of a personal judgment recovered by him against appellant for $148.60, upon which an execution had been issued and returned "no property found." That it was stated in the petition the tract of land sought to be subjected was purchased by appellant from one Evans, who had assigned the note for the balance of purchase money unpaid, amounting to $200, to appellee Moody, and that the latter filed answer setting up the note and claiming he had a superior lien on the land for the payment of it.

In the judgment purporting to have been rendered the land, or so much as necessary, was directed sold to pay the two debts, it being stated therein that appellee McClure had become owner of both.

At the May term, 1881, appellant filed exceptions to the report of the commissioner appointed to take evidence in relation to the destroyed papers and records, and also to the report of sale which, it appears, was filed at the November term, 1880. But each of the exceptions were overruled, the sale was confirmed, a deed directed made to the plaintiff, who was the purchaser, and a writ of possession to issue in his favor.

Section 4, chapter 72, General Statutes, provides that, in case the records and papers of any court shall be lost, destroyed, defaced or obliterated, such court shall appoint a commissioner, who shall have power and authority to fix on a convenient place to meet and sit from time to time, giving reasonable public notice thereof. Section 5 is as follows: "The commissioner may, at the instance of any person, issue a summons and cause the attendance of witnesses, and take evidence in writing of such witnesses relative to any record or paper so destroyed, defaced or obliterated, which deposition shall be legal evidence, and shall be returned to the clerk of the court and safely kept by such clerk. Before any such proof is taken the party offering it must make and file with the commissioner an affidavit that there is no attested copy of such record or papers in existence known to him. If such affidavit is not made no testimony taken shall be received. The commissioner shall not remain in office longer than one year."

It does not appear the affidavit mentioned was made and filed by the plaintiff, or any one for him; nor that the testimony of the attorney for the plaintiff in regard to the substitutes produced by him was taken in writing; and as the clerk of the court, in his deposition, states merely his opinion of the correctness of the copies of the petition and judgment, making no reference to the answer of appellee Moody, it is clear there was not such compliance with the provisions of section 5 as gave authority to the lower court to substitute the papers accompanying the report of the commissioner for the originals.

But we think that, in addition to the inherent power which, as said in Deshong v. Cain, 1 Duvall, 309, every circuit court has to supply its lost or defaced records, the lower court was authorized by section 1 to re-enter the judgment in this case without the previous appointment of a commissioner to take testimony. That section is as follows: "When any judgment or final order of any court of record of this State remains unexecuted and the record thereof has been lost, mutilated, defaced or destroyed, it shall be lawful for any person interested therein, upon ten days' notice in writing to the ad-

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verse party, to move the court in which such judgment was rendered or final order was made, to re-enter the same of record; and upon satisfactory proof that such judgment or final order had been theretofore entered of record, that the same had been mutilated, defaced or destroyed, and the purport thereof, it shall be the duty of the court to re-enter the same of record," etc.

It does not appear the notice required by that section was formally given, but the defendant did have notice the records and papers of the action had been destroyed by fire, and that the plaintiff had moved to supply the lost papers and re-enter of record the judgment, and was present in court when the order was made. Whether the court acted upon the report of the commissioner alone, or heard other evidence, does not appear; nor is it material; for it had, under the special provisions of section 1, the power, upon satisfactory proof, which it is to be presumed was made, to re-enter the judgment. It is true that, by reason of a noncompliance with the provisions of section 5, that seems to apply to the pleadings and other papers of an action, the court had no authority, upon the report of the commissioner as it stood, to substitute the copies produced for the original petition and answer of Moody, and a state of case might exist where it would be erroneous and prejudicial to the defendant to give full effect to and execute such a judgment in the absence of properly-authenticated pleadings and papers belonging to the case. But no defense was made to the action by appellant, and the judgment from which, by reason of the length of time, there could be no appeal, was rendered by his default, and the debts for which it was rendered are set out, and the land directed to be sold is fully described. We think, therefore, as the court had the power to re-enter the judgment, and properly did so, there is no reason why it should not have the same effect and be executed as if the record of the original had not been destroyed by fire.

But the court erred in overruling exceptions to the report of sale, for the commissioner does not show for what price the land sold, nor that he offered to sell less than the whole tract to pay the two debts, and as a consequence the purchaser gets the entire tract without there being any evidence of record showing for what amount appellant is entitled to credit.

The judgment confirming the report of sale for a deed and writ of possession is reversed, with directions to set aside sale and for further proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. ADAMS.

(Filed January 17, 1889—Not to be reported.)

1. Appeals—Practice—The instructions to the jury being proper, this court has no power to reverse the judgment unless the verdict upon which it is based is flagrantly against the evidence. The mere fact that the weight of the testimony is with appellant does not authorize a reversal.

2. Same—There having been three trials of this case—one in the police court and two upon appeal to the circuit court—the jury in each instance returning a verdict for the plaintiff (appellee), this court ought not to disturb the judgment.

3. Police courts—Civil jurisdiction—The legislature may confer civil jurisdiction upon police courts created since the adoption of the present Constitution of the State. Section 41 of article 4 of the Constitution applies only to police courts in existence when the Constitution was adopted.

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Wm. Lindsay and W. J. Lisle for appellant.

Harrison & Belden for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

The police judge of the town of Lebanon was invested by the legislature with the power to try civil cases where the amount in controversy, exclusive of interest and costs, does not exceed $500.

Section 4 of article 4 of the Constitution, as this court has heretofore decided, applies only to police courts in existence when the Constitution was adopted. (Trustees of Owensboro v. Webb, 2 Met., 576.)

It follows, therefore, that the police court, having jurisdiction in civil cases, properly heard and determined the controversy between the appellant and the appellee. The history of legislation in this State on like subjects, and the judicial decisions sustaining it, leave no room to question the constitutionality of this enactment conferring the jurisdiction. The case was heard in the police court, resulting in a verdict and judgment for the appellee, and on an appeal to the circuit court a similar verdict and judgment was rendered, from which the appeal is prayed. The claim by the appellee against the appellant is for the negligent killing of a mule belonging to the appellee by the employés of the appellant, and while in the discharge of duties pertaining to the employment.

While the weight of the testimony is with the appellant, the instructions being proper, this court has no power to reverse the judgment unless the verdict upon which it is based is flagrantly against the evidence. The cause of the verdict against the company is the conflict of the testimony of those in charge of the train, and that of those testifying for the plaintiff. If the mule was knocked from the track at the place designated by the witnesses for the plaintiff, the company's agents might have avoided the injury; while, on the other hand, if the animal was struck at the point fixed by the employes, and in the manner detailed by them, it was impossible to have prevented the accident. If the statements are true, as made by the plaintiff and sustained by his witnesses, then the theory of the defendant as to the cause and manner of the killing may be doubted, and the mere weight of the testimony being on the side of the railroad company does not authorize a reversal. Besides, there have been three trials of this case, the jury in each instance returning a verdict for the plaintiff. The jury returned a verdict in the police court. On the appeal to the circuit court, the jury returned a like verdict that was set aside by the trial judge, and a retrial ordered. On the third trial still a verdict was rendered for the plaintiff. Under such circumstances this court ought not to disturb the judgment below.

Affirmed, with damages.

SPALDING v. COMMONWEALTH.

(Filed January 17, 1889.)

1. Taxation of fund in hands of receiver—Where the ownership of a fund in the hands of the circuit court's receiver is in litigation the county court may, by leave of the circuit court, direct the receiver to list the fund for

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taxation, or, what is preferable, the circuit court itself should direct the receiver to list the property and pay the taxes. And the circuit court, in this case, having by an order consented that the county court might direct the receiver to list the fund in his hands, and directed him to pay out of the fund whatever taxes might be assessed against it, it was not necessary that the claimants of the fund should be brought before the county court. A proceeding against the receiver alone to compel him to list the fund was all that was necessary.

2. Receivers—Before suit can be brought against a receiver, leave of the court by which he was appointed must be obtained.

3. Taxation—Listing by county court - Under section 25, article 5, chapter 92 of the General Statutes the county court can, in case of a mere failure to list, direct its clerk to take the list of the delinquent, he having first been summoned to show cause against it. The offending in such case is confined to the mere failure to list, and a summons under said section need charge no more.

Samuel Avritt for appellant.

Sam T. Spalding and Lewis Edelen for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Holt.

The estate of Felix Mercer being in litigation in the Marion Circuit Court, an order was made by it in 1881 placing in the hands of the appellant, and directing him to loan it out, about $20,000 left by the decedent. The commissioner complied with the order, and has since continued to loan it, owing to the right to the fund remaining unsettled, taking notes therefor, presumably payable to himself. In June, 1885, upon motion of the proper parties, the court granted leave to them to institute suit in the Marion County Court to compel the commissioner to list the fund for State and county taxation for the years 1881 to 1885, inclusive; and the order further provided that the commissioner should, out of the fund, pay such sums as might be adjudged for these purposes. It does not appear that the estate had ever been listed for taxation, or that any taxes had ever been paid upon it for the years named. After the granting of this leave the sheriff of the county reported in writing to its county court clerk the appellant as delinquent in having failed to list said fund or pay taxes upon it, and, therefore, the latter officer issued a summons against the commissioner to appear before the county court at a time and show cause, if any existed, why the estate in his hands should not be listed for the years above named for county taxation.

A demurrer to the proceeding having been overruled, as well as a motion to quash the summons, an answer was filed by the appellant setting up how he had received the fund; that he had no interest in it, the notes being held by him subject to the order of the court; that the money belonged to Mercer's heirs, who mainly resided in other counties, and were necessary parties to the proceeding; that they were the proper parties to list it, and that he was not the possessor of it save as commissioner. A demurrer having been sustained to the answer, and the appellant failing to plead further, the county court rendered a judgment holding him liable for the taxes, and directing its clerk to take the list of the estate in appellant's hands for said years. He appealed to the circuit court. The record is a meager one, and while in the last named court the motion to quash the summons appears to have been re-

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newed and the demurrer to the proceeding again presented, yet there does not appear to have been any express ruling as to either; nor was the demurrer, filed in the county court to the answer, renewed by any order in the circuit court; but it is, perhaps, proper to regard the final judgment in the latter court, and which affirmed the judgment of the county court, as acting upon them, and we will so treat it. No reply was ever filed to the answer in either court.

It is contended, first, that there is no law warranting such a proceeding; that under the statute a delinquent can only be proceeded against for a fine and triple tax, and that a listing can only be compelled, if at all, by means of this penalty. It was, however, settled otherwise in the case of the Louisville & Nashville R. R. Co. v. Commonwealth, 85 Ky. 198, 8 Ky. Law Rep. 840, it being there held that, under section 25, article 5, chapter 92 of the General Statutes, the county court could, in case of a mere failure to list, direct its clerk to take the list of the delinquent, he having first been summoned to show cause against it.

The offending in such case is confined to the mere failure to list, and a summons under said section need charge no more. This was substantially done in that issued against the appellant because he was required to show cause, if any existed, why the estate should not be listed.

It is a general rule that, before suit can be brought against a receiver, leave of the court by which he was appointed must be obtained. This is because one court should not be allowed to take the property or fund, already properly under the control of another court, away from it. To do so would be a disregard of the rights of those already contending over the estate, and create a conflict of jurisdiction injurious to public interests and individual right. (Barton v. Barbour, 104 U. S., 126.) There was no necessity, however, in this instance for a resort to another forum. It is true that, under our law, the county court is the only power which can direct the listing of property for taxation which has been omitted by the assessor. Here, however, was a fund in the hands of the court's receiver. It was under its control. It was the estate of a decedent of Marion county. The right to it was in litigation. If the averment of the answer, that it belonged to Mercer's heirs, can be considered as one of fact, and is, therefore, in the absence of a reply, to be taken as true, yet the fund had never been distributed, and it was not known what portion of it would finally go to each of them. He or she could not, therefore, intelligently list his or her interest in it. Indeed the litigation might be of such a character as to consume it, or, as a result of it, the heir might not ultimately receive anything, and from the very nature of the case he or she could not list any portion of it. It was yet the estate of the decedent, subject to distribution by the court. It or its receiver was the possessor of it. The money has always been in Marion county, and has there received the protection of the law, and must in fact yet be distributed by its court. Undoubtedly, if it had already been listed for taxation, the court having control of it could have ordered its receiver to pay the taxes, and we see no reason why, when it had not been listed, the court could not have directed its receiver to do so, and also pay the taxes. There was, therefore, really no necessity for obtaining leave to resort to legal proceedings in another tribunal. The circuit court could have ordered its receiver to go into the county court and have it listed, and then pay the taxes. It, however, saw fit to arrive at it in an indirect manner, and while it was not the best mode, yet it was not an illegal one. It consented that another

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tribunal might take jurisdiction over its receiver as to this particular matter, and direct him as to it; and at last, in this instance, by reason of the appeal, it in fact controlled its receiver in the matter, and affirmed what the inferior tribunal had ordered to be done. So that at last the circuit court may be regarded as having directed its receiver to go into the county court and list the estate under its control.

It is contended it will not do to charge officers like receivers and sheriffs with the taxes upon funds transiently in their hands, and which may happen to be held by them upon the particular day when the owner or possessor is chargeable with the taxes. In this we concur. It would interfere with the proper transaction of business. The case presented is, however, a different one. Here was the estate of a decedent under the control of the court.

It was yet to be distributed. It was as yet uncertain as to whom it belonged, or at least what portion, if anything, each heir would finally receive. From the very necessity of the case it was proper for the court to consent that another tribunal might direct its receiver to list the estate in his hands, or what would have been preferable, it should itself have directed its officer to go and list it and pay the taxes.

The order of the circuit court granting the leave to another tribunal to pass upon the question of assessment also directed its receiver to pay any taxes that might be assessed against the fund. This entitled him to a credit for any sum he might thus pay; and in fact the judgment upon the affirmance of the appeal from the county court expressly directs such credit to be given. No loss can, therefore, come to him.

The provisions of chapter 92 of the General Statutes show it was intended that all property should contribute its proper proportion to the means necessary to support the county and State governments. They were enacted in the spirit of fairness and equality, and property situated like that in question will escape, and receiverships become exceedingly popular, unless the court in control of it can order its officer holding it to list it and pay the taxes upon it. Where the ownership of the fund is in question, and it is in litigation, there is no other practical way of reaching it. Here it could not be properly assessed to the owner. Even if, by reason of the averment in the answer of ownership in the heirs, it can be said that the owners were known, yet there had been no distribution of it to either of them—its situs had not changed—and one of them, in giving in his list, could not take into consideration any of this estate because he could not tell what he would ever get, if any of it. It is unlike the case which was presented in the City of Louisville v. Sherley, &c., 80 Ky. 71, 3 Ky. Law Rep., 568, because there not only the ownership of the fund sought to be taxed had been ascertained, but it had been allotted to the owner.

It is contended, however, that it belongs either to the personal representative or the heirs, and that they should have been brought before the circuit court, and the question determined. This would, perhaps, have required the inferior court to determine the very question at issue in the superior tribunal, and which might, for years, be undetermined. Such a conflict of jurisdiction would not only be useless, when the taxes could, without injury to any one, be paid out of the fund by the receiver under the order of the court, but might result in serious injustice. If the heir alone were proceeded against he could very well say: "There has been no distribution of the estate. I do not know the value of my interest, if I have any, or what I will ultimately receive."

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The estate should pay its proper proportion of the public burden in return for its protection under the law, and unless the mode indicated herein be followed it, and many thousand dollars situated like it, would escape taxation.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

THE WESTERN ASSURANCE CO. OF TORONTO, CANADA v. MEUTH.

(Filed January 16. 1889.)

1. Insurance—Failure to issue policy—An accepted application for insurance imports an agreement to issue the policy in general use by the insurers in execution of the contract, and the provisions of this policy control the right of recovery in the event no policy is issued.

In this case, the application having been accepted, but no policy issued, the company has the right to rely upon a provision as to limitation contained in the policy which the agent was authorized to issue, being the policy in general use by the company; and the insured can not claim that this provision is not binding upon him because the defendant did not furnish him with the contract, as there is nothing to show that the insured ever, at any time, made any demand upon the company for a policy of insurance, or ever informed the company or its managing officers that he claimed that the company was liable for the loss sustained, the only demand made being upon the local agent about three years after the loss.

2. Pleading—Inconsistent defenses—A party may deny making a contract at all, and yet may rely upon any defense which he has to the contract which plaintiff claims he made. Therefore, the denial by the defendant in this case that it made any contract at all, and the reliance upon the provision as to limitation, which the defendant claims was a part of the contract, if any was made, are not inconsistent defenses.

T. E. Ward for appellant.

Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Presiding Judge Ward.

For the purpose of considering the only question we deem important to the rights of the litigants in this case it may be assumed, on behalf of appellee, that he made an application for insurance in appellant's company, which application was accepted; that he paid the premium to its agent, and he agreed to issue a policy of insurance to appellee as soon as he received the necessary blank policy of insurance.

In this state of case Mr. May, in his work on Insurance, section 43, says: "If, upon all these points, an agreement has been arrived at, and no stipulation is made that the delivery of the policy shall be the test of the consummation of the contract, and no law makes such a delivery a condition precedent to its validity from that time unless another time is fixed, the contract is complete, and binds the parties. The policy, as we have seen, is not essential to its validity. It is but the form and embodiment, the expression and

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evidence of what has already been agreed upon, adding nothing thereto and detracting nothing therefrom. And whether issued immediately upon the arrival at a mutual understanding, or subsequently before the loss, or after the loss, with or without knowledge, or not issued at all, the obligations of the parties are not affected. If the insurers refuse, under such circumstances, to issue a policy because a loss has intervened, or any other change has taken place which would not be a defense under the policy if that had been delivered, they will not be allowed by the law to take advantage of the fact that no policy has been issued, but in divers modes, stated in another place, will be compelled to recognize their obligation just as fully as if a policy had been issued. An accepted application imports an agreement to issue the policy used by the insurers in execution of the contract; and this policy, when issued, becomes the evidence of the contract."

The principle, as thus stated, is no less just than reasonable, and, as applied to the facts of this case, is peculiarly so, because appellee's contention is that the agent agreed to issue him a policy as soon as he received the blank, the necessary inference is, aside from the legal implication, that the blank was the kind that the company used in issuing policies generally.

The appellee's property having been destroyed by fire within the time named in his application, and he having sustained loss to the amount of the indemnity provided for, the appellant company, among other defenses, relies upon a provision as to limitation which it avers was contained in the policy which its agent was authorized to issue, and would have been in the policy which would or should have issued on appellees' application. The agent was not authorized to issue any policy which did not contain this provision.

This provision was in substance that no action could be maintained for a loss under the policy unless begun within twelve months next after the loss occurred. The action was not begun until more than three years after the fire.

It is not claimed, and can not successfully be claimed, that such stipulations are not binding, and we deem it unnecessary to cite authorities to show that they are, but it is claimed that appellant should not be allowed to rely upon this defense because it denied making any contract at all. These defenses are not inconsistent. A party may deny making a contract at all, and yet may rely upon any defense which he has to the contract which plaintiff claims he made. Or, in order to present his entire case, he might deny making the contract claimed by the plaintiff, and aver that he did make another contract about the same matter, and then rely upon defenses growing out of that contract, if it was in fact the contract actually referred to by plaintiff, and the contract actually made.

It is also insisted that the appellant should not be allowed to rely upon this provision of its contract because it did not furnish the defendant with the contract, so that he might be informed of its peculiar provisions; and the case of Springfield Ins. Co. v. Jenkins, 9 Ky. Law Rep., 932, is relied upon to support this contention.

It is a sufficient answer to this to say that there is nothing to show that appellee ever, at any time, made any demand upon the company for a policy of insurance, such as he claims ought to have issued to him, that he might be informed as to his rights. There is no claim that he ever, at any time, informed the company, or its managing officers, that he claimed that the company was liable for the loss sustained, or made demand that it should

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pay him. The only demand which he claims at any time to have made was upon the local agent, and that was but a few days before the institution of this suit. Up to that time he seems to have acted upon the idea that he was not insured. So there is nothing in pleading or proof conducing to show that the company, upon proper demand, withheld any information to which the appellee was entitled, or that it was, by its conduct, estopped from relying upon this defense.

The judgment is reversed and the cause remanded for further proceedings consistent with the principles of this opinion.

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SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE R. R. CO. v. YOWELL.

Filed January 23, 1889. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Contributory negligence—A defendant who is guilty of willful negligence can not rely upon contributory negligence on the part of the plaintiff. Whether he can do so when his negligence is gross, yet not willful, is not so well settled, and is not necessary to be determined in this case.

The plaintiff was a passenger in a caboose attached to a freight train on defendant's road. When the train stopped at the station at which he was injured the car in which he was riding was detached from the other cars which, omposed the train and was left standing on the track; this was done for the purpose of doing switching at that station. During the switching four empty cars on the end of the train were shoved and then cut loose, and in this detached condition, and subject only to the control of a brakeman, were allowed to roll down against the caboose in which the plaintiff was standing, he having gone to the door to see what was going on; and although he saw the cars coming and braced himself to resist the shock, its force was so great as to dash him violently against the floor of the car, causing the injuries complained of. Held—That these facts established a reckless indifference to the safety of the passengers, and authorized a verdict for plaintiff. And the fact that the plaintiff was unnecessarily standing up and would not have sustained the injury if he had kept his seat, was not sufficient to excuse the defendant, whether its negligence was gross or willful.

2. Negligence—Instructions—The instructions correctly defined gross and willful neglect (L. & N. R. R. Co. v. Mitchell, 10 Ky. Law Rep., 211; L. & N. R. R. Co. v. McCoy, 5 Ky. Law Rep., 397), and such instructions, defining legal terms, being necessary to the proper understanding of other instructions, are not abstract.

3. Bill of exceptions—Although an instruction has the word "refused" at the foot of it, yet as the body of the bill of exceptions shows that it was given, and there is no complaint of its refusal in the grounds for a new trial, it must be presumed that it was given. But even if not, the error of the court in refusing it can not be considered, as it was not relied upon in the grounds for a new trial.

Rountree & Lisle for appellant; Avritt & Russell for appellee.

JONES v. McKENNEY, &c.

Filed January 23, 1889. Appeal from Lincoln Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Indemnifying bonds—A sheriff who has in his hands an execution of fieri facias in favor of the Commonwealth, issued on a judgment for a fine, can not demand or take a valid bond of indemnity, as provided in section 641 of the Civil Code.

W. H. Miller for appellant; R. C. Warren for appellees.

COMMONWEALTH v. KELLY.

Filed January 23, 1889. Appeal from Henry Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Liquor selling—The indictment in this case charges that on the 10th day of July, 1887, the defendant unlawfully sold, to a person named, spirituous liquors "by the pint, half pint, glass and drinks, and in quantity less than five gallons without having obtained a license therefor." Held—That the

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facts stated do not constitute an offense. The act of May 8, 1884, prescribed a penalty for the act charged in the indictment, but that statute was repealed May 17, 1886, and no other statute prescribing a penalty for the act charged was enacted until March 31, 1888.

J. S. Morris for appellant.

CISSNA v. SMILEY, &c.

Filed January 23, 1889. Appeal from Boyd Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Sureties—A surety is the creditor of the principal obligor from the time the obligation is entered into, and under the Code may avail himself of all the provisional remedies that are allowed to creditors generally against their debtors.

2. Same—Garnishment—Where a creditor seeks to subject a debt due to his debtor by a third person he can have no greater right against the latter than the debtor himself possessed.

Prior to the institution of this action the garnishees, who were made defendants, owed the principal defendant, but they were his sureties in a note past due. It is conceded that the principal defendant is, and was at the institution of the suit, insolvent. Held—That when the action was instituted the garnishees had a complete cause of action against the principal defendant to compel him to pay the debt for which they were his sureties. But, further still, the principal defendant being insolvent, a court of equity would not compel the garnishees to pay to him what they owed him until they had been released from their liability as his sureties; and the plaintiffs are in no better position than their debtor.

T. R. Brown for appellant; R. T. Burns for appellees.

RHODES v. COMMONWEALTH.

Filed January 23, 1889. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Keeping bawdyhouse—An indictment which charges that the defendants "did unlawfully keep and maintain a common, ill-governed and disorderly house, and willfully did cause and procure and suffer certain persons —men and women of evil fame—then and there to frequent and come together, and * * * unlawfully and willingly did permit the said men and women in the said house * * * at unlawful times, as well in the night as in the day, to remain drinking, tippling, cursing and whoring, to the common nuisance," etc., is a good indictment for keeping a bawdyhouse.

2. Same—If the owner of a house rents it to another to be kept and used as a bawdyhouse, and it is so kept and used, he is, in legal contemplation, the keeper of such bawdyhouse.

As the evidence in this case tended to show that appellant knew that his codefendant was a common prostitute and was keeping a bawdyhouse, yet with this knowledge continued to rent to her the house, the court properly refused to instruct the jury to find for him.

3. Evidence—It was competent for the Commonwealth to prove the general reputation for virtue of a woman who was seen frequently at the house.

4. Recalling witnesses—This court can not say that the court below abused its discretion in allowing the Commonwealth to recall witnesses and prove by them facts which the Commonwealth's attorney had omitted to ask them concerning their original examination. Before this court could reverse upon that ground the appellant must show that his case was materially prejudiced by the ruling of the court.

S. S. Sizemore for appellant; J. H. Powell for appellee.

MARSHALL, &c. v. MILLS, &c.

Filed January 23, 1889. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Barbour, reversing.

Forcible detainer—Traverse bond—A traverse bond being defective in limiting to $100 the costs and damages to which the traverser might be sub-

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jected, the court should have permitted a new bond to be executed by section 682 of the Code.

C. H. Lee for appellants; John H. Fryer for appellees.

GREENBAUM v. COMMONWEALTH.

Filed January 23, 1889. Appeal from Woodford Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Indictment—Nuisance—Pollution of stream—An indictment which charges that the defendant committed a common nuisance by habitually and periodically suffering and permitting offal and still slops to accumulate at cattle pens near a branch, and to flow into the branch, thereby polluting the waters and the air, is not liable to the objection that it charges two offenses that can not be joined, viz.: The common law offense of a common nuisance, and the statutory offense created by section 4, article 28, chapter 29, General Statutes, which provides for the punishment of any person who shall put anything into any stream or pond whereby fish may be sickened or killed, or the water rendered unfit for use, or stench be produced; and a demurrer to the indictment was properly overruled. The statute imposes a penalty for an injury to a private right, and not for a common grievance, and it is not necessary to a conviction under it that there should be any injury to the public.

2. Same—But when the act charged as a common nuisance is an act prohibited by the statute, upon failure to show that it was such as to annoy the public, so that there can be no conviction for the alleged nuisance, there may nevertheless be a conviction under the statute. And while the defendant was not prejudiced in this case by the failure of the court to so instruct the jury, it is the better practice to tell the jury what they may do in the different states of case.

3. Same—To constitute the offense charged it was not necessary that the acts charged should have been habitual or periodical. It is the result of the act rather than the act itself that constitutes a nuisance, and where a single act produces a continuing result it may be sufficient to maintain the indictment.

4. Same—The defendant had no right to pollute the water to the public injury merely to escape the pecuniary loss which would have resulted from stopping work until his trough, which had been blown down, could be replaced.

5. Evidence—In the opinion of a majority of the court the testimony of a witness, that frequently on crossing the branch members of his family "would cry out in pain and disgust at the odors," was competent for the purpose of showing the force and vigor of the stench, otherwise proved to have existed, though not competent to prove that there was a stench. In the opinion of the writer (Judge Bowden) it was mere hearsay, and incompetent.

W. Lindsay for appellant; P. W. Hardin for appellee.

COMMONWEALTH v. KENMAN.

Filed January 23, 1889. Appeal from Owen Circuit Court. Opinion of the court by Judge Bowden, reversing.

Liquor selling—Indictment—To charge in an indictment that the defendant unlawfully sold liquor "by the drink" is equivalent to charging that he sold it "as a beverage," and is sufficient under a statute prescribing a penalty for selling liquor as a beverage.

John S. Gaunt for appellant.

GARRETT, &c. v. MOSBY, &c.

Filed January 23, 1889. Appeal from Metcalfe Circuit Court. Opinion of the court by Judge Bowden, reversing.

Contract in consideration of support—Appellate jurisdiction—S. and his son-in-law, J., made a written contract whereby it was agreed that the representatives of S. should, after his death, convey to J. a tract of land

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then owned and occupied by S. as a homestead; and in consideration thereof J. bound himself "to live with and support" S. and an unmarried daughter during their lives, S. and his daughter "each keeping one horse apiece; also one milch cow and a flock of sheep." J. took possession of the place under this contract and supported S. until his death, and continued to support his daughter until his own death, after which his widow supported her until she married and removed to another county. The representatives of S., after his death, conveyed the land to J., the deed stipulating that if J. failed to support the daughter of S. "in a good and proper manner, and in conformity with the original contract," the right to subject the land was retained. In this action by the daughter and her husband against the representatives of J. to recover the value of her support from the date of her marriage, the lower court adjudged that the defendant should pay her $40 per year from the date of demand until her death. Held—

1. The judgment is for an annuity, the value of which is the amount in controversy; and as there can be no doubt that the value of this annuity exceeds $100, an appeal lies.

2. Looking to the value of the land and to all the circumstances, the parties must be understood as having contracted with reference to the continued residence of all of them at the homestead of S., and to the support of the father and daughter and their stock at that place: and the daughter, having voluntarily left, is not entitled to have money paid for her personal support.

Garrett & Dohoney for appellants; Lewis McQuown for appellees.

COMMONWEALTH, FOR USE, &c. v. BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.

Filed January 30, 1889. Appeal from Franklin Circuit Court. Opinion of the court by Judge Bowden, affirming.

Taxation—Construction of statute—An act approved February 27, 1867, provided for the submission to the voters of the city of Frankfort of "a proposition to levy a tax, not exceeding twenty-five cents on the one hundred dollars of taxable property, for the benefit of the common schools of said city," the act further providing that "if the result of the poll be in favor of the tax, then the common council shall be, and is hereby, empowered to levy a tax not exceeding the rate hereinbefore specified." The present charter of the city provides that the school fund shall consist, in addition to the pro rata due the city from the State, of all moneys arising from the taxes levied and collected under and pursuant to the act of February 27, 1867, "which, having been ratified by a vote of the said city, is declared in full force so far as to make it the duty of the board of councilmen of said city to levy and cause to be collected a tax of twenty five cents on each one hundred dollars' worth of taxable property in said city for the benefit of the school fund" Held—That, under the original act, the council had a discretion as to the amount of the tax to be levied, and, reading the two acts together, the court is of opinion that the council yet has such a discretion as the original act intended.

In this proceeding for a mandamus it is stated that the council has levied a tax of fifteen cents, and refuses to levy a tax of twenty-five cents, but it is not stated that the needs of the school require more than the rate levied. Held—That a demurrer to the petition was properly sustained.

G. W. Craddock and Ira Julian for appellants; G. C. Drane for appellees.

MOORE & CO. v. McALPIN, POLK & HUBBARD.

Filed January 30, 1889. Appeal from Henderson Circuit Court. Opinion of the court by Judge Bowden, affirming.

New trial—Diligence—This was a proceeding to obtain a new trial on the ground that a record in the office of the clerk of the United States District Court could not, after due diligence, be produced at the former trial. The only effort to show diligence was to prove by persons other than the clerk

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that they made search for the paper, and that it was not found until after the trial of the case. It was not proposed to show that the clerk or a deputy was asked in regard to the paper. Held—That the court can not say that such a search was diligent.

H. F. Turner and R. H. Cunningham for appellants; Hughes & Hughes for appellees.

ANDERSON v. WEST KENTUCKY COLLEGE.

Filed January 30, 1889. Appeal from Graves Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Pleading—Objection too late—In this action by an incorporated college to recover a subscription made to it by the defendant the petition failed to allege when the plaintiff was incorporated, or how, but no objection was made to the petition in the lower court on that account. Held—That the objection now comes too late. It should have been taken by motion to make more specific.

2. Subscriptions to corporations—It appears from the evidence that the plaintiff is a corporation acting under what is known as a county court charter; that the preliminary agreement was entered into before the execution of the note sued on, and that the corporation was afterwards organized by the election of officers. It does not appear when the preliminary agreement was filed, nor whether other steps necessary to give validity to the acts of the corporation from the date of such filing were taken. Held—That as the defendant did not rely on the nonexistence of a corporation with which he could contract, it may be presumed that the necessary steps were taken, and within the necessary time, to perfect the incorporation, and to validate all its acts as such, from the date the articles of incorporation were filed in the clerk's office.

3. Same—Agreements made with a corporation before its incorporation, and in view thereof, may be accepted and enforced by it after its incorporation.

4. Same—The note sued on was made payable when $15,000 should be subscribed. The effort to raise as much as $15,000 was afterwards abandoned, and subscriptions were solicited and taken, payable when $10,000 should be subscribed. The subscriptions reached $15,000. Held—That the change of purpose did not, in and of itself, affect defendant's obligation, which remained binding and enforcible whenever $15,000 should be subscribed, there being no claim that defendant's condition was altered upon the faith of the temporary abandonment of the effort to raise $15,000.

W. W. Robertson, L. Anderson and E. W. Hines for appellant; J. E. Robbins for appellee.

SMITH v. ANDERSON & CO.

Filed January 30, 1889. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Ward, affirming.

Warehouse receipts—A warehouseman has no authority to issue a receipt to one person for the property of another in store with him as warehouseman.

D. & Co., warehousemen, issued a receipt acknowledging that they had received of T. & Co. the cotton described therein, and delivered the receipt to S. to secure a loan made by him to them on the day the paper bears date. Held—That as the receipt showed upon its face that the warehousemen were not authorized to issue a receipt to any one but T. & Co. for the cotton described, it was a nullity, and a fraud palpable upon its face.

James S. Pirtle and Kohn & Barker for appellant; John C. Russell and John L. Dodd for appellees.

ELIZABETHTOWN, LEXINGTON & BIG SANDY R. R. CO. v. BORDERS.

Filed January 30, 1889. Appeal from Boyd Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Railroads—Damages from construction of road—In an action against a railroad company by an abutting lot owner to recover damages for injury to his property, by reason of the construction of the road, it was not error to

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permit the plaintiff to prove the value of his lot immediately before the construction of the defendant's road. The value of the lot just before it became generally known that the road would be built in front of it is one of the factors in estimating plaintiff's damage, to which the attention of the jury should be directed by the evidence, and to which it should be confined by the instructions; but this does not exclude all evidence of value at other times.

Breckinridge & Shelby for appellant; W. C. Ireland for appellee.

MEGUIAR, HELM & CO. v. PETERS.

Filed January 30, 1889. Appeal from Bath Circuit Court. Opinion of the court by Judge Barbour, affirming.

Partnership - In this action by appellants against appellee to recover money advanced to a firm engaged in the business of buying and selling tobacco, of which it is alleged appellee was a member, the court holds that while the appellants established a partnership, the weight of the evidence shows that no liability for losses rested upon appellee, and that appellants made the advances with full knowledge that appellee was not to be held responsible.

V. B. Young and E. W. Hines for appellants; D. B. Lacey for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. ROGERS.

Filed January 30, 1889. Appeal from Barren Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. A common carrier can not relieve itself by contract against its own negligence.

2. Grounds for new trial—"Error of law occurring at the trial, and excepted to at the time," is, as a ground for new trial, too general to require the court to review its action in any particular.

3. Continuance—The court properly refused a continuance, as the affidavit filed failed to show that the absent witnesses were within the jurisdiction of the court, or that their attendance could be procured if the case was continued.

4. Exceptions to depositions were based upon facts outside the record, which could only be established by proof aliunde. The affidavit of counsel was filed in support of the exceptions, and is a part of the record, but it does not affirmatively appear that this was all the evidence heard upon the trial of the exceptions. Held—That this court must presume that the action of the court in overruling the exceptions was right.

5. Reversible erorrs—As the action of the court overruling the exceptions to depositions was not made a ground for new trial, it can not be considered on appeal.

Porter & McQuown for appellant; Boles & Duff and W. P. D. Bush for appellee.

WHITE, &c. v. STATEN.

Filed January 30, 1889. Appeal from Bath Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Decedents' estates—Agreement as to distribution—The heirs of an intestate agreed among themselves and with the administrator of the estate that M., the illegitimate child of a deceased daughter of the intestate, should receive a few articles of personalty belonging to the estate, and should also receive a share of the estate the same as if she was the legal heir. Pursuant to this agreement the administrator distributed the estate and settled with the county court. Held—That he can not now be required to account to the heirs for the personal property received by M., and the amount paid over to her as her distributable share of the estate.

2. Fraud—The intestate, several years before her death, received a pension of $922, which constituted the principal part of her estate; $400 of this she paid to appellee, her nephew. Soon thereafter her children brought suit to have a committee appointed for her upon the ground that she was incapable

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of managing her estate, one reason assigned being that she was squandering her money, and had given appellee this $400. This was compromised, the plaintiffs executing a writing acknowledging that their mother was fully competent to manage what property she had. Upon the death of the mother appellee was appointed her administrator without objection from the children. After the settlement in the county court, and the distribution of the estate, appellants, two of the heirs, brought this suit to require appellee to account for the $400 received from their mother, upon the ground that she was illiterate and weak-minded, and that he had taken advantage of her condition. Held—That while the settlement of the suit for the appointment of a committee is not conclusive of the question, still it is very persuasive evidence that this matter of appellee's receipt of the $400 was satisfactorily explained and adjusted; and, further, appellants' present position is inconsistent with their conduct in permitting the appointment of appellee as administrator without objection on their part. Besides, as an original question, the evidence shows that appellee had given the intestate a home for several years before she received her pension, her children being unable to provide for her, and there is no reason for believing he took undue advantage of her condition.

D. B. Lacey for appellants; R. Gudgell & Son for appellee.

MENIFEE v. VANDERPOOL, &c.

Filed January 30, 1889. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Bowden, affirming.

Husband and wife—Decree to trade as feme sole—In this suit by a married woman, seeking to be decreed the rights and powers of a feme sole, it appeared that the wife owned a house in a small town, which she used as a hotel, attending strictly to her business and managing it industriously. Her father had just died, and she had an interest in his estate, from which it may be assumed she would receive property, real or personal, or both. Her husband was considerably in debt, and had no property liable to execution. Two affiants thought the purpose of the application was not to injure creditors, but solely to enable the wife to carry on business in her own name, while four affiants thought the purpose was to defraud, and that the husband's creditors would be injured by granting the application. The court concurred with the former two. Held—That the evidence shows the existence of the substantive conditions on which the relief may be granted, and this court can not say that the chancellor ought to have taken the opinion of the greater number of witnesses as to intent and effect.

J. B. Paxton for appellant; W. O. Hansford for appellees.

COTTTINGHAM v. FIREMAN'S FUND INSURANCE CO.

Filed November 14, 1888. Appeal from Henderson Circuit Court. Opinion of the court by Judge Bowden, affirming, Presiding Judge Ward, dissenting.

1. Insurance—Change of title or possession—When a change in possession is forbidden by a policy of fire insurance the policy will be rendered void if the assured places another in possession under such conditions that he can not rightfully at any moment demand an abandonment of the premises; the insured must retain the right of possession.

2. An executory contract for the sale of real estate is not a change in title, and such a contract as to insured property does not violate a condition of the policy prohibiting a change of title; but where the vendee takes possession under the contract, there is a change of possession within the meaning of a provision of the policy forbidding a change in the possession, and the policy is rendered void.

Presiding Judge Ward, dissenting, holds that a change of possession or occupancy does not affect the contract of insurance unless it is of a character which affects and increases the risk, and a change from one tenant to another of the same class of business is not a change of possession.

John L. Dorsey for appellant; Yeaman & Lockett for appellee.

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MODIFIED OPINION.

CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO. v. HEATH'S ADM'R.

This opinion, published in the last number of the Reporter (page 646), has been modified by striking out the words, "because it may be instituted in any county where the chief agent can be served," in the twenty-third and twenty-second lines from foot of page 649, and inserting in lieu thereof the following: "Because it may be instituted in another county than that in which the tort was committed as provided by section 72 of the Code, and its chief officer or agent may be served in any county where he may be found;" and the second paragraph of the syllabus, page 647, should be correspondingly modified.

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The Kentucky Law Reporter

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WALTER G. CHAPMAN . . . . . Frankfort, Ky.

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KENTUCKY COURT OF APPEALS.

MOORE'S ADM'R, &c. v. SMITH, &c.

(Filed January 19, 1889.)

1. Wills—Depositions of attesting witnesses—Section 31 of chapter 113 of the General Statutes, as to the manner of taking depositions of attesting witnesses to wills, applies alone to the court in which the will is offered for probate, and not to depositions taken to be used in the circuit court upon appeal from the court of probate.

2. Exceptions to depositions—Continuance—But if a commission had been necessary to take the depositions of the attesting witnesses in this case, yet as exceptions were not filed to the depositions until after the commencement of the trial, the court having sustained the exceptions, should have granted a continuance upon the application of the propounders of the will, and not have required them to submit to a judgment against them.

3. Same—While exceptions to depositions which go to the competency of the witness, or to the relevancy or competency of the testimony, may be filed at any time during the trial, no other exception can be regarded unless it be filed and noted on the record before the commencement of the trial and before or during the first term of the court after the filing of the deposition.

O'Hara & Bryan, Wm. Lindsay, D. W. Lindsey and A. G. Winston for appellants.

J. F. & C. H. Fisk for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Pryor.

The paper in controversy, the alleged will of Samuel S. Moore, was admitted to probate in the Boone County Court upon the testimony of B. F. Bristow, one of the subscribing witnesses. The probate was opposed by the next of kin of the devisor, and an appeal taken to the circuit court. There seems to have been a mistrial of the case at the first term of the circuit court at which the case was called, and on the last trial, in 1886, the court instructed the jury to find that the paper offered was not the will of Moore.

B. F. Bristow and C. W. Miller were the attesting witnesses, and their

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depositions had been taken, and were offered to be read on the trial. Miller was dead when this case was tried, and his deposition had been taken in the absence of the original paper that he had attested as the will of Moore. He was, however, presented with a copy attested by the clerk of the Boone County Court, and stated that he witnessed a paper similar to that, as he thought, in conjunction with B. F. Bristow, at the instance of the testator and in his presence. The deposition of Bristow was also offered to be read, and when his deposition was taken the original paper was presented and identified by the witness as the paper attested by him and the witness Miller at the instance of, and in the presence of, the testator, speaking also as to the signature of the testator and his competency to execute such an instrument.

After the parties had not only answered themselves ready for trial, but had gone into the trial, and offered to read the depositions of Bristow and Miller, counsel for the contestants filed an exception for the first time, to the effect that the depositions were incompetent because not taken pursuant to section 31, chapter 113, title "Wills," General Statutes. That section provides that when any will or any such authenticated copy is offered for probate, and a witness attesting the same is out of the State, or, if in the State, can not attend on account of sickness, age or other infirmity, etc., or resides at a distance of more than fifty miles, such court may cause a commission to be issued, annexed to the will or copy, and directed to any person authorized by law to take depositions, to take his deposition. The deposition is required to be certified as depositions are in other cases, and no notice need be given unless the probate is offered by some one who has made himself a party, etc. The pr pounders of the will insisted that the exception came too late, and should be disregarded, but the trial court adjudged otherwise, and sustained the exception. Counsel then asked for an attachment against the witness, Bristow, who lived at Covington, a distance of less than fifty miles from the place of trial. The attachment was allowed, and returned by the officer to the effect that the witness was sick in bed, and unable to attend court. The affidavit of the witness and his attending physician showed that the witness could not attend. The propounders of the will then offered to read the deposition, but this was refused by the court on the ground that the deposition had not been taken under a commission, as provided by the General Statutes. Counsel then filed an affidavit to the effect that they were taken by surprise by reason of the exceptions and the ruling of the court, and that the case be continued. This the court refused to do, and instructed the jury to find against the paper and for the contestants, hence this appeal.

If a commission had been necessary to take the depositions of the attesting witnesses in a case like this, a continuance under the circumstances should have been granted.

Exceptions to competency and the relevancy of testimony may be made at any time during the trial, but no other exception "shall be regarded unless it be filed and noted on the record before the commencement of the trial, and before or during the first term of the court after the filing of the deposition." (Section 587, Carroll's Code.) Besides, the depositions in this case established, if the witnesses were to be believed, and there was nothing to question the character of either for truth, the paper in controversy as the will of Samuel Moore. They were the attesting witnesses to the paper. Their testimony was vital to the propounders, for without it they had no case in court, and sustaining the exceptions left nothing for the trial judge

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to do but to instruct the jury to find for the contestants. The preparation of the case showed proper diligence on the part of the propounders and their attorneys. They had taken these depositions prior to the term at which a mistrial was had. No exception had been filed urging the objection that a commission was necessary until the trial was under progress, and it was, therefore, an abuse of judicial discretion to compel the appellants to submit to a judgment against them under such circumstances. If, however, the question was alone presented as to the application of this section of the statute to the practice in the circuit court, it is evident that it applies alone to the court of original jurisdiction, in which the paper is offered for probate. While the statute in regard to wills may be said to contain all the law on the subject, it was never designed that upon a mere question of practice in the conduct of the appeal in the circuit court, the trial judge should be confined to the mode of obtaining the attendance of witnesses, and the parties to the mode of taking depositions, provided by the statute for the probate of wills in the county court. The circuit court is not a court of probate. It has no power, as the county court has, to admit a will to probate without notice, where no one has made himse f a party opposing it. In fact the circuit court has no original jurisdiction over the subject-matter, and when brought to the circuit court by an appeal the hearing should be conducted as any other civil proceeding in that court.

The statute provides that where a will is offered for probate the testimony may be obtained in a certain mode, that is, by a commission directed to some one to take the deposition. It was executed so as to inform that court how to proceed when the witnesses could not attend who had attested the paper, and as a rule of procedure applies alone to the probate court. If the deposition had been taken to be read in the county court without a commission, and then offered to be read in the circuit court, the exception might be well taken, and then the exception should be filed before trial, if the contestants had been previously notified that it would be offered. In this case the witness was aged, infirm, and unable to attend court, and, therefore, by an express provision of the Code, section 554, the propounders of the paper should have been allowed to read it to the jury. If this commission is necessary in the circuit court, then the propounders of the will could take no step to prepare for trial by taking the depositions of the attesting witnesses until the circuit court convened, and then apply for a commission to take the deposition. It is plain to us that the mode of taking the deposition, as provided by the statute, applies only to the probate court.

The judgment below is, therefore, reversed, with directions to set aside the verdict of the jury, and award the appellees a new trial and for proceedings consistent with this opinion.

WILSON, &c. v. SUGGETT'S EX'ORS, &c.

(Filed January 19, 1889.)

1. Vendor and vendee—In this action against the personal representatives of the vendee to enforce a vendor's lien on land it appears that the vendor did not have the legal title to any of the land which he agreed, by title bond, to convey, and the equitable title to only about one-third of it. The vendee,

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ascertaining this fact, purchased from the holders of the legal title, and her devisees now claim to hold under them. The vendee paid to the vendor about one-third of the price which she agreed to pay for the land. The circumstances tend to show that the vendees took possession under her purchase from the vendor. Held—That the vendor is equitably entitled to the value of the interest in the land to which he is shown to have had title: and the lower court, in cancelling the note sued on and quieting the title of the vendee's representatives, has arrived at the right and equity of the matter as nearly as possible.

2. Married women—The vendee being a married woman when she executed the note sued on, and her coverture being pleaded, the court properly refused to render a personal judgment against her personal representative.

3. Evidence—The vendor was not a competent witness to prove the acts and conversations of the vendee, she being dead.

Thos. E. Ward for appellants.

H. F. Turner for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

This record presents a confused state of case. So much so that it is difficult, if not impossible, to arrive at a conclusion altogether satisfactory as to the rights of the parties.

The appellant, J. B. Griffin, held, as trustee for Daniel E. Brown, the title to a tract of land. The latter at his death left four children, to wit: Almira E. Suggett, James D. Brown and Eliza and Judith Sheets. It does not appear whether the father had an absolute right to the land or only a life estate; nor clearly whether, if but the latter, the land at his death was to pass equally to his children, or to the three daughters only. In any event, prior to his death in 1857, the son, in 1853, conveyed whatever interest he had, if any, to his sisters, Judith and Eliza Sheets, and Mrs. Suggett, by the same deed, conveyed her interest to L. W. Brown. Judith Sheets died, leaving two children, one of whom died, leaving the other as the sole heir to this interest.

Eliza Sheets died, leaving seven children entitled to her interest, James and George Sheets being two of them. In 1858 L. W. Brown, who either claimed to own by purchase the entire land, or else all of the interests save those of James and George Sheets, executed to the appellant, Griffin, a title bond for the land. Thereafter, but during the same year, the latter, as he testifies, purchased the interests of James and George Sheets direct from them. A title bond to Griffin purporting to be signed by James, and the testimony tends to show he executed it, is on file in this action, but no title paper whatever was given by George Sheets to Griffin; and there is no written evidence or competent verbal testimony showing that L. W. Brown had acquired any right in the land by purchase outside of the deed of 1853 from Mrs. Suggett. On the 10th day of January, 1863, the latter purchased the land from the appellant, Griffin, and for the purchase money executed her note to him for $600, payable March 1, 1864. It was assigned to the appellant, M. L. Wilson, in December, 1864, $200 having been paid upon it in March prior thereto. The appellants claim that a title bond was executed by Griffin, but it is not filed, nor is it shown by competent evidence that any was ever given.

Mrs. Suggett died in 1877, and this action was brought in 1878 upon the

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$600 note, against her executors and devisees, seeking a judgment in personam against the personal representatives, and one in rem against the land for the purchase money. It is clear the first could not have been rendered, because Mrs. Suggett was, at the date of the execution of the note, a married woman, and her coverture is relied upon as a defense to any such relief. The appellees claim that she, finding Griffin had, as they assert, not even an equitable title to the land, purchased the same from L. W. Brown and the Sheets heirs, and they exhibit deeds, duly executed and recorded, and purporting to have been made for a valuable consideration, from all of them to her, save James Sheets. That from L. W. Brown is dated May 17, 1864, the others bearing a subsequent date, but all prior to April 1, 1870. It is claimed by the appellants that, by the terms of the contract between Griffin and Mrs. Suggett, the latter accepted the former's title bond, and agreed to look to the holders of the legal title for it. This, however, is denied, and there is no competent testimony tending to show it. The evidence of the appellee, Griffin, relative to it, can not be considered, as the party to the transaction is dead, and the testimony relates to her acts and conversation.

It is certain that Griffin did not have the legal title to the land. It does not appear that L. W. Brown was in fact the owner by purchase of any interest in the land, save that of Mrs. Suggett, and the evidence tending to show the execution by him of the bond purporting to be from him to Griffin is not of a very satisfactory character. This is true also as to the genuineness of the bond from James Sheets to Griffin. At most, the latter is not shown to have acquired even an equitable title to the land, save the interests of L. W. Brown and James Sheets.

It is denied that Griffin was the owner of the land or had possession of it at the date of the contract with Mrs. Suggett, or that she took possession of it under him. Upon the contrary the appellees claim that she did so under her purchases from L. W. Brown and the Sheets heirs. The appellants assert that Griffin had possession of it from 1859 to 1863, when he sold to her. The evidence upon this point is somewhat uncertain. To some extent it sustains the assertion, but there is also testimony tending to show that during this time it was occupied by squatters.

All of the circumstances tend to show, but not very clearly, that Mrs. Suggett took possession under her purchase from Griffin; and if so, he is certainly equitably entitled to the value of the interest in the land to which he is shown to have had title. The fact that he held the legal title as trustee for her father during his lifetime cuts no figure, inasmuch as there is no claim that he made the sale to her by virtue of any such holding. The sale was made by him to her for $600. No right is shown in him to but little, if any, more than one-third of the land. She paid $200 upon the note, or one-third of the price she agreed pay him for the land. This, coupled with the fact that about fourteen years elapsed from the maturity of the note before this action was brought, during which one of the principals to the transaction died, and which delay is unexplained, creates a strong presumption that the lower court, in cancelling the note and quieting the title of Mrs. Suggett's devisees to the land, has arrived at the right and equity of the matter as nearly as is possible; and we are not disposed, in the dim light now shed upon the transaction, after the lapse of many years, by a meagre record, to disturb its conclusion.

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We have considered the testimony taken in the case, so far as it is competent, as we fail to see upon what ground the lower court excluded all of it.

Judgment affirmed.

COX, &c. v. PREWITT, &c.

(Filed January 19, 1889.)

Where a patent is issued to a person who is dead at the issuing of the patent his heirs take the title to the land so patented as if the patent had been issued to such heirs by name. And it does not make any difference that the survey was made after the death of the person in whose name the patent was issued, as it must be presumed that the price fixed for vacant lands by the county court was paid, and an order of the court authorizing him to enter and survey the land was duly obtained.

C. W. Lester for appellants.

R. D. Hill for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellees instituted this action to recover the land in contest, claiming under a patent issued in 1869 in the name of William Prewitt, whose heirs at law they are. A recovery was resisted in the lower court upon the grounds, first, that in 1857 appellant Cox, under whom appellant White claims, had the land duly surveyed according to law with a view of obtaining a grant therefor from the Commonwealth; and, second, that the patent to Prewitt in 1869 is void, and consequently the land was unappropriated and subject to the entry and survey made for Cox in 1872, which was followed by a patent to him therefor.

There is no record evidence furnished by the appellants showing either an entry or survey of the land made for Cox in 1857, nor does it appear he ever obtained an order of court entitling him to enter and have the land surveyed. The patent obtained by him in 1882 is void, and gave him no right to the land whatever if the one issued to Prewitt in 1869 be valid. And, therefore, the decisive question in this case is whether that patent is void.

It appears that William Prewitt, the ancestor of the appellees, died in 1862, previous to the date of the patent, and also before the survey, which, as appears from a recital in the patent, was made December 9, 1868.

Article 1, chapter 50, General Statutes, is as follows: "When a patent is issued, or shall issue, or a deed shall be made to a person who is dead at the issuing of the patent or the making of the deed, the heirs of such patentee shall take, hold and enjoy the title to the estate so patented or conveyed as if such patent had issued, or deed had been made, to such heirs by name."

It seems to us the patent under which appellees claim can not be held invalid without a disregard of the plain language of the statute, which meets just such a case as is now presented.

It does not make any difference that the survey was made after the death of the person in whose name the patent was issued, for it must be presumed that the price fixed for vacant lands by the county court was paid, and an

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order of court authorizing him to enter and survey the land was duly obtained, otherwise the patent would not have been issued.

The patent having been issued in the manner and in the name of a person expressly authorized by statute, and for land it must be presumed was at the time vacant and unappropriated, must, in this case, be held valid and effectual to give appellees a title to the land in dispute and a right to recover it of appellants, whose only claim is under a junior patent, which is void at least as to the land sued for.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. BALLARD.

(Filed January 22, 1889.)

1. Railroads—Duty to female passengers—In an action against a railroad company by a female passenger to recover for an injury resulting from being taken past a station to which she had purchased a ticket, it was not improper to instruct the jury that if any of the employes of the company were "insulting in words, tone or manner," they should find for the plaintiff "damages in their discretion," not exceeding the amount claimed in the petition.

2. Instructions as to damages—Such an instruction correctly submitted the question of punitive damages to the jury, and as the question of compensatory damages was correctly submitted by another instruction, no other instructions were necessary.

3. Excessive verdict—The jury having returned two verdicts for substantially the same amount, this court will not reverse upon the ground that the verdict (for $3,005) is excessive.

H. W. Bruce, Wm. Lindsay and W. J. Lisle for appellant.

Rives & Spalding for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, a young lady, was, in February, 1882, teaching a school at Loretto, Marion county, Kentucky. Her father lived between a half and a mile from a flag station on the appellant's road, known as Harper's Ferry. The appellee, on Saturday evenings, usually went to her father's home and returned again on Monday morning to her school. She made her trips to and from Harper's Ferry station on the appellant's passenger train. Her father was in the habit of meeting her at Harper's Ferry and taking her from that place to his home on horseback. She, Saturday evening, February 13, 1882, purchased a passenger ticket, which entitled her to travel on the appellant's train from Loretto to Harper's Ferry. She boarded the train at Loretto to make her trip to the latter place. She carried with her a bundle of considerable size and a valise. The conductor, Sweeney, was in the habit of running said train on Saturday evenings, and had said train in charge that evening, and took up the appellee's ticket before the train reached Harper's Ferry. The appellee swears that the train did not blow its whistle for Harper's Ferry, nor did it stop at that place In this she is corroborated by several persons who were passengers on the train. Also her father says that he was on his way to Harper's Ferry for the purpose of

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taking the appellee home, but as the train passed the station without stopping he concluded that the appellee was not on it, and he returned to his home without going to the station. The appellee says that she discovered that the train had passed the station; that she then called to the conductor, who was at the far end of the car engaged in conversation with some one, several times before she got his attention; that he then came to her and asked her at what place she wished to get off; she said at Harper's Ferry, to which point she had purchased her ticket. He said that the train had passed Harper's Ferry, and that he could not go back to it, but he would take her on to the next station. She declined to be taken on to the next station, but claimed that she should be put off at Harper's Ferry. He said if she would not go on she would have to get off the train and walk back. She said she could do so, but she would make him pay for it. He waived his hand towards the door as if to say go, and she went, carrying her bundle and valise, and he following to the door, and standing on the platform without offering to assist her; that she had to get off the train without any assistance whatever; that a brakeman was at hand, but offered her no assistance, but seemed to be enjoying the situation; that as she got on the ground from the coach steps, the lowest step being some three or four feet from the ground, the brakeman being right at her, grinned at her with a broad grin; that the conductor's tone of voice and manner towards her were insulting; that she got off the train about a mile from Harper's Ferry and she had to walk back to it, and from thence home, carrying her bundle and valise; that from the place that she got off the train to Harper's Ferry there was no pathway; the route was rough and muddy and uninhabited; that from the walk and excitement she was made sick, not however in bed all the time, for four days. On the other hand, the conductor swears that, owing to some casualty over which he had no control, the train was not stopped at the platform, but was stopped within sixty or seventy yards after passing it; that he waited to see if any one would get up as if to get off, but no one did; that he then called out "all out for Harper's Ferry," and no one getting up as if to get off, he went on. He denied in toto the conduct attributed to him by the appellee. He says that she was put off not exceeding four or five hundred yards from Harper's Ferry. The brakeman sustains the conductor. He also says that he was not rude to the appellee, but helped her off the train. The testimony of others is to the same purport. The father of the appellee swears that on the next morning the appellee showed him the place that she got off the train, and he stepped the distance to Harper's Ferry, and it was 1,975 yards.

It is manifest that the jury believed the appellee's entire story, therefore, they awarded to her $3,005 in damages. Theretofore there had been a trial of the case upon substantially the same evidence as was introduced on the trial of this case, which resulted in a verdict of $3,000 for the appellee, which this court set aside on account of an error in one instruction, which was as follows: "If the jury believe, from the evidence, that the defendant's agent or employes, or any of them, in charge of the defendant's train, carried the plaintiff beyond the station for which she had purchased a ticket, and refused to put her off at her station, and were indecorous or insulting, either in words, tone or manner, they should find for the plaintiff, and award her damages in their discretion, not exceeding $5,000." This court disapproved aid instruction upon the ground that it was improper to authorize the

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jury to find for the appellee on account of the indecorous conduct of the appellant's employes alone; but the remaining portion of the instruction was approved.

Instruction No. 1 in this case uses the language, "were insulting, either in words, tone or manner."

The appellant objects to the instruction on account of the use of the word "tone." We can not see the force of the objection, as applied to a female passenger. The jury were told that if the appellant's employes "were insulting in tone," they should award damages, that is, if their voice was so accented, inflected or modulated as to express intentional insult, then the jury should find for the appellee. It was in the foregoing sense that the word "tone" was used; in which sense the word would be commonly understood by men of ordinary intelligence. The appellant also objects to the latter part of the instruction, which reads: "They should find for the plaintiff and award damages in their discretion, not exceeding in all $5,000." This part of the instruction is objected to because it authorizes punitive damages. It does authorize punitive damages, and the trial judge doubtless intended that it should authorize punitive damages. We think that, as an instruction on punitive damages, it was properly drawn. The remaining instructions given by the court draw a correct distinction between compensatory and punitive damages. Also the composition of compensatory damages was correctly defined in one of said instructions. Indeed instruction No. 1 having correctly submitted the question of punitive damages to the jury, and one of the other instructions having correctly submitted the question of compensatory damages to the jury, it was unnecessary to have given the remaining instructions.

The refusal to give instructions B, C and D, at the instance of the appellant, was not an error because the jury were already fully and correctly instructed. This court held, when the case was here before, that the evidence in reference to the conduct of the brakeman was competent. (L. & N. R. R. Co. v. Ballard, 9 Ky. Law Rep., 8.)

The jury having returned two verdicts for substantially the same amount, we will not reverse on account of its excessiveness.

The judgment is affirmed.

GUDGELL, &c. v. TYDINGS, &c.

(Filed January 22, 1889—Not to be reported.)

1. Deed by life tenant—Limitation—Where a life tenant executes a deed purporting to convey the fee, with general warranty, the grantee takes only the life estate of the grantor, and limitation does not begin to run against the remainderman in favor of the grantee until the termination of the life estate.

2. Warranty—When those entitled in remainder to land thus conveyed by the life tenant, with general warranty, have received any estate by gift, advancement, descent, devise or distribution, from the vendor, they are barred of recovery to the extent of the value of the estate so received.

3. Same—Pleading—As the answer in this action for the recovery of land so conveyed alleges that the proceeds of the land were invested in other land for the benefit of the plaintiffs, it is sufficient to authorize the chancellor to require the plaintiffs to account for what they have received by gift or descent from their parents, the vendors.

W. P. D. Bush and R. Gudgell & Son for appellants.

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Rozel Weissinger and R. T. Colston for appellees.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Pryor.

It is manifest that by the will of Charles Bevins, executed in the year 1800, his granddaughter, Elizabeth Adams, only acquired a life estate in the land in controversy, with remainder to her children.

Bevins, the devisor, held the bond of Christopher Greenup, who was the original patentee, for 500 acres of land out of a patent boundary of 1,100 acres, and after the death of Bevins, Sr., Greenup conveyed the land (500 acres) to Charles Bevins, a son of the devisor, to be held in trust by him for his granddaughter and her children as provided in the will of his father. Charles Bevins, the trustee, desiring to relinquish the trust, and the granddaughter having, in the meantime, married Richard Tydings, Charles Bevins was permitted to resign, and Richard Tydings, the husband, was substituted as trustee by a regular proceeding in the Virginia County Court. Charles Bevins, Jr., as trustee, then conveyed the land to Richard Tydings in trust for his wife, "to be held in accordance with the provisions and under the trusts imposed by the will of Charles Bevins, Sr." This deed was recorded in the county of Bath where the land was located, and to which Tydings and his wife removed from Virginia and lived upon for many years.

The will of Bevins, Sr., was of record in the Bullitt County Court but the title from the patentee, Greenup, down to the vendors of these appellants is made perfect, with the clause in the deed from Greenup to Charles Bevins, Jr., showing title in him in trust for the wife of Tydings and her children, and from Bevins, Jr., as trustee, to Richard Tydings, astrustee, to be held by the latter in the same way.

Richard Tydings and his wife sold this land and made a general warranty deed to the vendors of those in possession, and they are claiming under that title, asserting the right of Tydings and wife to pass the absolute fee, when it is plain from their title they held for life only, with remainder to their children. All the title these purchasers from Tydings and wife obtained was the life estate of Mrs. Tydings, and, having entered under them, they are in no condition to plead the statute of limitation as a defense to the action. If these appellees, who are the children and descendants of Mrs. Tydings, had brought an action prior to her death against the parties in possession, the fact that they owned by purchase the life estate of Mrs. Tydings would have been a bar to the recovery. Mrs. Tydings died in 1865, and this suit was instituted in the year 1866. Those entitled in remainder could bring no action to recover the land until the life estate terminated, and, therefore, the lapse of time is not a bar to the recovery. Tydings and wife sold the land to Jones and Moore, separate parcels to each. Whether Jones obtained a general warranty deed or not for his land is immaterial.

There was a conveyance made in the year 1876 by Tydings and wife to Henry Moore for his part of the land, with a general warranty of title, and the land in controversy was and is a part of the Moore tract. Tydings and wife, or their heirs to the extent of assets descended to them from their ancestors, are liable on this warranty, and the right of recovery being established, and a judgment rendered for the land, then under section 18 of chapter 63, General Statutes, article 1, the children of Tydings and wife

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having received, by descent from their parents, certain lands, or an interest in certain land in the county of Bullitt, they must account to the purchaser from their ancestors for the value of the land thus descended before they are permitted to oust them of the possession of the land claimed in this action. That they did inherit land from their parents this record shows, but the extent and value is not certain, or if they received title before the death of their parents, it was in the nature of a gift or advancement made after the sale to the vendors of these appellants, and must account for its value before a recovery is allowed.

The statute provides that if the claimant "has received any estate, real or personal, by gift, advancement, devise, descent or distribution from the vendor, such claimant shall be barred of recovery to the extent of the value of the estate so devised." How much estate these appellees received does not distinctly appear, or its value, but that they did receive an estate after the conveyance of their ancestors, either by gift or descent, is evident.

Counsel for appellees maintains that there is no pleading alleging a state of facts showing that appellants had received property by descent or gift from their ancestors, and, therefore, it was not the duty of the chancellor to make the defense for him. This is really the only question in the case, for if the appellants have set up no such defense the case should not be reversed to enable them to assert this equity.

The appellants, as a defense to the action, allege, in their response to the petition for the recovery of this land, that the amount received from the sale of it by the ancestors of the appellee had been invested in other lands for the wife and children of Tydings upon the same trusts and conditions as the land sold was held by them, and there is much in the record to sustain this position. They claim that the proceeds having been invested for the benefit of these claimants, they are estopped, having received other lands in lieu of that sold, from asserting their claim. The appellees are also called on to show or state the property purchased by their ancestors after the sale of the Bath county land. These purchases are all set forth by the appellees, and the conveyances made are in trust to Mrs. Tydings and her children. Why this was done is explained, or attempted to be explained, by the appellees, upon the idea that this property was purchased by the proceeds or income of certain property belonging to their mother, and the conveyances made to her and her children. This applies to the Bath county land that was secured to the appellees and their mother by a regular conveyance.

The appellees say they never consented to any investment, and in fact that the investments were made out of moneys belonging to their mother, and the chancellor below proceeding on this theory, which has much proof to susatin it, permitted the recovery. Whether the investments were made out of the proceeds of the Bath county land or not, it is plain that their father and mother made the investments, and the children derived the benefit of them at the death of the mother, and to the extent of that benefit the appellees will be denied the right of recovery, and the pleadings were sufficient to authorize the chancellor to require them to account for what they had received by descent or gift from their parents.

The judgment is, therefore, reversed and remanded, with directions to require the commissioner to ascertain the value of the property derived by these children, either by gift or descent, from their parents, and if it exceeds in value or is equal in value to the land sought to be recovered, the recovery should be denied—the value to be fixed on the land at the time it was given,

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or descended. If of less value, then to the extent of the value no recovery can be had.

Judge Holt not sitting.

STARKS, &c. v. CURD, &c.

(Filed January 22, 1889.)

1. Bankruptcy—Attachments—Under the bankrupt law, if an attachment out of the State court was levied as many as four months before the filing of the petition in bankruptcy, the lien created by such levy continued notwithstanding the filing of the petition in bankruptcy.

2. Same—If a creditor of the bankrupt had a lien by attachment or otherwise for the security of his debt, and he filed his debt in the bankrupt court and asked that it be allowed and prorated as an unsecured claim, without apprising the assignee of the existence of his lien, he thereby waived his lien. But this waiver was for the benefit of the assignee as a trustee for creditors, and not for the benefit of the bankrupt; and if the assignee chose to waive his right to the attached property by failing to appear and assert it, the attaching creditor had the right to enforce his lien, which the court properly allowed him to do in this case.

3. Same—Fraudulent conveyances—When the debtor, prior to the bankrupt proceedings, had executed conveyances with the design to defraud his creditors, the title to the property thus conveyed passed to the assignee in bankruptcy for the benefit of creditors as if no such conveyances had ever been executed.

4. Judicial sales—Judgment—As the land sought to be subjected in this case consisted of separate tracts, lying in two different counties, it was error to order a sale of the land in gross, without reference to the fact whether it would be necessary to sell it all to pay the debt, interest and costs. The court should so amend the judgment as to direct the sale of said land by the tract, and only so much thereof as will be necessary to satisfy the debt, interest and costs.

Gilbert & Reed and W. M. Smith for appellants.

Wm. Lindsay for appellees.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Bennett.

The appellees instituted their several actions in the Calloway Circuit Court against the appellant, W. M. Starks, to recover debts due them on contract by him. They obtained attachments in said actions, which were levied upon the several tracts of land in controversy. More than four months after the levy of these attachments the appellant, W. M. Starks, abandoned his residence in said county and State and moved to the State of Missouri, in which State he took up his residence; and after making said State his place of residence he filed his petition in the U. S. District Court for that State to be declared a bankrupt. The register in bankruptcy took charge of his case; an assignee was duly appointed and qualified; the appellant, W. M. Starks, was duly and finally discharged from all his debts and liabilities existing at that date. After getting his final discharge he returned to this State and filed answers to the appellees' actions, among other things contesting the grounds of attachment and denying that the real estate in controversy was subject to said attachments, and that the appellees, except one, had filed

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their claims in the bankrupt proceedings, and had them allowed as unsecured claims, which was a waiver of the attachment liens, if any they had. His wife and children also appeared in said actions and set up title in themselves to said lands by reason of conveyances by deed to them by the appellant, W. M. Starks.

It is perfectly manifest that the conveyances by the appellant, W. M. Starks, to his wife and children were made with the design to defraud his creditors, therefore, as against said creditors, no title passed to them, but thereafter passed to his assignee in bankruptcy, subject, however, to the appellees' attachment liens.

The fourteenth section of the bankrupt act provided: "That as soon as said assignee is appointed and qualified the judge, or where there is no opposing interest, the register, shall, by an instrument under his hand, assign, and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in the said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

It has been uniformly held that if the attachment out of the State court was levied as many as four months before the filing of the petition in bankruptcy the lien created by such levy would continue notwithstanding the filing of the petition in bankruptcy. Also, it has been uniformly held that if a creditor of the bankrupt had a lien by attachment or otherwise for the security of his debt, and he filed his debt in the bankrupt court and asked that it be allowed and prorated as an unsecured claim, without apprising the assignee of the existence of his lien, he thereby waived said lien. Were the rule otherwise, such creditor would not only have the benefit of his lien security, but would prorate equally with the other creditors, which would be a fraud upon the equality of right among the creditors of the bankrupt that the bankrupt law attempted to establish.

But the waiver of the lien was for the benefit of the assignee only, as trustee for the bankrupt's creditors. The lien, however, by proving the claims as unsecured, was not extinguished, but was simply waived at the instance of the assignee for his benefit as subrogatee. (Cook v. Farrington, 104 Mass., 212; 12 Bankrupt Register, 512.)

By the section supra the title of the property passed to and vested in the assignee, whereby the bankrupt was totally divested of title; and, as just said, if the bankrupt had previously conveyed his property for the purpose of defrauding his creditors, nevertheless the title passed to the assignee for their benefit as fully and completely as though no such conveyance had been made. Therefore, it has been uniformly held that the bankrupt could not appear in the State court and take advantage of the waiver. He had parted with his title to the property, and had been discharged from liability on the debt, and, of course, had ceased to have any interest whatever in the proceedings. (Cases supra.) If the assignee, who was the party in interest, could, if he wished, take advantage of the waiver and defeat the attachment, and take the property, freed of its lien, on the other hand, as the waiver was only for his benefit as subrogatee, he could waive his right to it and let the property be subjected to the attachment lien, which waiver, on his part,

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would be presumed, under circumstances similar to this case, by his failure to appear and assert his right.

Therefore, the judgment of the circuit court subjecting said property to the attachment liens, but not giving personal judgment against W. M. Starks, is affirmed. But the tracts of land attached were separate tracts, and were situated in Calloway and Marshall counties; and the judgment, as we understand it, directed the master commissioner to sell the several tracts lying in each county in gross, and without reference to the fact whether it would be necessary to sell it all to pay the debts, interest and costs. This, it will be readily seen, was an error, and for this error the case must be reversed, with directions to amend the judgment so as to direct the sale of said land by the tract, and only so much thereof as will be sufficient to satisfy the debts, interest and costs.

EVANS v. ENGLISH.

(Filed January 24, 1889—Not to be reported.)

1. Homestead included in mortgage by fraud—Judicial sales—In this action to enforce a mortgage lien the defendant, by his answer, asserted a right to a homestead, alleging that a mortgage that passed the homestead right was presented to him, and that he declined to sign it for that reason; that the plaintiff then wrote another mortgage and handed it to him, stating that it did not embrace the homestead right, and that he signed it, relying upon plaintiff's representation as true, whereas it was false; that the representation was made with the fraudulent intent to deceive, etc. A demurrer to the answer was sustained, and the property sold. Exceptions were filed to the report of sale because the property was sold at a sacrifice. There is proof that the price at which the property was purchased by the plaintiff did not exceed one-third of its value. Held—That the fraud alleged being admitted by the demurrer to the answer, which should have been overruled, the purchaser, being a party to the fraud, can not avail himself of an advantageous bargain, and the court can not look to the facts of the record for the purpose of determining whether the answer is true or false, the demurrer thereto having been sustained.

2. Homestead—The fact that the mortgage recites that the defendant is "of the city of Louisville," while the land lies in Meade county, does not preclude the defendant from asserting his claim to a homestead, it being expressly averred in the answer that the defendant was living with his family on the land at the time of the execution of the mortgage.

John C. Walker for appellant.

J. W. Lewis & Son for appellee.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Pryor.

The demurrer to the answer filed by the appellant should have been overruled. The appellant was indebted to the appellee in a sum of money evidence by note, and to secure the payment gave to the appellee a mortgage on real estate in the city of Louisville, and on a tract of 100 acres of land in Meade county. In a suit to foreclose the mortgage the appellant, by way of defense, said that at the time of its execution he was living on the tract of land in Meade with his family of three children; was a bona fide housekeeper, and refused to execute a mortgage embracing his right to a home

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stead; that a mortgage was written and presented to him that passed the homestead right, and he declined to sign it for that reason; that the appellee then wrote another mortgage, handing it to him, and stating that it did not embrace this homestead right; that upon this representation of the appellee, and relying on it as true, he signed the mortgage without reading it, and did not know until this action was instituted but that the agreement had been in good faith carried out, and his homestead exempted from the operation of the mortgage; that the representation was made to deceive, and with the fraudulent intent to include the homestead within its terms. The demurrer was sustained to this answer, and the property sold. Exceptions were filed to the report of sale because the property was sold at a sacrifice. There is proof that the property was worth $2,000, and it sold for not exceeding one-third of its value, and the homestead purchased by the plaintiff. If the facts alleged are true the plaintiff should not be permitted to avail himself of his purchase under the circumstances. While an ordinary sale by order of the chancellor, under the proof in this case, would be sustained, although the plaintiff was the purchaser, where the fraud is admitted, as it is on demurrer, the purchaser, if a party to it, can not avail himself of an advantageous bargain, and will not be protected by the chancellor.

We are asked to look to the facts of the record with a view of determining whether the answer is true or false. This can not be done, as the mouth of the defendant was closed as to his defense by sustaining the demurrer to his answer.

The mortgage recites that the agreement was entered into between the appellant, party of the first part, of the city of Louisville, etc. It is, therefore, insisted that the appellant is estopped from saying that he lived in Meade when the recital in the mortgage is that he is of the city of Louisville. The mortgage may have been written in Louisville, and doubtless was, but whether so or not the answer is express and positive in the statement that, at the time of its execution, the appellant was living with his family in Meade, and there is no such inconsistency between the recital in the mortgage and the statements of the answer as would preclude the defense.

The judgment is reversed, with directions to set aside the sale, to overrule the demurrer and for proceedings consistent with this opinion.

MASONIC SAVINGS BANK v. BANGS' ADM'R, &c.

(Filed January 24, 1889.)

1. Partnership—Interest—While it is the general rule in the settlement of partnership accounts not to allow interest until after a balance is struck in a settlement between the parties, unless there is a different agreement between them, yet this rule is by no means universal, and does not apply where one of the partners has misappropriated the firm assets to his own use, withdrawing greatly more than his share of the profits.

2. Same—Compromise—A compromise agreement as to the amount due by a decedent to his surviving partners was only intended to fix the amount due at the death of the deceased partner, and was not intended to determine the question as to the right to interest after his death.

3. Final order—The commissioner having paid to the other creditors a greater portion of their claims than to the surviving partners, the court directed him to make the latter equal out of any other assets collected. It is insisted upon cross appeal that the uncollected assets will not be sufficient

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for this purpose, and that the other creditors should have been compelled to refund. Held—That this is not a final order. It will be time enough to compel the creditors to refund when it is ascertained, upon a final distribution, that there is not enough left to produce the equality contended for.

Helm & Bruce for appellant.

J. K. Goodloe and John Roberts for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This action involves the settlement of an insolvent estate, and the distribution of the assets between creditors. The decedent, John B. Bangs, was a member of the firm of John P. Morton & Co., and had been for a number of years. At his death the surviving partners were John P. Morton, Alex. Griswold and H. M. Griswold, who continued the business after the death of Bangs without any settlement of the partnership business. The capital invested belonged to John P. Morton, and the net profits were divided between the partners, the two Griswolds owning one-fourth, Bangs one-fourth, and Morton one-half. An approximate statement of the value of the stock of the firm was made, and a statement of the accounts of Bangs with the firm, with a view of showing his indebtedness. They were engaged in selling books, stationery, binding, etc., and did a large business. During the existence of the partnership Bangs, who was the active partner of the firm, drew largely upon its assets for his individual use, and used the firm name in obtaining money that was applied to his individual purposes. The estate of Bangs was indebted to the firm, upon the statement made, in a sum exceeding $34,000, the most of which consisted of the appropriation of money to his own use, over and above his part of the profits, during a period of near twenty years.

The personal representative of Bangs, protesting against the statement of accounts made out against his intestate by the surviving partners, particularly the charge of interest that swelled the account to the amount claimed, conferred with Morton & Co. on the subject, and the result was a compromise, that was confirmed by the chancellor on the 17th of December, 1876, by which the indebtedness of Bangs was reduced to $28,645. The agreement was in writing, and contained this clause: "But this agreement is not to prevent the surviving partners from proving and claiming any additional indebtedness arising to them out of the partnership, not entering into the claim already filed, provided they do so within thirty days from this date, and provided further, upon their failure to prove or claim any additional indebtedness, not included in their accounts already filed within thirty days from this date, then the foregoing sums are to constitute the entire indebtedness from said estate to them as the surviving partners, and no additional claim shall ever be presented or allowed to them, or either of them, on account of said late partnership." After this compromise it was ascertained that Bangs had drawn from the firm or used the firm's name in obtaining $2,000 at one time, and about $10,000 at another time, and these sums the firm having to pay, were presented as additional claims, and about which there is no controversy, except as to the question of interest.

The administrator of Bangs qualified on the 9th of August, in the year 1884, and the claims against the estate, where no written promise to pay af-

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peared, were all made to bear interest from that day; where there were written obligations to pay, those written promises controlled, of course, the question of interest.

So the commissioner, the court below confirming his report, allowed interest on the claim of Morton & Co., as was allowed on other claims bearing no interest on their face. The Masonic Savings Bank, a creditor of the estate of Bangs, filed an exception to the interest allowed the firm of Morton & Co. on their account, and the exception having been overruled, brings the case to this court. The appellant insists that the agreement of compromise embraced all claim for interest that had accrued before the compromise was made. The appellees contend that the agreement only fixed the indebtedness of Bangs to the firm at his (Bangs') death, simply reducing the claim from $34,471 to $28,645.

The appellant also maintains that no interest should be allowed for the reason that, under the rule with reference to the settlement of partnership accounts, it is not proper to allow interest until after a balance is struck on a settlement between the partners, unless there is a different agreement between them. While this is the general rule, it is by no means universal, as there may be many reasons why, in certain cases, it would be unjust to refuse to charge interest against a partner who has withdrawn greatly more than he was entitled to from the firm assets, applying it to his own use, to the detriment of his co-partners.

It seems to us in the present case, as the insolvent estate is unable to pay its debts, the question is: Would it be equitable to allow other creditors interest upon their claims from the time of administration and deny the same to the appellees, whose claims are equally meritorious?

It is evident from the manner in which this deceased partner handled and used the assets of the firm that he would and ought to be charged with interest on these large sums drawn out by him, and to which he was not entitled, and unless the agreement of compromise settles this question the judgment below should be affirmed. Here was certainly a delinquent partner using recklessly the assets of the firm for his own purposes, and such a case is an exception to the general rule as settled by many reported cases. (Honore v. Colmesnil, 7 Dana, 199; Taylor v. Young, 2 Bush, 428; Bowling v. Dobyns, 5 Dana, 434.) "Except, however, where there has been a fraudulent intention, or an improper application of the money of the firm, it is not the practice to charge a partner with interest on the money of the firm in his hands." (1 Lindley on Partnership, 788.)

The compromise may well admit of two constructions, but, when looking to the subject-matter of settlement, we think the intention of the parties can be readily ascertained. The firm of John P. Morton & Co. were claiming that the deceased partner was owing the firm at his death a sum exceeding $34,000. The account was presented and resisted by the administrator, resulting in a compromise, by which $28,645 was the sum agreed on, with the stipulation that no additional sum should be allowed unless presented within thirty days. The recitals in the agreement are that the claims of the surviving partners are reduced from the one sum to the other, and the less sum is substituted for the larger amount.

Nothing was said about interest, and while the original claim of the firm included interest and swelled the amount to a sum exceeding $34,000, interest being charged both before and after Bangs' death, still that fact does not

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control the question in this case. The chancellor, to whom the compromise was submitted, has construed the agreement as not determining the question of interest, and we think it plain that the parties were only fixing the amount due the firm by the deceased partner at his death, and, besides, in a settlement of such an estate, to allow interest on all other claims of the same character, or coming within the same class, and denying interest on the claim of the surviving partners, because it originated from the partnership, would be unjust and inequitable as between these creditors.

It seems that the commissioner, in making payments to creditors out of the assets converted into money, had paid more to the other creditors in proportion to their demands than to John P. Morton & Co., and the attention of the court being called to that fact, the commissioner was directed to first make the firm equal in the pro rata distribution of any other assets collected, and the firm, conceiving that such an order might be final, has prayed an appeal, alleging that the uncollected assets will not be sufficient to make them equal, and the order, if final, would preclude them from compelling the other creditors to refund. The order is not a final order. There has not been a complete settlement or a final distribution, and the order entered was proper, for if the assets uncollected are sufficient to equalize the firm with the other creditors it would be useless to compel the creditors to refund. It will be time enough to do this when it is ascertained that there is not enough left of the estate to produce the equality contended for.

The judgment below is affirmed on the original and cross appeal.

BAKER v. COMMONWEALTH.

(Filed January 24, 1889—Not to be reported.)

Continuance—For the purpose of acting on a motion for a continuance this court must presume that the statements of the affidavit filed in support of the motion are true. And if the affidavit discloses evidence that is absent, material to the defense, and that due diligence has been used to obtain it, and that it is within the reach of the process of the court, the continuance should be granted.

C. T. Atkinson for appellant.

P. W. Hardin for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and convicted in the Nelson Circuit Court of the crime of breaking into the dwelling house of Dr. H. D. Rodman, and taking therefrom personal property belonging to the owner.

The house was broken into between half past twelve o'clock and daylight on the night of the 10th of October, 1888. The appellant moved the court, upon his affidavit, to continue the case on account of the absence of his witnesses. The affidavit disclosed that the appellant had used due diligence to obtain his witnesses. The affidavit also disclosed that he could prove by one witness that he spent the night that the house was broken into with him at Lebanon Junction, a distance of fifteen miles from the place where the crime

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was committed. Also, that he could prove by one O'Brien that he gave the appellant the personal property found in his possession, for the purpose of taking the same to Louisville to be delivered to O'Brien's wife; that he was on his way to Louisville with said property at the time of his arrest; that he would also prove by said witness that, if said property was stolen, he knew nothing about it. We can not see why the court overruled his motion for a continuance unless it was upon the ground that the statements in the affidavit were not believed. If so, the court went beyond its province. The question to be determined was: Did the affidavit disclose evidence that was absent, material to his defense, and that due diligence was used to obtain it, and that it was within the reach of the process of the court? If the statements of the affidavit are true, and we must presume, as the lower court should have done, for the purpose of acting on the motion, that said statements were true, they showed that, notwithstanding the proof for the Commonwealth, the appellant was not guilty: for the proof against him was all circumstantial, and the proof that he proposed to furnish would have explained it away.

We have heretofore decided that if, conceding all the statements of the affidavits in reference to absent evidence to be true, but nevertheless conceding the truth of said statements, the proof upon the trial showed conclusively that the accused was guilty, this court would not grant a new trial, for the reason that the error of the court was not prejudicial to the substantial rights of the accused. Here, however, the statements of the affidavit, if true, would entitle the accused to an acquittal.

The judgment is reversed and the cause is remanded, with directions to grant the appellant a new trial.

STRICKLIN v. COMMONWEALTH.

(Filed January 24, 1889—Not to be reported.)

Attempt to commit rape—Under an indictment for rape upon the body of an infant under twelve years of age appellant was convicted of an attempt to commit a rape upon such infant. No exception was made to any ruling of the court except to the instructions, and as the court fully and properly instructed the jury the judgment is affirmed.

John P. Salyer for appellant.

P. W. Hardin for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Chief Justice Lewis.

Under an indictment for rape upon the body of an infant under twelve years of age appellant was convicted of an attempt to commit a rape upon such infant, provided against in section 4, article 4, chapter 29, General Statutes, and his punishment fixed at confinement in the penitentiary for the period of five years.

No exception was made to any ruling of the court in this case except to the instructions, and consequently the only question for us to consider is in the one in regard thereto. The court fully and properly instructed the jury relative to the offense of which appellant was found guilty, and we do not

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perceive wherein there was a failure of the court, as stated in the grounds for a new trial, to give all the law of the case to the jury.

We have made a careful examination of the record, and are not able to find any reversible error committed to the prejudice of the accused.

Judgment affirmed.

KING v. OHIO VALLEY R. R. CO.

(Filed January 24, 1889—Not to be reported.)

1. Appeals—As the bill of exceptions recites that the motion for a new trial was overruled, and that appellant excepted to the ruling, the court will not refuse to consider the appeal because no order was ever entered on the record overruling the motion.

2. Agreed judgment—In a proceeding by appellee to condemn a right of way through appellant's land, after the commissioners had filed their report, but before its confirmation, the parties, by way of compromise, agreed that it was to be treated as amended in certain respects. They differ as to the extent and character of the modifications agreed upon by them. The appellee, without notice to appellant, obtained a judgment conforming to its version of the agreement. In this action by appellant for a new trial, Held—That according to the burden of the evidence the judgment embodies the contract of the parties as to what it should be, and it is, therefore, binding, although the agreement of the parties was oral and not entered into in open court.

Ken. Chapeze for appellant.

Hughes & Hughes for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Holt.

The appellee, the Ohio Valley Railway Co., being authorized by its charter to do so, instituted proceedings in the county court under the general law of April 11, 1882 (General Statutes, page 281), to condemn a right of way through the land of the appellant, Lou King. After the commissioners had filed their report, but before its confirmation, the agent of the appellee and the appellant, by way of compromise, agreed that it was to be treated and considered as amended in certain respects. They now differ as to the extent and character of the modifications then agreed upon by them. The appellant also claims that by the agreement the prosecution of the proceeding was to cease, and nothing more was to be done until the time arrived when she was to be paid the agreed compensation for the right of way. Upon the other hand, the appellee claims that the proceedings were at once to progress, the appellant not making any resistance by reason of the compromise as to the commissioners' report.

The agreement was verbal, and not made in court. The appellee, acting upon its understanding of the matter, thereafter obtained a judgment, which recites that it is a consent one, and which conforms to its version of the agreement. The appellant was not in court either in person or by attorney when it was rendered, and had no notice or knowledge of it until more than thirty days, the period allowed for an appeal in such a case, had elapsed. She thereupon, and before the second term of court after the discovery, filed a petition in the county court for a new trial. This was authorized by sec-

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tions 344 and 700 of the Civil Code. Issues were formed, and, upon hearing, the county court dismissed her petition. She appealed to the circuit court, where the matter was heard de novo, and it affirmed the judgment of the lower court.

It is urged that we can not consider her appeal to this court because no order was ever entered upon the record in the county court overruling her motion for a new trial. The bill of exceptions filed in that court, however, recites that it was done, and that she excepted to the ruling. We will not, therefore, refuse her relief upon this ground.

Conceding that the appeal from the county court to the circuit court of the action for a new trial in effect brought up the entire case; also that the latter court had appellate jurisdiction of the proceeding, and that the circuit court had a right to hear the evidence and try it de novo, as it did do, and that a bill of exceptions from the county court was not required, and the circuit court not confined by law to hearing it upon the record from the lower court, yet it is manifest that the judgment, which was rendered in such court, was sustained by the evidence. So that, considering the case as presented by the appellant herself in the circuit court, she was entitled to no relief as against the judgment of condemnation. It was entered, as the decided weight of the testimony shows, in conformity to the agreement of the parties. It is true it was oral, and not entered into in open court. But the judgment embodies the contract of the parties as to what it should be according to the burden of the evidence, and is, therefore, binding. If the appellee has failed to comply with it, it can be made to do so.

Judgment affirmed.

COMMONWEALTH v. GREEN.

(Filed January 24, 1889.)

Practice in criminal cases—Examination of witnesses—The Commonwealth's attorney, ascertaining during the examination of a witness that the testimony of another witness, in or near the place of trial, was important, announced his purpose to have the witness brought in and examined. As the attorney was about to conclude the examination of the witnesses for the State the judge said the defendant could proceed, and when through he would determine whether the witness should be examined. When the defendant was through the witness was offered upon a material point, but the court refused to allow him to testify upon the ground that the county attorney knew what the witness had testified to in the examining court, and was guilty of laches in not having him summoned. Held—That, under the circumstances, the court should have permitted the witness to testify, as there seems to have been no unnecessary delay caused by the attorney for the State, and the testimony was of vital importance, but the court is not inclined to make this case a precedent upon which to base a rule governing the discretion of the trial court.

P. W. Hardin and J. H. Powell for appellant.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Pryor.

This court, in a case like the one before us, can establish no definite rule by which the courts below are to be governed as to the number of witnesses

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to be examined as to any one point, or as to the right of a litigant, by counsel, to re-examine a witness in rebuttal or in chief, or to have called and examined a witness after the case is closed, who has not been examined by either party.

Such questions are addressed to the discretion of the trial court, and while that discretion is seldom abused, it sometimes happens that its improper exercise necessitates a reversal by this court.

In the present case the attorney for the Commonwealth ascertained, during the examination of a witness, that the testimony of another, in or near the place of trial, was all important for the prosecution, and announced to the court his purpose to have the witness brought into court and examined. As the attorney was about to conclude the case for the State, so far as the examination of the witnesses was concerned, the judge said the defendant could proceed, and when through he would determine whether the witness should be examined. When the defendant was through he offered to examine the witness to a point material to the prosecution, but the court declined to permit the witness to testify, as the county attorney knew what this same witness had testified to in the examining court, and, as the court held, was guilty of laches in not having the witness summoned.

While, under the circumstances, the court should have permitted the witness to testify, as there seems to have been no unnecessary delay caused by the action of the attorney for the State, and for the additional reason that his testimony was of vital importance to the prosecution, still the trial judge may have supposed, as we think the record clearly shows, that the Commonwealth had made good its complaint, and there was, therefore, no necessity for further testimony, and for that reason closed the investigation. The verdict, however, resulted in an acquittal, and while the examination of the witness might have affected the result, we are not disposed to make this case a precedent upon which to base a rule governing the discretion of the trial court.

WALLACE, &c. v. MARQUETT.

(Filed January 17, 1889.)

Lis pendens—Adverse possession—A purchaser pendente lite is bound by the judgment rendered against the person from whom he purchased, but a party may, by an unreasonable delay in the prosecution of his suit, lose the benefit of his lis pendens, and deprive himself of any remedy against bona fide purchasers.

W. instituted a suit against M. in 1858 for the recovery of land. S. had then been in the adverse possession of the land for thirteen years. After S. had been in possession for more than fifteen years he sold to M., who, in 1874, sold to appellee, who had no notice of W.'s action, and was never made a party. In 1881, twenty-three years after the institution of the action by W., judgment was rendered in his favor against M. for the recovery of the land. In this action by appellee to enjoin the execution of a writ of possession issued upon that judgment, Held—That appellee is not bound by the judgment against M. He is not to be regarded as a pendente lite purchaser, but his rights are to be determined as if no action had ever been instituted by W.; and as he and those under whom he claims had been in the adverse possession of the land for thirty-six years when the writ of possession issued, he is entitled to the relief sought.

J. W. Menzies and L. T. Applegate for appellants.

O'Hara & Bryan for appellee.

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Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Pryor.

In this case the appellants filed a demurrer to the petition of the appellee, and moved to dissolve the injunction. The demurrer was overruled and the injunction made perpetual, of which the appellants complain.

The facts alleged in the petition are in substance these: In the year 1858 an action was instituted in the Pendleton Circuit Court by Samuel Wallace and others against Lewis Myers and others for the recovery of a large tract of land. In August, 1881, a judgment was rendered against Myers and others for the land, and a writ of possession awarded. The appellee, Charles Marquett, in the year 1874, and while this action against Myers was pending, purchased the land in controversy of Myers, it being a part of the land that Myers had lost by the recovery.

The writ of possession having been placed in the hands of the sheriff, and Marquett being about to be turned out of possession, filed the present action in equity enjoining the execution of the writ in so far as it disturbed his possession, relying on the following state of facts: He alleges that two men, by the name of Summers and Kidwell, were in the adverse possession of this land long before the action was instituted by Wallace against Myers, claiming the land against Wallace and all others, it being defined by a marked boundary, and continued in the adverse possession for more than fifteen years, and for so long a period as vested them with a perfect title. That not only holding, but being in the actual, adverse possession of this land for so long a period, Summers, having acquired Kidwell's title, sold the land to Lewis Myers, the defendant in the suit of Wallace, and Myers, in the year 1874, sold and conveyed the land to the appellee, who has been in possession since that time. So the vendors of Myers had, as is alleged, acquired title by an actual, adverse possession of more than fifteen years before the sale to Myers, and had entered on the land in the year 1845, thirteen years before the appellants, Wallace and others, instituted their action, which was in 1858. So there was a continuous possession of the land by Summers, Myers and the appellee from the year 1845 until this writ of possession issued in the year 1881, a period of thirty-six years. It is argued that the appellee can not hold by reason of this adverse possession in Summers and Myers because he claims under Myers by the conveyance of 1874, and as Myers lost the land in the Wallace suit, the appellee, being a purchaser lis pendens, is in no better condition than Myers. It is distinctly alleged that neither Summers, Kidwell nor the appellee were parties to the action brought by Wallace, and that they, nor either of them, had notice of the bringing or the pendency of that action.

Why Myers purchased the interest of Summers does not appear. He may have attempted to take shelter under that title to defeat a recovery by Wallace, but whether so or not, if the purchase from Myers by the appellee makes the latter a lis pendens purchaser, then the demurrer should have been overruled. It must be conceded that if no action had been brought by Wallace against Myers that the adverse possession for over fifteen years, or over thirty years in this case, would have vested the appellee with a perfect title. The mere fact that he acquired title from Myers does not make the verdict and judgment against Myers conclusive as to the appellee, for if no party to the action, he is not bound by it unless he is a lis pendens pur-

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chaser. If not a lis pendens purchaser it is immaterial when he purchased. If before the judgment, the judgment against Myers can not affect him. The question then is: Was he such a purchaser? The fact of his acquiring title from Myers does not preclude him from raising this question, for in such cases the question as to a lis pendens often arises. It is well settled that a purchaser pendente lite is bound by the judgment rendered against the person from whom he purchased, and the chancellor will not permit his possession to interfere with his enforcing the judgment.

A party, by laches, may, however, lose his lis pendens, and the purchaser from the party whose title is defective, and against whom a recovery is had, will be treated as a stranger to the proceeding. When there is an unreasonable delay in the prosecution of the action it is such negligence as will deprive the party of any remedy against bona fide purchasers. "To entitle him to enforce it against bona fide purchasers he has been held to reasonable diligence in the prosecution of his suit, and should be guilty of no palpable slips or gross irregularities in the management of the same, by which injury many accrue to the rights of others who are not parties." (Clarkson v. Morgan's Devisees, 6 B. M., 449; Watson v. Wilson, 2 Dana, 406; Erhman v. Kendrick, 1 Met., 146.)

So here was an action pending for twenty-three years, with parties in possession during the entire period, claiming to hold the land as their own, and the appellee purchasing from the defendant in the action, who was in possession, and who had derived title from those whose possession before he purchased had ripened into a perfect title. He had no notice of the pendency of the action, and under such circumstances it would be a harsh rule of law or equity that would treat him as a purchaser with notice or a purchaser pendente lite. On the contrary he should be held to be a bona fide purchaser, and his rights considered and determined as if no action had been instituted by the appellants for the recovery of the land in controversy.

For the reasons indicated the judgment below is affirmed.

WALLACE, &c. v. ARNOLD.

(Filed February 2, 1889—Not to be reported.)

Lis pendens—Adverse possession—See syllabus in Wallace, &c. v. Marquett, ante, page 750.

J. W. Menzies and L. T. Applegate for appellants.

O'Hara & Bryan for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Pryor.

This case involves a question similar to the one made in the case of Wallace, &c. v. Marquett, decided at the present term (ante, page 750), both cases coming from the Pendleton Circuit Court. In the year 1858 an action of ejectment was instituted by the appellants, Wallace and others, against Louis Myers and others, to recover a large tract of land that embraced within its boundary the twenty-seven acres of land now in controversy. The plaintiffs in the ejectment recovered in that case, and had a writ of possession

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issued for the first time in October, 1881, more than twenty years after the action was originally instituted. When the writ issued the present appellee was in the possession, and had been, by himself and his vendors, in the continued, actual possession by actual occupancy, under the title of Myers, from the year 1833. Myers sold to Blackburn this land, or the tract containing twenty-seven acres, in regard to which there is more difficulty as to the title than as to the other tracts, in the year 1833. Blackburn, holding the bond of Myers for title, entered upon and had possession of the land from the year 1833 till the year 1860, a period of twenty-seven years, claiming under his title bond. He then resold the tract to Myers in the year 1860, and in 1862 Myers sold the land to Ekins, giving to Ekins his bond for title. Ekins sold to Lovelace, assigning to him the bond of Myers. Lovelace, in October, 1863, sold the land to the plaintiff (appellee), Arnold, and assigned to him Myers' bond, and, in the year 1868, Myers executed to the appellee a conveyance, and under this title he was in the possession when the writ was issued. From the year 1833 until, and when, the writ issued Blackburn, Myers, Ekins, Lovelace and the appellee had been in the actual occupancy of the land under the title already set forth. The appellee, under the facts stated, filed his petition, and enjoined the appellants from executing the habere facias, and the chancellor, perpetuating the injunction, they have appealed. The sole question, it seems to us in this case, as in the one decided, is: Was the action against Myers a lis pendens? If not, this action must be treated as one in which the title of the appellee must be overcome by the production of a better title in the appellants. The recovery against Myers is no evidence of title against the appellee. He was no party to that action, nor were any of his vendors except Myers. The appellee had possession under his title bond from the year 1863, without any notice, actual or constructive, of the suit in ejectment against Myers. This gave him title against the appellants and all others; and if not, here was a possession under that title for nearly half a century, with an unbroken chain of title and possession, and there being no lis pendens, as was decided in the former case, the appellee can not be disturbed in his possession. (Pomeroy's Equity Jurisprudence, section 634.)

Judgment affirmed.

MAGOWAN, BY, &c. v. McCORMICK.

(Filed January 26, 1889.)

Devise—Application of purchase money—A testator devised land to A, his son, remainder to A's children, empowering him to sell the land and re invest the proceeds in other land, to be held in the same way, but provided that "the purchaser must see to the investment of the purchase money, or the land here given my said son by me must be held responsible." A sold to B the land thus devised to him and his children, and B deposited the first payment in a bank until A could make the investment required by the will. A becoming both mentally and physically unable to make the investment or to ratify it, B has gone into a court of equity asking the chancellor to enforce the contract. B having paid all the purchase money into court, a conveyance has been made to him under the order of the chancellor, and the chancellor has directed the investment made, ordering the purchase money, in the meantime, to be loaned out. Held—That as the judgment appealed from may be regarded as releasing the lien of the infant remaindermen on the land sold to secure the investment of the purchase money in other land, the judgment should be so amended as to retain a lien.

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Peters & Tyler for appellants.

Wood & Day for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

James P. Magowan died in the county of Montgomery, leaving a last will and testament, with his widow and several children surviving him. Under this will his children held the land devised to them for life, remainder to their children, etc., with the power on the part of his children to sell the land devised to each. He had a son, James Asa Magowan, who is now dead, leaving his widow and several children, who are infants, and defendants to this proceeding. The power conferred on each child, naming them, to sell his or her part of the land devised is in this language. After giving the land to Asa Magowan for life, remainder to the children, the testator proceeds: "If my said son, James Asa Magowan, should be of the opinion that it would be to his interest to sell said lands or any part thereof, he has full authority and power to do so, provided the proceeds of said sale be invested in other lands, and the title thereto be so taken as to secure to him a life estate in said lands, and upon his death said lands, pass to the same person and in the same way that the lands herein given him are to pass, and the purchaser must see to the investment of the purchase money, or the lands here given my said son by me must be held responsible."

On the 2d of January, 1885, James Asa Magowan, by a regular conveyance, conveyed this land, or a part of it, devised to him, to the appellee, B. F. McCormick, and put him in possession. The parties, Magowan and McCormick, knowing the provisions of testator's will in this regard, by an agreement made at the time between them, McCormick deposited the first payment in a bank at Mt. Sterling until James Asa Magowan could make the investment as required by his father's will. Magowan, by reason of bad health, became unable to attend to business, and by a certain deed of trust attempted to empower James W. Brooks to make the investment for him, and Magowan, becoming both mentally and physically unable to make the investment, or to ratify it when made, the purchaser, McCormick, has gone into a court of equity for relief, and asking the chancellor to execute the trust conferred on the son by the testator.

It is manifest from the provisions of the will of the testator that the purchaser, McCormick, is entitled to have the contract enforced, and equally certain that the children have a lien on the land sold McCormick to secure the investment of the purchase money in other land. No investment has been made, but a conveyance under the order of the chancellor made McCormick, the latter having paid all the purchase money into court. The chancellor has directed the investment made, and as none has been made, and the money loaned out, it might be insisted that the confirmation of the sale by the chancellor, in the event the money is lost, releases the land conveyed the purchaser from the lien retained by the will to secure the investment, and this may be the cause of complaint by the children, who were all infants, but who appear in this court without any brief or an assignment of errors.

The object of the testator was to secure these children by having their money invested in land, and to secure this the testator requires the purchaser to see to it that the investment is made. By section 23 of chapter

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113, General Statutes, title "Wills," "a purchaser is not required to look to the investment of the purchase money for land sold under a general or special trust, unless so expressly required by the conveyance or devise." The trust is required to be executed by the trustee, and the purchaser, or the latter at least, remains bound until the investment is made. When the chancellor undertakes to execute the trust he should retain a lien until the investment is made, and if the purchaser wants to pay the money into court let it be loaned out as his money, and not that of the infants.

The judgment rendered may have the effect of releasing the lien, and for that reason the judgment is reversed and remanded, with directions to so amend the judgment or order as to retain a lien on the land sold McCormick until the investment is made and approved by this court. If the investment has already been made there will be no necessity of modifying the judgment.

ORR'S ADM'R v. ORR'S EX'OR.

(Filed January 26, 1889.)

1. Claims against decedents' estates—When a personal representative has not in his hands sufficient assets to pay the debts against the estate of a deceased person, and institutes an action for a settlement, which has been referred to a commissioner to audit and report upon claims filed and proved by creditors, a demand by a creditor of payment from the personal representative is not indispensable.

2. Husband and wife—A husband used his wife's money in erecting a dwelling house on his land. From that time up to her death, a period of twenty-five years, the wife failed to assert any claim therefor. Nine years after her death the appellant, as her administrator and only heir, asserts a claim against the estate of the husband, who died several years after the wife's death, alleging that the husband agreed, in consideration of the use of the wife's money, that the house to be built should belong to her and descend to her heirs. The claim, as presented, is in the nature of a demand for the money so applied. Held—That if the alleged antenuptial contract ever could have been enforced, it can not be enforced for the benefit of appellant upon vague and unsatisfactory testimony of verbal admissions by the husband thirty-five years ago.

J. R. Minor for appellant.

J. B. Clark for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Chief Justice Lewis.

William Orr having died in 1886, leaving a widow, but no children, the executor brought this action for a construction of the will, and division accordingly, of the residue of the estate left after payment of debts against it, to do which it appears a portion of the realty will have to be sold; and an order was made referring the action to the master commissioner of the court to settle with the executor, report the personal and real estate, and debts found and allowed against the estate. At the April term, 1887, the commissioner reported, amongst other matters, that a claim against the estate for $4,300 had been filed by the administrator of Amanda G. Orr, deceased, the question of allowing which was referred to the court. Thereupon the ex-

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ecutor filed both a general and special demurrer, and also moved to dismiss and disallow the claim because no demand for the payment of it had been made upon him; and at the same time judgment was rendered dismissing the claim without prejudice as to any independent proceeding the administrator may hereafter institute.

When a personal representative has not in his hands sufficient assets to pay the debts against the estate of a deceased person, and institutes an action for a settlement, which has been referred to a commissioner to audit and report upon claims filed and proved by creditors as provided in chapter 3, title 10, Civil Code, a demand by a creditor of payment from the personal representative is not, as has been heretofore held, indispensable.

The nature and consideration of the claim of appellant is stated in his affidavit in substance as follows: That Amanda J. Orr, then the wife of William Orr, died in 1878, leaving appellant, John G. Lyon, her only brother and heir at law, who, in 1887, was appointed administrator of her estate; that she and William Orr were married in 1849, and in 1850 they made a verbal contract, by which she agreed that the proceeds of her share of the estate of her father, consisting of land and slaves, some of which was sold in 1850 and the residue in 1852, her husband uniting with her in the deed, the whole amounting to $4,300, might be appropriated to the construction of a dwelling house upon a farm owned by him, and it was so applied, and the house was built in 1853, and in consideration thereof he agreed said dwelling house should belong to her and descend to her heirs; that William Orr died in 1886, leaving no descendants, but owning an estate of the value of $20,000, which he disposed of by will, not giving any part thereof to appellant, the only heir of Amanda G. Orr. He makes further affidavit that the said sum of $4,300 is a just demand, etc.

The affidavits of two persons are filed in support of the claim, which tend to show that William Orr stated about the time the house was built, in 1853, he had received the money under the agreement as stated in the affidavit. The contract as therein set out was that, in consideration of the use of the wife's money in building the dwelling house, the husband agreed it should belong to her and descended to her heirs. But the claim, as presented, is in the nature of a demand for the money so applied. It can not be supposed they intended or contemplated that the title of the dwelling house should be literally in the wife, and at her death pass to her heirs, while the land on which it is situated would remain to the husband, and go, at his death, to his heirs or devisees. Even if such had been the intention no trust resulted which she, in her lifetime, much less her brother, nine years after her death, could enforce, because it is not claimed either that the deed was in the name of the husband without her consent or that he violated any trust in purchasing and taking the title of the land to himself, which he had acquired and paid for before the money was furnished to erect the dwelling house. If she was entitled to anything in virtue of the alleged postnuptial contract it was to an equitable settlement upon her of the money invested in the dwelling house. But the presumption of law is the money so used was, by the husband, reduced to possession, and was a gift, and not a loan, and that presumption, it seems to us, is too strongly supported by acquiescence, and failure of the wife to assert any claim for a period of twenty five years, and up to her death, to be overcome by vague and unsatisfactory testimony of verbal admissions by the husband thirty five years ago. Moreover, if the

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appellant could, as her heir at law and administrator, recover at all it is a strong reason against the interposition of a court of equity in his behalf that he delayed nine years after the death of Amanda Orr before asserting his claim or administering upon her estate.

In our opinion the alleged antenuptial contract can not be now, if it ever could be, enforced for the benefit of appellant, and the lower court properly dismissed and disallowed it.

Judgment affirmed.

ATCHER, &c. v. SMITH, &c.

(Filed January 26, 1889—Not to be reported.)

Vendor and vendee—Sale of infant's real estate—S., having sold, by title bond, a tract of land to A., instituted this action against A. to enforce the contract, making his (S.'s) children, who were infants, parties defendant, alleging that he owned, in his own right, seven-twelfths of the land, and his children five-twelfths. There is no evidence that S. had any title to the land except his curtesy in a part of it. Held—That the petition should be dismissed.

Montgomery & Poston and R. L. Stith for appellants.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Pryor.

In this case the appellant, Smith, sold, by title bond, to Atcher a tract of land, containing ninety two acres, Atcher executing his notes for the purchase money. Smith instituted his action making Atcher and his, Smith's, children, who were infants, defendants, and asked that the contract be enforced, alleging that he owned, in his own right, seven-twelfths of the land and his children five twelfths, and that in his children's interest he had a life estate, the title in them having been derived by descent from their mother. The chancellor sold the land under the statement that his sale to Atcher was for the benefit of the infants, and asking that the sale be confirmed and the land sold for the purchase money. An inspection of this record shows that the appellee, Smith, the father, had no title to any of the land sold except his curtesy. The deed to the entire tract of land was made to his wife by her father, yet the contract with Atcher is enforced, and nearly all the purchase money awarded the father as his own, on the idea that he owned seven-twelfths of the tract and had a life estate in the remainder. This does not appear from the record. There is no evidence of title, verbal or written, to support such a claim, even if the chancellor had the power to enforce contracts of sale made by the father of the infants' real estate instead of pursuing the statute, where the rights of the infants in the sale of their real estate are fully protected.

The judgment is reversed and cause remanded, with directions to dismiss the petition.

JOHN'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 26, 1889—Not to be reported.)

1. Railroads—Duty to trespassers—The right of a railroad company to the use of its track is exclusive of the public, save where the public has a right to cross or use it, or where its use in a reckless manner would necessarily

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endanger the lives of those whose nearness to it requires the exercise of care and caution. Therefore, in passing through a town or city greater care must be exercised than upon a portion of the road where persons have no license to be. In the first case, those in charge of a train must be upon the lookout for persons on the track, and must, by the usual signals, give warning of the train's approach, while in the latter they are not bound to anticipate their presence and guard against injury to them, but must, when made aware of their peril, avoid the injury by the exercise of all reasonable means.

As the plaintiff's intestate in this case was upon the track at a place where she had no right to be, and those in charge of the train never discovered her peril, a peremptory instruction for the defendant would have been proper.

2. Same—Instructions—An instruction telling the jury that it was the duty of those "in charge of the train" to use proper care to avoid injuring the deceased authorized the jury to consider the negligence of a brakeman or flagman on the section of the train which killed the deceased.

3. Grounds for new trial—A ground for a new trial which merely states that the court erred in giving or refusing instructions is sufficient to raise any and all questions upon this point; but where the party expressly indicates the refusing or giving of certain instructions as error, and names no others, either expressly or in a general way, he will be confined to those named.

Thos. H. Hines and M. N. Webster for appellant.

Winslow & Winslow for appellee.

Appeal from Gallatin Circuit Court.

Opinion of the court by Judge Holt.

In January, 1886, Nancy John, an old lady living near the place where she met her unfortunate death, left her home, and started along or near the railroad track toward the little town of Glencoe, distant something over one-third of a mile. A train of the appellee was approaching in the direction also of the village, and upon a down grade. Shortly before it reached her it became separated; and the engineer, to prevent a collision between the two portions of it, increased his speed, thus making a gap between the two detached sections.

There appears to have been some claim by the appellant upon the trial below that the train was cut in two by some one engaged in operating it for the purpose of making what is known as "a running switch," and which is forbidden by the rules of the company. There is, however, no testimony whatever to sustain it. Upon the contrary the evidence tends to show that this separation occurred by reason, either of the breaking or the loss of a connecting pin, occasioned by the bumping or striking together of the drawheads of the cars in checking them upon a down grade; and this is doubtless the fact. The first section of the train passed Mrs. John, she, of course, not being then upon the track. The two sections were then from thirty to forty yards apart, the conductor and one brakeman or flagman being upon the rear one. At this time, and at a point about half way between the two sections, she went upon the track and was struck by the rear one, and killed almost instantly. Her administrator sues to recover damages, upon the ground that it occurred through the willful neglect of those in charge of the train. The evidence is convincing that when she so exposed herself she was not more than twenty yards at most in front of the cars, which were moving

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at twelve or thirteen miles an hour. Her head was covered up with a shawl, doubtless to protect her from the cold, and this, together with the noise of the portion of the train that had already passed her, probably prevented her from hearing the noise of the approaching rear section. This occurred upon the line of the appellee's road in the country. There was not even a road crossing nearer to the spot than 250 yards. There is no evidence showing that any of the persons engaged in the management of the train knew she was on the track, or in any peril whatever. The testimony offered for the appellant failed in toto to so show, either affirmatively or inferentially; and upon the case, as presented by him, the court should have granted the nonsuit, which was asked at the close of his testimony. This, of course, should never be done wherever there is any evidence whatever upon which the jury might find a verdict for the plaintiff. It was, however, altogether absent in this instance. The lower court, however, saw proper to let the case go to the jury, and the testimony introduced by the appellee shows affirmatively all want of knowledge upon the part of those operating the train that Mrs. John was neither upon the track, or in any peril whatever.

We do not understand the brakeman who was upon the rear of the train as testifying that when the train was descending the grade he saw her upon the track. Upon the contrary, he says she was "standing on left of track."

The company was entitled to the exclusive use of its track at the place where the killing occurred. The right of a railroad company to the use of its track is exclusive of the public, save where the public has a right to cross or use it, or where its use, in a reckless manner, would necessarily endanger the lives of those whose nearness to it requires the exercise of care and caution. In passing through a town or city greater care must be exercised than upon a portion of the road where persons have no license to be. In the first case those in charge of a train must be upon the lookout for persons, and must, by the usual signals, give warning of its approach, while in the latter they are not bound to anticipate their presence and guard against injury to them, but must, when made aware of their peril, avoid the injury by the exercise of all reasonable means.

In this instance the deceased was upon the track at a place where she had no right to be; those in charge of the train never discovered her peril, and hence there was no opportunity for the exercise of the care which the law requires under such circumstances.

The grounds for a new trial expressly confined the appellant's objection to the ruling of the court as to instructions to the second one given, and the refusal to give the first and second ones asked by the appellant. A ground for a new trial, which merely states that the court erred in giving or refusing instructions, is sufficient to raise any and all questions upon this point. But where the party expressly indicates the giving or refusal of certain instructions as error, and names none others, either expressly or in a general way, he will be confined to them.

It does not clearly appear from this record what instructions were given to the jury. The record is confused in this respect. Thus no instruction marked "second" appears to have been given, but, from all that appears, we suppose the one appearing in the record as "nine" is in fact the one which was objected to by the appellant. We will, therefore, briefly consider them.

The two instructions asked by the appellant and refused failed to embody the rule above expressed by us as to the duty of those in charge of a train as

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to one upon the track at a place where he has no right to be, and were, therefore, objectionable, and the second instruction, or number "nine," as it appears in the record, substantially conformed to it. It told the jury in substance that, although the deceased negligently went upon appellee's track, and at a place where there was no public crossing, yet if those in charge of the train became aware of her danger, it was their duty to use proper care to avoid injuring her. It is urged that this instruction expressly confined the exercise of this care to those managing the train, and that this took from the consideration of the jury any negligence upon the part of the brakeman or flagman upon the section which killed Mrs. John. We do not see how this is possible. The jury certainly understood that he was one of the parties engaged in the management of the train.

The instructions, taken as a whole, were more favorable to the appellant than he had a right to ask, and the judgment is affirmed.

O'DANIEL v. O'DANIEL.

(Filed January 29, 1889.)

1. Passways—Adverse possession—In this action to enjoin the defendant from obstructing a passway over his land it appears that the plaintiff and his vendors have used this way for more than fifty years, with only such changes as may have been necessary from time to time by reason of high water, and that it has been, during all this time, the only direct passway from plaintiff's land to the county seat, and is now his only outlet. Held—That the use of this passway being indispensable to the enjoyment of the plaintiff's premises, and having been used from time immemorial, the grant to the use should be implied. It was not necessary for the plaintiff to show by positive testimony that he had claimed this use as a matter of right, and so proclaimed to his neighbors, the burden being on the defendant after such a long use of his premises to show that the use was merely permissive. Nor is the plaintiff estopped by reason of the fact that he has closed up other ways, which lead in other directions. Nor is a proceeding in the county court, by which an effort was made to condemn this route for a passway, a bar to this action, the proceeding having been dismissed without prejudice before judgment.

2. Same—Under our statute of limitation the continued use of a passway over another's land for fifteen years, unexplained, creates the presumption that the use or claim was adverse.

Samuel Avritt for appellant.

J. R. Thomas and Lewis Edelen for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Pryor.

This controversy between the appellant and the appellee arises from the use, by the appellant and those under whom he claims, of a private passway, the appellant alleging that its use has been obstructed by the appellee, by placing logs and constructing watergaps across the way, that prevents travel upon it. The chancellor is asked to have the obstruction removed that the appellant may exercise his right of passage over it. It is alleged that this passway has been used by the public and by the owners of the farm on

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which the appellant resides, under a claim of right, for more than half a century; that the use has been constant and continued by the vendors of the appellant, and the appellant during this entire period, and is the only way from the farm of the plaintiff to the public highway and turnpike leading to his county seat; that this private way is appurtenant to his farm, and was, at no time, obstructed until the wrongful act of the plaintiff complained of, which occurred shortly before the bringing of this suit.

The appellee admits the use, but insists that it was only permissive; that the passway used was up Hardin's creek, and in building fences on either side of the creek the owners of the land could not erect them near the water's edge on account of high water, and this left a space of from fifty to one hundred yards between the fences on each side, and this space had been used by the public for many years, not under a claim of right, but by mere permission, the road being changed from time to time in the space mentioned by the change in the channel of the creek or by reason of high water. It is further alleged that the plaintiff (appellant) is estopped from asserting any right, as he applied to the county court of Marion to condemn this route as a private passway and was defeated; that his vendors, who lived on the land, and from whom he derived title, had caused other passways to be closed up that were appurtenant to the premises, and, having done so, the appellant having had possession of the land for a period of less than fifteen years, can not now assert his claim; that he advised the vendor of the appellee to close up the passway, and stood by when the watergaps were being made without making any objection.

A man by the name of Beauchamp owned the land of which both the tracts owned by the appellee and appellant are composed, and when he owned it, which was in the year 1820, this passway was used by the public and by himself as a passway to the county seat. Mills, Hayden and Thompson, who were near eighty-six years of age when they testified, say that this way in dispute was located in or near the branch when they were boys, and the land was fenced on either side; that it was used as a passway from this land and by the neighborhood before Marion county was formed. Beauchamp sold this land in the year 1820 to William Russell and William Mudd, Russell purchasing the one tract and Mudd the other. The two farms adjoin and border on the creek, and divers witnesses, all of whom are uncontradicted, say that this passway has been used by these farms during the entire period; some of them being old men, state that its use extends as far back as they can recollect, and has remained uninterrupted, except the slight changes that would now and then be made by reason of the high water; fences were all the time on either side of the creek, at least for thirty years, and the constant use of the passway is not in fact controverted. It does appear that a passway from the farm of appellant, leading down a branch, called Meat House branch, to the Lebanon and St. Mary's road, was stopped up by the consent of the owner of the land upon which appellant now lives, prior to appellant's purchase; but this outlet, while it led to the county road, was not in the direction of Lebanon, but was a convenient outlet when going in the opposite direction. The closing of this passway is no evidence of the abandonment of the way up Hardin's creek, nor was the closing of the lane through which a wagon could not pass, leading in the direction of the Cecil pike, an estoppel.

It plainly appears that the passway on the creek bordering on the land

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owned by the appellants and the appellee was the only direct passway from appellant's farm to his county seat, and had been for half a century. It also appears that when the present passway was closed by the appellee it left the appellant with no outlet whatever from his home to the county road, and if constant use for so long a period can give a claim of right, such as is urged here as belonging to the plaintiff, it seems to us this passway should be opened. The proceeding in the county court, by which an effort was made to condemn this route for a passway, is no bar to this action because the proceeding, before judgment, was dismissed without prejudice, the appellant preferring to risk his remedy in a court of equity. There never was any abandonment of the use or act done by the appellant that would estop him from asserting his right. It is agreed that there was never any assertion of right by those who traveled over this passway but such as consisted in its use, and it must, therefore, be presumed the use was merely permissive. We can not concur in such a conclusion. When appellant purchased this land the passway from the farm to the county seat was plain and unmistakable, and when appellee purchased his farm it was equally as manifest, and there was no reason for inquiring as to the duration of the time the passway had been used. It was the only passway, and while its use for a less time than fifteen years conferred no right, the appellee could, at his peril, rely upon its use for so long a period as to make it appurtenant to his farm, and as vesting in him the right of way.

At common law the long enjoyment of an easement gave the right to the easement, and the use continuing uninterrupted for twenty years or longer, when unexplained, created the presumption that the claim or use was adverse. Under our statute of limitation the continued use for fifteen years unexplained would create the presumption as to the right, and in this case the use for more than half a century certainly establishes the right to the passway, and it was not necessary to show, by positive testimony, that the appellant had claimed this use as a matter of right, and so proclaimed to his neighbors. The burden was in fact on the defendant (appellee), after such a long use of his premises, to show that the use was merely permissive.

The case of Bowman v. Wickliffe, 15 B. M., 84, is relied on by counsel for the appellee. In that case the pathway was through unenclosed woodland, and in this same woods divers other passways ran that had been changed and estopped from time to time by the owner at his pleasure; besides, says the court, "it is perfectly evident that the use of this passway was at no time, or until within a few years past, claimed as a right, but was regarded by all parties as a mere privilege allowed by the owners of the land, which they had a right to withdraw at pleasure."

The necessity for this passway from the farm of the appellant, and its constant use for so long a time by its occupants, undisturbed until a few years since, is convincing that the appellant and his vendors claimed the right to use this passway as their own, even against the wishes of the appellee. It followed the land, and was indispensable as an outlet to the enjoyment of the premises, and having been used from time immemorial, the grant to the use should be implied.

The judgment below is reversed and remanded, with directions to require the appellee to remove the obstructions, and for proceedings consistent with this opinion. (Thomas v. Bertram, 4 Bush, 317.)

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LICKING ROLLING MILL CO. v. FISCHER & WEICHMAN.

(Filed January 26, 1889.)

1. Appeals—Presumptions—This court will presume, unless the contrary appears, that the lower court committed no error in its instructions to the jury, and, therefore, that pleadings not copied into the record, but which were before the lower court, authorized the instructions given.

2. Same—Jurisdiction—As the appellees' claim was not sufficient to give this court jurisdiction of the appeal, it is a serious question whether a counterclaim of $4,000 pleaded by appellant, which there was no evidence whatever tending to prove, is sufficient to give this court jurisdiction of the whole case, but as the court is not now ready to pass on the question, it will not deny the appellant a hearing.

Hallam & Myers and Fisk & Fisk for appellant.

Cleary & Hamilton for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Bennett.

This case was once before the Superior Court by appeal by this appellant from a verdict of a jury, and judgment thereon, for $3,000 in favor of the appellees. The case was reversed, not upon its merits, and sent back for another trial, which was had, and which resulted in a verdict and judgment thereon for $1,700 in favor of the appellees. The case is now in this court by an appeal by the appellant.

Appellees' amended petition alleges in substance that they leased from the appellant a lot of ground, situated in the city of Covington, for a term of years, commencing on the — day of January, 1879, and ending on the — day of March, 1888; that said land was to be used by the appellees in carrying on a coal and coke business; that the appellees had the right, at any time during their lease, to erect buildings, etc., on the leased ground, which were to belong to them during the lease and afterwards, provided the same were removed from the said land within thirty days after the expiration of the lease; that, during the lease, they erected on said land coal bins and chutes worth $3,000; that the appellee, by its employes, wrongfully placed a quantity of unslacked lime on the ground under said bins and chutes; that said lime, while it was at the place where it was thus wrongfully placed, was caused to generate heat by being flooded by the Licking river, which heat was communicated to the appellees' bins and chutes, whereby they were fired and consumed. The appellant by its amended answers, traversed the appellees' allegations as to the lease, the erection of the bins and chutes, the wrongful placing of the lime under the bins and chutes, or the destruction of the bins and chutes by fire caused by the overflowing water from the Licking river mixing with said lime. The appellant, as a counterclaim, alleged that the bins and chutes were fired by the negligence of the appellees, which fire was communicated to the appellant's coal elevator, which was situated on said leased premises, and adjoining the bins and chutes; that said fire destroyed the said elevator, whereby the appellant was damaged in the sum of $4,000. The allegations as to the counterclaim were traversed. The lower court refused the instructions asked for by the appellant and appellees and gave seven of his own, to some of which the appellees objected, and to all of which appellant objected. The appellant, while objecting to all the instruc-

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tions given by the court, particularly objects to instruction No. 4. The amended petition, copied in the record, complains of a tort—not of a breach of contract by the appellant. The objection urged against instruction No. 4 is, if the appellant was licensed by the appellees to use said ground for general purposes, or for the specific purpose of sorting its lime, and by the gross carelessness or negligence of its employes, the lime being stored under said bins and chutes, was permitted to come in contact with the high water, whereby fire ensued and the buildings were burned, then the jury should find for the appellees. We do not mean to say that this instruction was wrong, but we mean to say that if the appellant's contention be correct, we must presume that the lower court, unless the contrary appears, committed no error, and that the pleadings, not copied, but which were before the lower court, authorized said instructions. The court's instructions in reference to the tortious conduct of the appellant's employes were correct.

Upon the subject as to whether or not the buildings were fired by the heat generated by the unslacked lime coming in contact with the high water from the Licking river there was proof pro and con; the jury found upon that subject, and we can not disturb their verdict. The lower court peremptorily instructed the jury to find for the appellees in reference to the appellant's counterclaim. There was not a scintilla of proof before the jury that tended to show that the buildings were fired and burned by the negligence of the appellees, or either of them. The appellees' claim is not sufficient in amount to give this court jurisdiction; so the question which the appellees make is, does the fact that the appellant claimed, in his counterclaim, $4,000, which was wholly unsustained by the proof, give this court jurisdiction of the whole case? Upon appellant's appeal as to its counterclaim the question to be determined is not as to the weight of the evidence, but as to whether there was any evidence whatever tending to prove the counterclaim; so it will be seen at a glance that the question is a serious one. But as we are not quite ready to pass upon the question now, we will not deny the appellant a hearing.

But for the reasons above assigned the judgment of the lower court is affirmed.

HINDS, &c. v. BOSTON, &c.

(Filed January 31, 1889—Not to be reported.)

1. Title bond—Questions of fact—The evidence fully sustains the finding of the lower court that the father of appellants, through whom they claim as heirs, had parted with the equitable title to the land in controversy by the execution of a title bond therefor. Besides, this was a question of fact upon which the lower court passed, and this court would not disturb its findings unless clearly erroneous.

2. Infancy—Pleading—The fact that the father of appellant was an infant at the time of the execution of the title bond can not avail them, as his infancy is not relied on by any pleading, the issue tendered being that no such bond was ever executed.

Garnett & Dohoney for appellants.

Geo. R. Price for appellees.

Appeal from Metcalfe Circuit Court.

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Opinion of the court by Judge Holt.

It is certain that Joseph U. Hinds was at one time the owner in fee of the land in dispute. The appellees claim that by a title bond given by him to Wm. Cassidy, in 1859, the latter acquired the equitable title to it; and, as the pleadings stand, this is the only question we need consider. The evidence shows that Hinds was an infant in 1859; but his then incapacity to bind himself beyond the power of avoidance is not relied upon by any pleading. The issue tendered by the appellants is that no such bond was ever executed. Two witnesses testify to its existence. They differ as to the manner of the purchase. One gives it as his recollection that Cassidy paid the consideration direct to Hinds; while the other says that the latter and one Olds exchanged lands, and by the direction of the latter the title bond for the Hinds land, or that now in dispute, was executed by Hinds direct to Cassidy.

It is urged that the latter witness is not worthy of credit because, as the vendor of a part of the land to one of the appellees, he is an interested party; also because he is contradicted in his version of the transaction in some respects, and is also assailed as to character. The transaction occurred in 1859. This suit to recover the land was brought by the two children of Joseph U. Hinds in 1884. A quarter of a century had elapsed. It is rather to the credit of the witness, than a circumstance against him, that his recollection, after such a lapse of time, should not be exact, even conceding that he is mistaken as to some circumstances connected with the purchase. Some four or five witnesses assail his character; but he is sustained by a greater number; and his testimony is, in our opinion, supported by uncontroverted circumstances appearing otherwise in the case, and this, to our mind, weighs as much, or more, in favor of his evidence than anything else. Each of the two witnesses testify affirmatively to the main point, which is, that Cassidy held the bond on Hinds for a title. As early as 1859 Cassidy took control of the land, it then being woodland, in the way of cutting wood upon and clearing it. It was thus rendered more valuable. After his death, which occurred about 1860, it was divided among his children by commissioners under a court proceeding as a part of his estate. A portion of the land in dispute fell to a daughter, Mrs. Stephens, and the balance of it to a son, Levi Cassidy. Commissioners' deeds were made to them respectively. The daughter subsequently conveyed her portion to J. P. L. Boston, whose heirs now hold it by inheritance, and are appellees to this appeal. The son sold his portion to one Shafner, who is the witness already alluded to, and he conveyed it to the appellee, Kinser. It is altogether improbable that all this would have occurred without there having been any sale of the land by the father of the appellants. Moreover, it appears, from the testimony in behalf of the appellants as well as the appellees, that at the time, or soon after, it is claimed the sale was made Hinds took possession of the Olds land, and in fact lived upon it; and, besides, whether the sale was in fact made and bond given is a question of fact upon which the lower court has passed, and we would be unwilling to disturb its judgment unless clearly erroneous.

It may be questionable whether the appellants, owing to the lapse of time and the fact that their father became of age before his death, could, in the face of a plea of limitation, have relied upon his infancy as avoiding his

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contract. Whether this be so or not, it has not been done by pleading; and as, in our opinion, their ancestor parted with the equitable title to the land, and it is held by the appellees, the judgment is affirmed.

RUTTLE, &c. v. CITY OF COVINGTON, &c.

(Filed January 31, 1889—Not to be reported.)

1. Right to construct railroad over streets of city—Under the general power to control streets, sidewalks, etc., a city council can not grant to a railroad company the right to use the streets of the city for the construction of its road.

2. Same—The legislature has the power to authorize the construction and operation of a railroad through a city or town, and upon its streets, when they are not wholly obstructed, even without the consent of the municipal legislature; but the authority must be conferred by express enactment, or in such language that it can be necessarily implied. The power, in general terms, to construct a railroad "to" a town or city does not mean the authority or right to appropriate and use any street or alley the railway company may see proper to occupy, without regard to the inconvenience or injury that may result to the public or to individuals thereby.

O'Hara & Bryan for appellants.

Hallam & Myers for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Lewis.

This action was instituted by Ruttle and others, residents and owners of real estate in the city of Covington, to enjoin the city council thereof from passing an ordinance, or in any manner granting the right of way over, along or across any of the streets, alleys or public places of said city to the E., L. & B. S. R. R. Co. for the construction of a railroad. And the court having dissolved the injunction granted and dismissed the action, the plaintiffs prosecute this appeal.

If the council possesses the power under the charter of the city of Covington, it is conferred by section 19, which is as follows: "They (the council) shall have also exclusive control of the streets, sidewalks, lanes, alleys, market places and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair." It is clear that under the general power to control streets, sidewalks, etc., a municipal legislature can not grant the right to a corporation or individual to appropriate and use the streets of a town or city for any purpose not contemplated by the legislature when the charter was granted, and which would tend to obstruct and hinder the free use of the streets for the purpose and in the modes they are commonly understood to be dedicated for public and private use. And as laying down railway tracks is not such an appropriation or use of streets of a town or city as they are ordinarily intended for, and as was manifestly intended by the section of the charter quoted, it seems to us no power, either express or implied, has been conferred by the city charter of Covington upon the board of councilmen to grant the right of way to the company.

If then the authority exists at all, it is in virtue of the act of the legisla-

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ture incorporating the E., L. & B. S. R. R. Co. And the section of the charter of the company under which the power is said to exist is as follows: "That the E., L. & B. S. R. R. Co. may construct, operate and maintain a railway or railways from any point or points on the line of its railway to the cities of Newport, Covington, or either of them, and from any point or points on its said line to any point or points on the line of the Kentucky Central R. R.," etc. Building and operating a railroad upon the streets of a town or city necessarily results in inconvenience and injury to those residing or having real estate adjacent to such streets, and the right of a company to thus appropriate to its use what was intended to be used by the public for different purposes, and upon the faith of which private rights and interests have been invested, should never be implied, but permitted to be exercised only where there is a clearly-expressed grant by the legislature. The section quoted does not, in express terms or necessarily, authorize the railroad company to operate and maintain its railway upon any street of Covington, with or without the sanction of the city council, for if the power to lay its tracks upon one street may be implied, the right to thus appropriate and use any or all others follows. The legislature has the undoubted power to authorize the construction and operation of a railroad through a city or town and upon its streets, when they are not wholly obstructed, even without the consent of the municipal legislature. But the authority must be conferred by express enactment, or in such language that it can be necessarily implied.

The power in general terms given to construct and operate a railroad to a town or city does not necessarily, or even fairly, mean the authority or right to appropriate and use any street or alley the railway company may see proper to occupy, without regard to the inconvenience or injury that may result to the public or to individuals thereby. In this case the right given by statute to the company may be fully preserved and exercised, by going to the city of Covington or intersecting its road with the Kentucky Central Road, without occupying any and all streets or public places in the city of Covington, the company may, for its interest or arbitrarily, choose to appropriate. The language of the statutes in the case of Lexington & Ohio R. Co. v. Applegate, 8 Dana, 294, and E., L. & B. S. R. R. Co. v. Combs, 10 Bush, 384, was radically different from that used in the section quoted. In each of those cases authority was expressly given to the respective companies to construct their roads through the cities mentioned in the charters.

As the legislature has not seen proper to give to the company in this case, in express terms, the right claimed, we are not authorized to strain the language of the statute for that purpose, when the effect would be to seriously impair the usefulness of the public streets of Covington, and do injury to the rights of individuals.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

REINICKE v. MORSE.

(Filed January 31, 1889—Not to be reported.)

1. Action for new trial—In this independent action for a new trial of an action, in which judgment had been rendered, by default, it appeared that one of the attorneys for the defendant in the original action, being com-

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pelled to leave the city on the day of trial, gave his answer to his associa counsel to file, and the latter, being sick, did not attend court, and was n able to be present during the week when the case was tried and the jud ment rendered. Held—That the court acted properly in granting a ne trial.

2. Same—As permission to file an answer in the original action was t only relief asked, it was error to hear the whole case on its merits when t defendant in the petition for a new trial had made no preparation, a there had been no suggestion by the plaintiff or the court that the ca would be heard on the merits of the original action.

3. Appeals—A motion to set aside the judgment was not necessary in ord to maintain an appeal, as the action stood for trial and the court had juri diction to render the judgment, but erred merely in the relief granted.

4. Same—Motion for new trial—An independent action for the new tri of an ordinary action is in the nature of an equitable action, and a motio for a new trial is not necessary.

Wm. Goebel for appellant.

Geo. R. McKee and Irving Halsey for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

A judgment by default had been rendered in favor of the appellant against the appellee, and the appellee, after the term at which the judgment was rendered, filed this petition, asking for a new trial on the ground that she had a valid defense to the action, and alleging facts that, if true, constituted such a defense as entitled her to a hearing in the original action. She asked that the judgment be set aside that had gone by default, and that she be permitted to answer. The grounds for the new trial were controverted by the appellant as well as the cause of defense. The deposition of the defendant (appellee) was taken, conducing to establish her defense, but no proof taken by the appellant. The case was submitted, and a judgment rendered not only granting the new trial, but deciding the case on its merits for the appellee. The case is brought to this court and a reversal asked on two grounds: First, because the evidence did not authorize the granting of a new trial; second, the court abused its discretion in passing upon the merits of the controversy when no proof had been taken by the appellant, and when the appellee only asked for a new trial, and that she be permitted to file her answer in the original action.

The counsel for the appellee in the original action was compelled to leave the city of Covington on the day of the trial, and gave his answer to Judge McKee to file in the case, who was also employed, and the judge, being unwell, did not attend the court, and was physically unable to be present during the week when the case was heard and the judgment rendered. Under the circumstances the court acted properly in granting a new trial, but erred in passing on the merits when the relief asked for was permission only to file an answer in the original action. While the court might have disposed of the whole case on its merits when the parties had prepared the action for a new trial with that view, yet when the object of the petition is that the party may be allowed to plead to the action in which the judgment by default is rendered, it would be misleading to the defendant in the petition for a new trial to submit on the original case also, when he had made no preparation, and in the absence of any suggestion by the plaintiff or the

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court that the case would be heard not only on grounds for a new trial, but on the merits of the action in which the judgment by default had been rendered.

It is urged that before an appeal could be taken there should have been a motion for a new trial as in an ordinary action. While this is a petition for a new trial of an ordinary action, we know of no rule of practice that requires, in an independent action of this character, a motion for a new trial at the instance of the party whose judgment has been set aside. It has always been treated as in the nature of an equitable action, by which causes are presented for granting the new trial that did not exist, or were not known, when the judgment that is set aside was rendered. The trial court alone can dispose of the question involved. It is not an issue of fact the trial of which by a jury has been waived, but the judge alone has the power to dispose of the issue. Nor is this brought within the class of cases where the action does not stand regularly for trial, as in the case of a judgment prematurely rendered or motion to set aside the judgment before an appeal can be prosecuted. The action did stand for trial, and the court had the jurisdiction to render the judgment, but erred in rendering a judgment determining the merits of the controversy instead of remanding the parties to the original action, and allowing the appellee to file her answer to the action for the recovery of the balance due on the note in controversy. This case comes from the Superior Court, and the reversal there concurred in for the reasons indicated.

Judgment reversed and remanded for proceedings consistent with this opinion.

DIXON v. LYNE, &c.

(Filed January 31, 1889—Not to be reported.)

1. Husband and wife—Voluntary conveyances—A conveyance by a husband to his wife's brother in trust for the wife, in consideration of money advanced by the brother from time to time to the grantor and wife, is supported by a valuable consideration, and the land conveyed can not be subjected by the husband's creditors.

2. New trial--In this action by the husband's creditors to subject the land a judgment was rendered for the plaintiffs after a defense by the husband and wife. Upon motion by the wife to set aside the judgment upon the ground that her real defense was not interposed, it appeared that the wife, being sick and unable to attend at her lawyer's office, entrusted her defense to her husband, and that through his neglect it was not made. Held—That the court did not abuse its discretion in setting aside the judgment.

S. B. & R. D. Vance for appellant.

Alvin Duvall for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Pryor.

The appellant is attempting to subject the land conveyed by the husband of Mrs. Lyne to John Kelly as trustee for her (she being his sister) to the payment of a debt for which the land is liable in the event the deed was voluntary or without any other consideration than that of love and affection. A judgment was rendered after a defense had been made by Lyne and his

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wife, and by others who were defendants, and resisting the recovery, but at the same term of the court set aside, at the instance of Mrs. Lyne, on the ground that her real defense had not been interposed. The defense of the wife was that her brother, John Kelly, had purchased this land for $3,000 in money actually paid by him, and the conveyance then made to her brother as trustee for her benefit. Why this defense was not interposed when the case was originally heard is to be attributed to the neglect of the husband. The wife, on the motion to set aside the judgment, shows by the affidavit of her husband that she was sick and unable to attend at the office of her lawyer, and entrusted her defense to her husband, who swears that he understood that he had given the attorney the character of the defense his wife had, and there must have been some misunderstanding between himself and the attorney in regard to the matter. The attorney swears he never understood that he was to make a separate defense for Mrs. Lyne, but made a defense common to all the defendants, attacking the validity of the note sued on or the judgment obtained upon it. The affidavit of F. F. Cheaney was filed, who says that he was at the house of Lyne, and his wife there talked of her defense, and that was the purchase of the land by her brother for her; that he was an innocent purchaser, and she could hold the land, but would not make the defense, and intended to stand by the answer already filed in the case. This affidavit, or the facts contained in it, are contradicted by the affidavit of Mrs. Lyne, who denies the conversation, and says that her defense was the purchase by her brother of the land sought to be subjected and the conveyance made for her benefit.

The conveyance by Lyne, the husband, to Kelly as trustee for his wife, was executed and recorded on the 29th of August, in the year 1874, nearly ten years before this action by the appellant was instituted, and it is singular that the defense was not made at the first hearing. We are satisfied the facts of the defense were not made known to the attorney, but equally well satisfied that the wife supposed the defense had been made, and relied on it to defeat the recovery. The discretion of the trial court was not absurd in setting aside the judgment. The husband swears that the money constituting the consideration for the conveyance to the wife had been advanced to him and to his wife by her brother, who lived in Nevada. That it was advanced is apparent from the statement made by the husband both as to the time and manner of receiving it, and, if untrue, his statements could have been easily contradicted. Some of the money was sent to the husband or wife a few days before the conveyance was made, and there is but little doubt as to their having received this money. It is urged that these various sums sent by the brother for the benefit of his sister were gifts from him, and that no consideration therefor was received or expected. Whether so or not, the land was conveyed in consideration of the money actually received, and long before this action was instituted. The husband was insolvent, and had nothing but this land to live on. The brother of the wife was asking him to pay her debts and educate her children, and it is not unreasonable to suppose that the brother would secure, in some way, to his sister this money that he was constantly advancing to a thriftless husband. The best evidence of the fact is the conveyance itself made many years prior to this litigation, sustained by the testimony of Lyne, and the fact that the money was actually advanced.

The judgment, in our opinion, was proper, and is now affirmed.

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KENTUCKY SUPERIOR COURT.

HOARD v. MORRIS, &c.

(Filed January 16, 1889.)

Wire fences—Nuisance—A barbed wire fence is not, as a matter of law, a nuisance, and the owner is not liable for an injury inflicted upon the stock of others which may stray upon the land and be driven or run against the fence by the owner of it, when in the lawful and prudent exercise of his own business upon his own land.

W. E. Seddle for appellant.

J. A. Mitchell for appellees.

Appeal from Edmonson Circuit Court.

Opinion of the court by Presiding Judge Ward.

The appellant complains of an order sustaining a demurrer to his petition, and of a resulting judgment dismissing his action.

The facts constituting appellant's claim for damages are briefly these: That appellees, Mason Morris and the Louisville & Nashville R. R. Co., built, on the line separating the lands of the former from the company's right of way, a barbed wire fence, which they knew to be dangerous to stock; that appellant's mare, without fault on his part, "escaped from his premises and wandered up said railroad in the direction of said fence, and while grazing on said company's land, which was open and unobstructed, said mare becoming frightened at one of the company's trains passing on said railroad, ran upon and against said fence, by which she was greatly cut, mangled and permanently injured and crippled for life, to the plaintiff's damage in the sum of $105."

It is a sufficient answer to much of the argument submitted in behalf of appellant to say that there is no averment that said fence was built or designed or intended as a trap or snare for the stock of plaintiff or any one else. It is not alleged how plaintiff's mare reached the lands of the railroad company—whether by leaping over a barbed wire fence or passing over a cow-gap at the end of the right of way, which was out of repair, or whether she strayed from plaintiff's lands on the side of the road to the side of the road between defendants' lands, which were separated by the fence complained of; nor is there any averment that the company was guilty of any negligence in the management of its train at the time the injury was inflicted.

The sole ground of complaint is that persons who build such a fence to separate their lands, or, for that matter, one person who builds such a fence to separate his own lands, is liable in damages for an injury inflicted upon the stock of others which may stray upon the land and be driven or run against the fence by the owners of it, even when in the lawful and prudent exercise of their own business upon their own lands. This can not be main-

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tained except upon the ground that the erection of such a fence is a nuisance of such an aggravated character as to indicate a reckless indifference to the right of others, or a purpose to injure all who, by misfortune, might come in contact with it.

This court can not be unmindful of the fact that many prudent persons have, with the best of motives, erected such fences to give security to their enclosures against their own as well as their neighbors' cattle, nor of the fact that the practicability and usefulness of such fences are an experiment, now receiving general sanction, to the end that they may be adopted or rejected, nor to the fact that they have, as to many counties in the State, been declared by the legislature of the State lawful fences. These considerations are conclusive against the right of the court, as a matter of law, to say that such a fence is a nuisance.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

COMMONWEALTH v. HURT.

Filed February 6, 1889. Appeal from Wayne Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Indictment—An indictment charging a statutory offense is sufficient if the words employed in the indictment convey the same meaning as those used in the statute.

An indictment against a school trustee under section 16 of article 8; chapter 96. General Statutes, which charges that the defendant, in consideration of $5 promised to him by another, agreed to vote, and did vote, for a certain teacher, necessarily means that he agreed to "accept" the promised consideration for his vote, and did for said consideration vote, and is sufficient.

P. W. Hardin for appellant.

MEIER v. LEWIS.

Filed February 6, 1889. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

Under the mechanic's lien law for the city of Louisville and Jefferson county, where a subcontractor gives the required notice to the owner or employer, he acquires a lien only from the date of notice, and if before that time an attaching creditor of the contractor has acquired a lien by service of process of garnishment upon the owner, the lien thus acquired is superior to that of the contractor, and if the owner pays the subcontractor the amount he owes the contractor, he does so at his peril.

Marshall & Lochre for appellant; C. B. Seymour for appellee.

BRIDGEFORD v. FOGG, SHAW, THAYER & CO.

Filed February 6, 1889. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Partnership—Judgment affirmed as to one and reversed as to others—In an action against partners upon a partnership liability a several judgment may be rendered against each partner, or a judgment may be rendered against one, and the action dismissed as to the others. And the appellate court may, in such a case, affirm as to one and reverse as to others.

2. Same—A judgment against three partners was reversed by this court as to two of them and affirmed as to the other. It is now contended that the grounds upon which the affirmance was based rendered the judgment of affirmance, and also the judgment which was affirmed, a mere nullity. Held—That as the lower court had jurisdiction to render several judgments against the partners which were valid until reversed, and this court had jurisdiction to affirm the judgment against the one and reverse as to the others, the judgment can not be rendered void because of the reasons given for affirming it.

R. J. Elliott and Simrall & Bodley for appellant; C. B. Seymour for appellees.

BRANNIN, BRAND & GLOVER v. CROUCH, GARVEY & CO.

Filed February 6, 1889. Appeal from Owen Circuit Court. Opinion of the court by Judge Barbour, reversing.

Counterclaim and set-off—Pleading conclusion—In an action upon a promissory note the defendant pleaded as a counterclaim the damages which he alleged he had suffered by reason of the unauthorized sale by plaintiffs of tobacco which he had on storage with them as warehousemen. Held—

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1. That the defendants' answer is not good as a counterclaim, as there is no averment which shows that the storage of the tobacco or its sale arose out of the contract or transaction stated in the petition as the foundation of plaintiffs' claim, or that they were in anywise connected with the subject of the action.

2. The defendants' alleged cause of action can not be pleaded as a set off, as it sounds in tort and seeks to recover unliquidated damages.

3. The averment that the defendants could have sold the tobacco within four months after the sale at an advance of $8 per hundred weight is a mere conclusion of the pleader, and is not sufficient to show that he suffered any loss on account of the sale of the tobacco.

Montgomery, Lindsey & Botts for appellants; J. W. Greene and Thomas R. Gordon for appellees.

THE STONE & HINES LUMBER CO. v. ALLEN, &c.

Filed February 6, 1889. Appeal from Knox Circuit Court. Opinion of the court by Judge Bowden, affirming.

Sales of personal property—Passing of title—Appellant entered into a written contract with E., whereby E. agreed to cut into lumber and deliver on cars at Woodbine, Ky., all of the poplar lumber cut from certain timber he had purchased, the prices which appellant was to pay being stated. The contract provided that "all lumber shall be put on sticks at mill," specifying how long the different thicknesses should remain on sticks before being put on the cars, appellant agreeing to advance to E. "such sums of money, payable on the 15th day of each month, as shall be necessary to carry on said work, and also to pay for the lumber as we haul it away from the yard. The money advanced shall be on account of lumber only." After E., in pursuance of his contract, had made all of the lumber and delivered the greater part of it, attachments sued out by creditors of E. were levied upon the lumber that had not been delivered on the cars. Appellant claims an ownership of the attached lumber, and asserts a lien in the event its first claim can not be maintained. Held—That when the attachments were levied the appellant had neither title to nor possession of the lumber, but E. owned it and had it in possession. And as appellant had neither title nor possession, it had no lien for money advanced. While there is evidence that logs in the woods and at the mills were branded with appellant's brand, yet as it appears that the contract was not changed, this could not have been an assertion of title or possession which could not have been claimed under the contract.

R. D. Hill for appellant; D. W. Lindsey for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. GARTIN.

Filed February 6, 1889. Appeal from Marion Circuit Court. Opinion of the court by Judge Bowden, affirming

Practice—While the record recites that grounds for a new trial were filed, it does not show what they were, and the practice is not to order a certiorari on the court's own motion with a view to a reversal. In the absence of grounds the pleadings alone can be considered, and they are sufficient to sustain the judgment.

W. J. Lisle, H. W. Bruce and W. Lindsay for appellant; Samuel Avritt for appellee.

HOWARD v. COMMONWEALTH.

Filed February 6, 1889. Appeal from Hardin Circuit Court. Opinion of the court by Judge Bowden, affirming.

Reversible errors—The action of the court in overruling a motion for a new trial in a criminal case is not subject to exception, and is, therefore, not a reversible error.

P. W. Hardin for appellee.

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DANIEL & BRO. v. BARNES, &c.

Filed February 6, 1889. Appeal from Grayson Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

As a legal proposition it may be admitted generally that if a wife, not authorized under the statute to trade as an unmarried woman, should enter into a partnership, the profits therefrom would be the property of the husband. And if a wife should enter into a partnership under such circumstances, and sell her interest in the firm profits through the agency of her husband, she would, at all events, be bound by the terms of that sale in a suit by her to recover on that contract.

In this action, in which a married woman seeks to recover the amount agreed to be paid her for her interest in a partnership, she is bound by the terms of the contract; but the evidence fails to sustain the allegations of the defendants' answer as to what the terms of the contract were.

G. W. Stone for appellants; J. S. Wortham for appellees.

TARLTON v. HYDE.

Filed February 6, 1889. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Maliciously suing out distress warrant—Indemnifying bond—The execution of an indemnifying bond by the plaintiff in a distress warrant does not preclude the defendant from bringing his action against the plaintiff for maliciously suing out the distress warrant and having it levied and the property sold. The defendant is not confined to his action on the indemnifying bond, in which he can recover only the damage resulting from the seizure and sale of his property, whereas he is entitled to be compensated also for the injury to his business.

Ira Julian for appellant; J. A. Scott for appellee.

MARION NATIONAL BANK v. FIDELITY TRUST CO.

Filed February 13, 1889. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Appeals—The judgment appealed from shows that the appellant excepted and prayed an appeal, but it does not appear that the appeal was granted. Held—That it would seem that this was sufficient to secure to the appellant an appeal, but whether so or not it is not necessary to determine in this case. The only object of having the order to show that the "appeal is granted" is to notify the appellee that the appeal is actually pending, and that the appellee was advised of that fact in this case is shown by the fact that he filed a counter schedule to a schedule filed by appellant for a partial transcript.

2. Trusts—Agent—Banks—Interest on deposits—A deed of assignment for the benefit of creditors provided that C., the assignee, might appoint R., one of the grantors in the deed, his agent to aid him in any or all the duties under the assignment, which C. did. The trust fund was deposited in a bank, of which R. was the cashier, and in making up the account from time to time the clerk in the bank, by the direction of R., credited the account with interest until July 1, 1878, after which R. directed that interest be no longer allowed. At that date a dividend was declared, and checks made out by R., payable to creditors for their respective shares, and sent to C. to be signed, which was done, and the checks returned to R., who delivered some of them, but others were never delivered, and were found among his papers after his death in 1885. It is evident that this dividend was declared upon the basis of the principal fund, the interest not being taken into account, and that the checks drawn were intended to cover that fund, leaving the interest untouched. In October, 1886, the balance of the fund, as shown by the books of the bank, including the amount of the checks drawn in July, 1878, and never delivered, was paid to appellee, the successor of C., as trustee, and this action was afterwards brought by appellee to recover interest on the fund deposited from the time of its deposit. Held—That the evidence

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was not sufficient to show a contract to pay interest beyond the time it was actually paid by placing it to the credit of the fund, and notice to R. that no interest would be allowed after July 1, 1878, was the same as notice to C.; nor is the bank chargeable with laches by reason of R.'s failure to deliver to creditors the checks drawn on the fund in July, 1878.

3. Practice—The action being in equity, it is proper for this court to consider the evidence and express its opinion as to its effect, even though not prepared to direct a final judgment to be entered in accordance with what now seems to be the rights of the parties.

Goodloe & Barr for appellant; W. W. Thum for appellee.

SPALDING v. GHENT.

Filed February 13, 1889. Appeal from Greenup Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Contract for monument—Instructions—In this action to recover the contract price of a monument made by the plaintiff for defendant the defendant pleaded that the monument she contracted for was to have the word "Spalding" on one side of it, this being the family name of her husband, which she wished to perpetuate, in memory of whom the monument was to be erected, but that the name "Spalding" was spelled "Spaulding" on the monument tendered to her, and, therefore, it was not the monument contracted for, and she was not bound to receive it or pay for it. The plaintiff denied that it was a part of the contract that the name was to be spelled "Spalding," but says the defendant, when called on to write the name down for him, said M., plaintiff's agent, who was then present, knew as well as she how to spell the name, but that neither he nor M. knew the correct spelling of the name. Defendant denies telling M. to write the name, but says she wrote it down, spelling it correctly. There was evidence tending to support these several averments, except that M. did not know how to spell the name. Held—That it was error to instruct the jury that if they believed that defendant left to M. the spelling of the name, then she could not refuse to accept the monument because of any error he may have made in the spelling of the name in having it placed on the monument. As the evidence stood the matter could have been submitted to the jury by telling them to find for the defendant if M. knew how to spell the name Spalding as spelled by defendant and her family, or if defendant furnished him with information as to how it was to be spelled, and it was not so written on the monument.

2. Same—Evidence—The defendant's objections should have been sustained to the questions propounded to her as to whether she had not made up her mind, shortly after she made the contract, that she did not intend to receive the monument, notwithstanding it came up to the contract. This was irrelevant and incompetent.

E. F. Dulin for appellant; T. H. Paynter for appellee.

NICHOL'S ADM'R v. RICE.

Filed February 13, 1889. Appeal from Hancock Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Pleading—The plaintiff alleges, in his petition, that "his claim of $188.70 against defendant's estate is a just one, and no part of said claim has ever been paid, except the sum of —— dollars," and he prays judgment for the above-named sum, "less —— dollars." Held—That the allegations do not show any indebtedness or cause of action, and did not authorize a judgment.

2. Judgment by default—As one item of the account sued upon is for damages, the court was not authorized to render judgment upon it until the damages were assessed in the mode prescribed in sections 126 and 379 of the Code.

W. S. Roberts for appellant; Henry Mason and R. E. Duncan for appellee.

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HOFFMAN & AHLERS v. PRICE & LUCAS.

Filed February 13, 1889. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming; Judge Bowden, dissenting.

1. Conditional sales—Warranty—While a guaranty or warranty will not be implied in a sale which is conditional upon the approval of the thing by the purchaser after a trial, the parties may agree that in the event the purchaser incurs loss or expense in making the trial he shall be paid the amount of such loss or expense.

2. Prejudicial errors—The defendants were not prejudiced by the refusal of the court to allow them to read to the jury a writing, the existence of which was admitted by the plaintiffs in their evidence, and the terms of which were repeatedly stated to the jury.

Judge Bowden, dissenting, holds that the case made by the pleadings was not presented to the jury.

Dodd & Grubbs for appellants; Brown, Humphrey & Davie for appellees.

ELIZABETHTOWN, LEXINGTON & BIG SANDY R. R. CO. v. GARTNELL.

Filed February 13, 1889. Appeal from Boyd Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Practice—Appearance—Whether the court should have quashed the return of service of the summons is not necessary to decide, as upon the return of the case the defendant will be regarded as having entered its appearance by the appeal.

2. Railroads—Negligence—Evidence—In this action against a railroad company to recover for an injury to plaintiff by the alleged negligence of defendant in running one of its trains, an ordinance of the town in which the injury occurred, limiting the rate of speed of trains through the town to six miles an hour, was not competent evidence.

3. Same—An instruction making the defendant liable if the collision was caused by the train running faster than the rate fixed by the ordinance, without regard to whether this rate was in fact a negligent one, and without regard to plaintiff's negligence (the defendant having pleaded contributory negligence), was erroneous.

4. Same—An instruction absolving plaintiff from all care, although the train was on time and plaintiff knew this time, and making the company liable without regard to his absence of care, if it failed to give warning of its approach, was erroneous.

Breckinridge & Shelby for appellant; R. C. Burns for appellee.

MARCHAND, &c. v. YORK.

Filed February 13, 1889. Appeal from Daviess Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Attachment bond—Interest on damages—In this action on an attachment bond in the common form the court told the jury they might, in their discretion, allow interest on damages, which were for the levy and sale of personal property seized and sold under the attachment, and for a reasonable attorney's fee. Held—That this was proper.

2. Same—Measure of damages—Double the amount of the debt to be secured by the attachment is not the limit of the liability on the bond; the clerk is merely directed to require security to that extent, as presumably sufficient.

3. Same—The court properly refused to tell the jury they should deduct

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from the damages found the proceeds of the property sold, none of the proceeds having been paid to plaintiff. He can not be required to look to the sheriff.

4. Same—The market value is the test of the value of the property sold—not what it brought at that sale.

Sweeney & Son for appellants; George W. Williams & Son for appellee.

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KENTUCKY COURT OF APPEALS.

KENTUCKY COURT OF APPEALS.
CLAY v. CHENAULT.

(Filed February 5, 1889—Not to be reported.)

Construction of deed—While, as a general rule, the habendum of a deed must give way to the granting words when clearly contradictory of them, yet it should be restored to equally with the other parts of the instrument to arrive at the intention of the maker, which must govern when ascertainable.

By the granting clause of a deed, which recited the payment of the purchase price by C the father of the grantee, land was conveyed to L, habendum: "To have and to hold said lots of ground to the said L and the children of his body, lawfully begotten, but in case of his death without children or their descendants, then to revert to and descend at his death to the said C and his heirs and assigns in fee forever, and the said C reserves, during the minority of the said L, the right to control the use and possession of said lots, and to collect the rents and profits for the benefit of said L." Held—That L takes an estate for life, remainder to his children, and in case of his death without children or their descendants, then the estate to go to C and his heirs in fee, it being manifest from the entire instrument that such was the intention of the parties. Therefore, L can not pass by deed a fee simple title to the property conveyed.

C. F. & A. R. Burnam for appellant.

Appeal from Madison Court of Common Pleas.

Opinion of the court by Chief Justice Lewis.

The only question in this case is, whether appellant, Lawney Clay, was, by the deed made to him in 1874, invested with the fee simple title to two lots of land, which he has sold and agreed to convey to appellee, Chenault. The granting and habendum clauses of that deed are as follows: "That the parties of the first part, and in consideration of the sum of $3,500, of which the receipt is hereby acknowledged, payment of the same having been made by C. M. Clay for the grantee herein, have granted, bargained and sold and hereby sell, alien and convey to the party of the second part, the lots or parcels of land situated, etc. * * * To have and to hold said lots of ground

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to the said Lawney Clay, and the children of his body, lawfully begotten, but in case of his death without children, or their descendants, then to revert to and descend at his death to the said C. M. Clay and his heirs and assigns in fee forever. And the said C. M. Clay reserves, during the minority of the said Lawney Clay, the right to control the use and possession of said lots, and to collect the rents and profits for the benefit of said Lawney Clay."

Construing that deed according to the plain meaning of the language used, it is manifest the intention of the parties was to convey to the vendor, Lawney Clay, only a life estate in the lots, and when it is considered that the consideration was wholly paid by C. M. Clay, the father, whose wishes alone controlled, the vendor, Lawney Clay, being, at the time, an infant, it is almost impossible to avoid that conclusion. And the intention being thus clear, whatever seeming repugnancy there may be between the different clauses of the deed must, if possible, be reconciled, giving to each meaning and effect, but to no part such meaning or force as will defeat the interest, as manifested by the whole instrument. As said in Henderson v. Mack, 83 Ky., 379, "the office of the habendum clause in a deed is to limit and define the estate granted, and while, as a general rule, it must give way to the granting words of the deed, when clearly contradictory of them, yet it should certainly be resorted to equally with the balance of the instrument to arrive at the intention of the maker, which must govern when ascertainable." Section 10, article 1, chapter 63, General Statutes, provides: "If any estate shall be given by deed or will to any person for his life, and after his death to his heirs or the heirs of his body, or his issue or descendants, the same shall be construed to be an estate for life only in such person, and a remainder in fee simple to his heirs, or the heirs of his body, or his issue or descendants."

The words used in the habendum clause, properly construed, mean an estate for the life of Lawney Clay, remainder to his children, and in case of his death without children, or their descendants, then the estate to go to C. M. Clay and his heirs in fee. If such is not the meaning intended, we are unable to see what purpose the parties had in providing for the disposition of the estate in case of the death of Lawney Clay. It seems to us to hold that the appellant has and can pass by deed a fee simple title to the lots in question, would be contrary to the plain intention of the parties to the deed from Brown and wife, and consequently the lower court properly adjudged appellee, the purchaser, should not be required to pay the purchase price and accept the deed of appellant.

Wherefore, the judgment dismissing the action is affirmed.

DAVIS v. CORNELIUS.

(Filed February 5, 1889—Not to be reported.)

Dower—Estoppel—While a widow will be estopped from claiming dower as against one to whom she represented before his purchase from the heir that she had no interest, the proof that she made such representations should be more convincing than it is in this case before the chancellor will deprive her of dower.

Clarke & Applegate for appellant.

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J. L. Dougherty for appellee.

Appeal from Pendleton Chancery Court.

Opinion of the court by Judge Pryor.

The attempt in this case is to divest the widow of dower upon her representations to the purchaser that she had no interest in the land, but that it belonged to her daughter, who had married, and, together with her husband, sold the property.

The appellant (the owner) says that the appellee told him she claimed no interest, and induced him to make the purchase. This is denied by the appellee, and, on the contrary, she says that she always asserted her right. Chiles says that long before he purchased for Davis the appellee told him it belonged to her daughter, and she had given her up the land. The realty did, in fact, belong to the daughter. Her father, during his lifetime, had made her a deed of record in the county where all these parties lived. He left his widow in the possession at his death, where she continued to reside until this purchase was made. That the widow might be estopped as others from asserting a right of ownership in property left her by her husband, and purchased by those who relied on her statements that she had no interest, is well settled, but the proof should be more convincing than in this case before the chancellor would deprive her of dower in the realty sold by the heirs. She was in the possession and had been for years, and whether living with her daughter, or the daughter with the mother, is immaterial, as the claim of the one was not hostile to that of the other. The deed was of record under which the daughter held. Her mother was not a party to it, and the purchaser must have known this when investigating the title. It was an easy matter to have had the mother unite in the conveyance by the daughter and her husband, and certainly would be more secure than relying on conversations that are detailed by the appellant and denied by the appellee, purporting to have occurred many years before this suit was instituted. The chancellor below knew these parties, the circumstances surrounding the parties, and was not satisfied that, under the proof, the widow should be deprived of her dower in the property. In this conclusion we concur.

Judgment affirmed.

PERKINS v. THE MAYSVILLE DISTRICT CAMP MEETING ASSOCIATION.

(Filed February 7, 1889—Not to be reported.)

1. Corporations—Liabilities for tort—A corporation may be made liable for a tort, or even an assault and battery committed by its agents when in discharge of a duty connected with their employment; but, to make the corporation liable, the act complained of must be within the object of the association.

In this action the plaintiff complains that his property was seized by the defendant, a camp meeting association chartered by the legislature. A trespass upon his close is also alleged, but the manner of committing the forcible entry or by whom does not appear. It is also alleged that the president of the corporation prevented persons from being entertained by the plaintiff, and interfered with his trade as a merchant by telling others that he had no right to sell his goods or to entertain them, although on his own premises. Held—That the petition does not state a cause of action. It does not appear

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that the trespass, if any, was authorized by any act of the corporation as such: and if the president interfered with the plaintiff's trade as alleged, he is personally liable, if any liability exists.

2. Camp meeting association—Police regulation—The plaintiff's business house was a stable, erected on his own land, within one hundred yards of the place for religious worship, and under a police regulation in defendant's charter designed to prevent the conduct of temporary business houses during the time the defendant's meeting continued, the plaintiff was properly fined in a regular proceeding before a justice of the peace.

L. W. Galbreath for appellant.

Cochran & Son for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Pryor.

A corporation may be made liable for a tort, or even an assault and battery committed by its agents when in discharge of a duty connected with its employment and in its execution. (Chitty's Pleadings, volume 2, 16 American edition.) To make the corporation liable the act complained of must be within the object of the association. Here the plaintiff complains that his property was seized and taken possession of by the corporation. A trespass upon his close is all ged, but the manner of committing the forcible entry or by whom does not appear. It is also alleged in one count that the president of the corporation prevented persons from being entertained by the plaintiff, and interfered with his trade and calling as a merchant in telling others that he had no right to sell his goods and wares or to entertain them, although on his (the plaintiff's) own premises.

The District Camp Meeting Association of the Metohdist Church was chartered by an act of the legislature, and to suppress disorder, confusion, and prevent the disturbance of religious worship, a police regulation is found within its charter enacted to prevent hucksters and itinerant venders of what may be termed goods, and keeping private entertainment in a particular mode, calculated to disturb those assembled for religious devotion. The act does not, nor was it intended, to interfere with any legitimate trade or calling, either on one's own land or off of it, but to prevent the conduct of temporary business houses for the time only that the meeting continued. If there was a trespass on the plaintiff's premises, it does not appear that it was authorized by any act of the corporation as such, and if the president of the corporation interfered with appellant's trade by telling others they ought not to be entertained by him, he is personally liable if facts are alleged constituting a cause of action.

Besides, we think the answer filed to the first count in the petition, to which the demurrer filed was overruled, presented a defense to the whole charge as made by the plaintiff, and while that count was as defective as the other two, a trial was had on the merits, at least the law and facts were submitted to the court and a judgment for the defendant. The plaintiff's business house was a stable, erected on his own land, within one hundred yards of the place for religious worship, and the corporation, in order to enforce the police regulations embraced within its charter, applied to a justice of the peace, and had, under regular proceedings, a fine imposed on the appellant and his partner for selling, etc., and in discharge of the fine a part

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of the goods were surrendered to the officers, and on the admission of these facts the judgment was rendered.

There was nothing in the charter that authorized the agents of the corporation to go on plaintiff's land or otherwise injure him in his trade, and if the president of the appellee, in word or action, violated the constitutional rights of the appellant, he is personally liable. On the facts admitted, the justice was right in not regarding appellant's stable as a place of business and in suppressing its operations.

Judgment affirmed.

MEADOR v. MEADOR, &c.

(Filed February 7, 1889.)

1. Descent—Lien—Equity—Surety—Land descended to heirs with an execution lien upon it for a debt for which one of the heirs was primarily bound, the ancestor being merely surety in the debt. In a suit by the heirs for a division of the land the execution creditor asserted his lien, and the chancellor ordered that the land allotted to the heir, who was primarily liable for the execution debt, be first subjected to its payment. Held—That this was proper. The fact that the creditor could not have directed the sale of some particular portion of the land presents no reason why the chancellor can not do so in order to prevent litigation and hardship. The ancestor, the surety, could have maintained an action to compel the principal to discharge the debt, or to subject his property, first, to its payment, and there is no reason why the rule should not extend to the heirs of the surety, when, as between them and the principal debtor, their property is secondarily liable for the debt.

2. Homestead—Where property has come to a debtor by descent he may be entitled to a homestead therein, although the debt to which it is sought to be subjected was created prior to the time at which he received the property, but as the property in controversy here descended with the lien upon it, as against that lien, the heir is not entitled to a homestead.

Chapeze Wathen and C. C. Fairleigh for appellant.

J. W. Lewis & Son for appellees.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Holt.

In 1876 the appellant, John H. Meador, with his father, Paschal Meador, as his surety, executed to R. J. Patterson a note for $2,000, payable on demand, and bearing 10 per cent. interest from date. About three years thereafter the appellant, with the written consent of the surety, mortgaged to Patterson certain real estate to pay the debt. The creditor brought suit in 1881, and obtained not only a decree enforcing the mortgage lien, but a personal judgment against John H. and Paschal Meador. A certain sum was realized by the sale of the mortgaged property, but not enough to pay the debt. An execution issued upon the judgment and was levied upon two tracts of land of Paschal Meador, but only one was sold, the other remaining in lien under the execution. At this time Paschal Meador died, leaving the parties to this action, except Patterson, as his heirs. His widow made several payments upon what remained unpaid of the debt, leaving a balance still owing, however, of $286.60 and interest.

In 1886 a portion of the heirs of Paschal Meador instituted legal proceed-

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ings to divide his unsold land, and which was subject to the execution lien of Patterson for the remainder of his debt. A judgment was rendered therefor and the division had, a certain portion of it being allotted to the appellant as one of the heirs. The appellees brought this action in equity before the confirmation of the division of the land, asking that the interest of the appellant in it be first subjected to the Patterson execution lien, as he was the principal in the debt; and, if the division already made should be confirmed, that his allotted portion be first sold, and if not, that then his interest in the land be first subjected to the payment of the debt.

The pleadings admit the facts above recited, and also the insolvency of the appellant. A demurrer to the petition having been overruled, the appellant filed an answer averring that the execution levy was upon the entire tract of land; that he was a housekeeper with a family; owned no real estate save his interest in this land, which was worth less than $1,000, and that as soon as the division of it among the heirs was completed, he intended to use his portion as a homestead. A demurrer was sustained to the answer, and judgment entered, directing that the portion of the land which had now been confirmed to the appellant should be first subjected to the payment of the remainder of the debt. He now complains. It is admitted he was the principal in the debt, and that he is insolvent. It appears his father, although only his surety, was compelled by execution sale to pay a considerable portion of what has heretofore been paid upon the debt.

No equity in favor of the appellant addresses itself to the court, and the inquiry arises, did any legal reason or rule exist forbidding the subjection of his interest in the land to the payment of his debt, or in the manner appellees have adopted to reach it?

It is urged that the demurrer to the petition should have been sustained, because the execution lien was upon all and not a part of the land, and as the creditor could not have directed the sale of a particular portion of it, neither could the chancellor: also because the creditor's remedy was complete at law as well as that of the appellees, they having a right as is claimed after payment of the judgment and its assignment to them, to enforce it against the appellant's portion of the land. The execution creditor is not complaining. It is only the principal debtor, who rightfully and legally is the one to pay the debt. Moreover, the chancellor has not lifted the lien from all the land and placed it upon part of it, but has merely directed that, in enforcing it, the land of the party who is primarily bound for the debt shall be first subjected This is certainly a proper office of equity. Because the creditor, at his carpice, could not have directed the sale under his execution of some particular portion or interest in the land, presents no reason why, to prevent additional litigation, hardship, and probably loss to innocent parties, the chancellor should not, upon a proper state of case, interfere and control the manner of the sale.

Prior to the adoption of the Code of Practice a surety could maintain a bill to compel the principal to discharge the debt. (Morrison v. Poyntz, 7 Dana, 307.) The Code, section 661, expressly gives this right. It avoids multiplicity of action, and is, moreover, just to the surety. It is more adequate to his protection than any legal remedy. This is all the appellees have done. Their property being liable to the creditor, they stand in the place of their ancestor, and he unquestionably could have maintained an action to compel the appellant to discharge the debt, or to subject his property first to its payment. We see no reason why the rule should not extend to the heirs of the surety when, as between them and the principal debtor,

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their property is secondarily liable for the debt. If it be subjected to its payment they can look to him for reimbursement, and if the property of both the principal and the surety be in lien to the creditor, the principal, who, as between himself and the surety, is both morally and legally first bound to pay, can not be heard to say that equity, the great foundation of remedial justice, can not compel him to do so.

The fact that one who is otherwise entitled to a homestead acquires it after the creation of the debt, does not deprive him of the right to it if it comes by descent. In such a case no estate of the debtor has been divested, and the creditor can not say that the means upon which he relied for payment have been thus invested. He has no ground of complaint. The statute denies the debtor the homestead if obtained by purchase by him, because it is probable the possession of the very means thus used enabled him to obtain the credit; but this reason for its liability in case of purchase fails where he gets it by descent. (Jewell v. Clark's Ex'or, 78 Ky., 398.) In the case now presented, however, the lien was created upon the land when it belonged to Pascbal Meador. It descended to the appellant with the lien upon it, and as against it he has no homestead.

Judgment affirmed.

WILLIAMS, &c. v. GAITSKILL'S ADM'R, &c.

(Filed December 20, 1888—Not to be reported.)

Liens—J. purchased land under an execution against A. for much less than its value. He afterward conveyed the land to H., in consideration that H. would pay certain debts named in the deed, among them a debt to G., for which J. was bound as A.'s surety. H. gave his notes for some of the debts, among them the debt to G. Thereafter H. conveyed the land back to A., in consideration that A. would pay certain debts for which H. was bound, naming them, the debt to G. being one of them. The deed recites that a lien is retained to secure a compliance on the part of A., "but it is not intended to give a lien to any one but H." A. having made an assignment for the benefit of creditors, his assignee resists G.'s claim to a lien, although A. has never complied with his agreement with H. Held—That G. is entitled to a lien.

Cornelison & Mitchell for appellants.

W. H. Holt and B. J. Peters for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

A tract of 400 acres of land was purchased by J. J. Anderson under an execution against Josiah Anderson for much less than its value. In November, 1872, J. J. Anderson conveyed this land to P. A. Howard, in consideration that he (Howard) would pay certain debts therein named, and among them a debt to John Gaitskill for several thousand dollars. These debts J. J. Anderson was liable for as the surety of Josiah Anderson. Howard gave his notes for some of the debts, among them the debt to Gaitskill, but never paid it, and became a bankrupt. A suit was then instituted to enforce a lien on this land for the Gaitskill debt and other debts secured by the deed to Howard. Howard, in December, 1874, conveyed the land back to Josiah Anderson, in consideration that Anderson would pay certain debts upon

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which Howard was bound, naming them, the debt to Gaitskill being one of them. The deed from Howard to Anderson recites that a lien is retained to secure a compliance on the part of Josiah Anderson, but it is not intended to give a lien to any one but Howard. Josiah Anderson had become a bankrupt shortly before the reconveyance was made to him by Howard, and it was not pretended that the Gaitskill debt had been paid. This debt was a lien by the deed of 1872, and also a lien by the deed of Howard to Josiah Anderson, and Josiah Anderson, the appellant here, or his assignee, is now claiming the absolute right to the land without having complied with his agreement with Howard. It is not necessary to comment on the facts of this case. The execution of the note to Williams and Trimble that has never made its appearance, and the obligees on one of them ignorant of the fact that such a note was in existence; the relation of the parties who are antagonizing the claim of Gaitskill in this case towards each other, and the peculiar nature of the lien reserved in the deed by Howard. leave but little room to doubt the real purpose of this reconveyance.

The judgment below is affirmed. Judge Holt not sitting.

To a petition for rehearing Judge Pryor delivered the following response to the court:

It is evident from the pleadings in this case that Williams never had any valid claim against Josiah Anderson or Howard, and that the item of indebtedness of $4,000, which is the $2,400 note and interest in the deed from Howard to Anderson on the part of Howard, or of the Andersons to Williams and Trimble, never, in fact, had an existence. Trimble, to whom the debt was payable, or a part of it, never heard of the claim, and Williams, who sets up the $2,400 note in the old record, and also in the new, makes no effort to show the justice of his claim, although it is alleged to be ficticious by Gaitskill in his reply to the answer and cross petition of Williams. Trimble says that Howard owed them nothing, and it is plain that the claim is without merit, and equally so the claim of Josiah Anderson.

Petition overruled.

FRAZIER v. CLARK, &c.

(Filed February 16, 1889.)

1. Measure of damages—The plaintiffs allege in their petition that they entered into a contract with defendant to saw into lumber all the timber on a certain tract of land, for which they were to be paid a certain price per hundred feet; that they were to commence on a certain day and saw exclusively for defendant until the timber was exhausted; that they purchased a mill and offered to comply with their contract, but defendant refused to permit them to do so; that they could have sawed a certain quantity of lumber, and that by reason of the breach of the contract they were damaged in the sum of $2,000, for which they ask judgment. It appears from the testimony that the plaintiffs began to operate their mill prior to the time at which they were to begin work for defendant, and continued to operate it for sevearl months thereafter. and until they sold it, and that the sawing was as profitable as it would have been if under the contract with defendant. Held

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—That the plaintiffs are entitled to recover only the actual damages sustained and that as no actual damages are either alleged or proved, they are entitled to recover only nominal damages.

2. Motion for new trial—The verdict was returned July 16, 1886. The motion for new trial was made July 19. A Sunday intervened. Held—That the motion was in time.

3. Appeals from Superior Court—Practice—Where an appeal has been heard in the Superior Court on its merits, and certified to this court as involving a novel and important question, mere rules of practice not taken advantage of in the Superior Court will not be considered here, whether the appeal was granted at the instance of the appellant or the appellee.

This appeal was heard in the Superior Court on its merits, and, upon appellant's motion, was certified to this court as involving a novel and important question. No question was made in the Superior Court as to the bill of exceptions or the motion for a new trial. It is insisted in this court for the first time that the motion for a new trial was not made in time, and that the bill of exceptions can not be considered because filed in vacation. Held—That these questions will not now be considered.

W. W. Lyles, R. S. Bevier and M. B. Bowden for appellant.

W. F. Browder for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Pryor.

It is alleged in the petition of the appellees that they entered into a contract with the appellant, Frazier, to saw for the latter all the timber on a certain tract of land into merchantable lumber, for which they were to be paid at the rate of 33⅓ cents for every hundred feet. They were to begin sawing on a certain day, and continue until they had completed their contract, and also were to saw exclusively for Frazier until the timber was exhausted. They allege they purchased the saw mill and offered to perform the contract, but Frazier refused to permit them to go upon his land or comply with their agreement; that they could have sawed not less than two million feet of lumber, and claim that by reason of the breach on the part of the appellant they were damaged in the sum of $2,000. There is much conflicting testimony on the issue as to whether any such contract was made as is alleged, but the testimony for the appellees conducing to establish such a contract, and the jury so finding, the principal question arising in this case is as to the measure of damages. The details of the contract are not all given, but only so much as is necessary to determine the legal question involved. The action was instituted within three weeks from the date at which the execution of the contract was to begin. The court below, in instructing the jury, said that, as the appellant had admitted that the timber would have produced two millions of feet, that quantity, at 33⅓ cents per hundred feet, is the basis of recovery, and after deducting from it the cost of sawing and stacking the lumber as provided by the contract, the remaining sum is the amount the appellees should recover.

It is made to appear from the testimony that the appellees were running their mill for others prior to and at the time at which the contract with the appellant was to begin, and further, that their mill was provided with all the timber it could saw from the time the appellees bought it until sold by them, paying as much as Frazier's contract would have paid them. The mill was idle about three weeks, and no longer, and continued sawing after it was sold. No loss of work or sawing has been alleged or proven, but, on

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the contrary, the testimony tends to show that the appellees have sustained only nominal damages. The case is thus presented by the proof: The appellant employs appellees, with their mill, to go upon his land and saw two million feet of lumber, and not to saw for others until the contract is completed. The appellant refuses to permit appellees to enter and perform their contract. The services of the appellees and their mill were, in violation of their contract, dispensed with, and the appellees, as their own engineer and witness testifies, operated the mill from May preceding the 1st day of June, when the work for appellant was to begin, until Christmas of the same year, and the sawing was as profitable as it would have been if running under the contract with appellant. If, therefore, the appellees are permitted to recover the entire profit that could have been realized on the contract with the appellant, and have run their mill continuously with the same profit for others, they are permitted to recover or make double profits. The amount of recovery in a case like this is the actual damages sustained. Suppose the appellees had brought their action after the time for the performance of the contract on their part, and it had been made to appear from the testimony that they had, by the use of their mill and their own services in running it, made more profit than they could have realized from the contract with appellant, will it be insisted that the appellees could recover more than nominal damages? If charged with the profit that could have been made during the period, it would be just and equitable that appellant should be credited by the value of the use of the mill by the appellees for the same time; and if, in summing up the profits, the appellees have lost nothing, there has been no injury.

The instruction given in this case makes the offer to perform equivalent to actual performance, when appellees were only entitled to the actual damages. They had equally as profitable employment in the same county and neighborhood, and, therefore, lost nothing, looking to their own testimony. The criterion of recovery for the sale and delivery of personal property where there is a breach is the difference between the price to be given and the value of the property at the time and place of delivery; but the case presented here is not within that class, and in ascertaining the actual loss sustained, if the appellees, with their personal services, connected with the operation of their mill, have sustained no damage, there is no reason for making the appellant pay the profit they have already received, for all the complaining party is entitled to is a just recompense for the actual injury sustained.

The principle governing this case is similar to that in regard to contracts for personal services, as in the case of Whittaker v. Sandifer, 1 Duvall, 261. Whittaker was to serve Sandifer for one year as an overseer on his farm for a fixed sum. Sandifer discharged him after Whittaker had been in his service for some months, and the result was an action to recover the price agreed to be paid for the year's labor, in which it was held by this court that he was entitled only to the actual damage sustained, and determining in effect that if he had equally profitable employment after his discharge the damages would be nominal. In the case of Petrie v. Lane, 58 Mich., 527, the plaintiffs owned a saw mill, and agreed to saw four million feet of logs, to be delivered by the defendant in a certain year, the plaintiffs to be paid a fixed price for sawing. The logs were not delivered, and the plaintiffs sued for the loss of profits, and insisted that, as a matter of law, they were entitled to all the profits they could have made on the contract, regardless of

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the actual damage they had sustained. Their mill was not closed, but working all the time, sawing lumber to its fullest capacity, upon which they made like profits, and by giving them the same profits against the defendant they were doubling the capacity of their mill, as well as their profits. As the right of recovering actual damages in that case was disclaimed, the judgment for the defendant was affirmed. This is a much stronger case against the recovery than the case cited. Here the appellant had contracted for the service of the appellees in connection with the operation of their mill, for such a time as would enable them to saw the timber on his farm, the use of the mill to be applied to the sole purpose, and no other, without the consent of the appellant. There was a breach of the contract by the defendant, and the appellees, with their mill, proceeded at once to saw for others, running continuously for the period of seven months, and until sold by the appellees, making as much or more profit than would have been made if the contract had not been violated by the defendant. There was no sale of the timber to the appellees, or such stipulations in the contract as would bring the case within the rule as to the measure of damages when applied to a breach for the failure to deliver personal property, or in the case of ordinary contracts for the refusal to permit the execution of specific work. The machinery must be used, and not allowed to remain idle, that the owner might speculate on the probable profits to be derived from the particular undertaking. If A, with his machine, undertakes to thresh the grain of B on a named day at a fixed price per bushel, and B declines to permit the work to be done, it does not follow as a matter of law that A can recover the contract price, less the costs of his hands, as his damages. If he should employ his machine in threshing a like quantity of grain for others on the same day, with no loss of time or inconvenience by reason of B's conduct, the injury is nominal only. In this case there was no allegation of any extra expense, loss of time, or any special injury alleged or proven by the appellees, nor their failure to obtain like employment with like profits, or, if obtained, for less profit than that to be realized from the contract with appellant; but a general averment that actual damages had been sustained to the amount of $2,000, when the proof shows that no actual injury had been sustained. Nominal damages should have been awarded.

The judgment is reversed and cause remanded, with directions to set aside the verdict, grant the appellant a new trial, and for proceedings consistent with this opinion. Under this view of the case we have not considered the other questions raised. If the appellees can amend their petition, the answer can then controvert the amount of lumber that is alleged could have been made from the timber, etc.

(Response to petition for rehearing—Filed March 14, 1889.)

The silence of this court in regard to the questions raised in the last brief of counsel was, of itself, sufficient to suggest that his brief filed on the appeal from the Superior Court had not been read or considered, and, therefore, some explanation is required why the questions raised were not disposed of. The case was appealed from the Superior Court to this court, and involved an interesting question in regard to the measure of damages. The question made and decided was certified by the Superior Court as novel and of sufficient importance to be passed on by this court, and in the examination of the record the briefs of counsel on each side were found attached to

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it, and were carefully read and considered on the hearing. The brief filed by counsel now complaining, and considered by this court, discussed the merits of the controversy arising on the evidence and the instructions, and with a full presentation of the questions certified by the Superior Court, this court rendered the opinion, reversing the judgment below, differing with the Superior Court as to the measure of damages. There was, in fact, a reversal in both courts on that point, and it was the certificate from the Superior Court that enabled this court to determine the question. We have examined, since the petition was filed, the brief filed by the appellee in this court, and find two questions raised that were not made in the Superior Court or considered here. The first is, that the motion for a new trial was not made in time. The verdict was rendered on the 16th of July and the motion was not made until the 19th of the month. An examination of the calendar will show that Sunday intervened between the two periods in the year 1886, when the trial was had, and, therefore, the motion was heard or made in proper time. The second objection is, that the bill of evidence was not filed during term time, but in the clerk's office, under an order giving the appellant sixty days in which to prepare the bill. It was signed by the judge, and there is no order showing that it was ever filed in court. These facts appear, but it still further appears that no motion was made in the Superior Court to strike the bill of evidence from the record, either because it was not filed in time or for the reason that the motion for a new trial was not made within the three days. The case was then presented and heard on its merits, and the evidence discussed by counsel as being part of the record. Now this court, instead of deciding the important question involved, is called on to determine what parts of the record are to be considered, and, in effect, to dismiss the appeal if the pleadings sustain the judgment, without regard to the evidence or the instructions.

These objections came too late from either party, and the fact that the appeal was granted at the instance of the appellant, can make no difference. While all laws regulating appeals from other courts to the Court of Appeals, so far as the same are applicable, regulate appeals to this court from the Superior Court, that court has the jurisdiction to hear and determine finally questions arising in a case like the one before us; and to permit either party, after an argument in that court on the merits and a decision rendered either way, to make a motion to dismiss on either of the grounds stated, would be trifling with the administration of justice, and imposing such useless labor on the Superior Court in the investigation of intricate legal questions that can not be sanctioned. The rules of practice, if not taken advantage of in the Superior Court by having them passed on, will not be considered here. The appeal is allowed to this court merely because the legal questions raised are involved in doubt, and not that we may exercise the right of dismissal because the record is defective, when no such point has been made in that court. Mere irregularities in the proceedings of inferior courts to the circuit court are disregarded, and with a court of the dignity and learning of the Superior Court to hold that questions involving mere motions to dismiss that were never raised in that court, are to be disposed of on the certificate from that court asking, in effect, a decision of the legal questions raised that determine the merits of the controversy, would be not only trifling with the labors of that court, but a plain disregard of the purpose for which the appeal is granted.

Petition overruled.

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LOUISVILLE & NASHVILLE R. R. CO. v. BERRY, BY, &c.

(Filed February 7, 1889.)

Evidence—In this action against a railroad company to recover for an injury to the plaintiff, a boy about fourteen years old, alleged to have been caused by a defective platform, by means of which the plaintiff was thrown under a moving train and crushed, it was not competent for the defendant to prove that the plaintiff was in the habit of jumping on moving trains at that place, and had been warned of the danger. The plaintiff having testified positively that the injury was caused by his stepping on a rotten plank in the platform and being thrown under the train, and his statement corroborated by convincing circumstances, such testimony was not competent either to impeach the plaintiff or to show that the injury was caused by his negligence.

Barnett, Noble & Barnett and Wm. Lindsay for appellant.

Baker, Kinney & Kinney, O'Neal, Jackson & Phelps and Jas. W. Head for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

The appellee, Berry, a boy about fourteen years of age, at the instance of Mrs. McGee, with whom he lived, and by whom he was controlled, accompanied a lady and her child to the depot of the defendant to aid her in boarding the train. It was after night and dark when the train approached. The platform from which passengers get on and off the train lies between the two tracks of the railway, an is about four feet wide, with the edge of the cars, when they reached the platform, extending over it some four or five inches. After the boy had reached the platform and the lady had entered the car the boy, in leaving the platform, stepped with one foot into a hole that had been caused by the rottening of the plank, causing the appellee to fall with one leg protruding under the wheels of the cars as they moved off, crushing his ankle and foot in such a manner as required his leg to be amputed; that the company knew of the defect in the platform, or, by the exercise of ordinary care, should have known it. He claimed and was awarded compensatory damages for the injury sustained. The case went to the Superior Court, and was there affirmed, and an appeal was then prayed and granted to this court.

The boy testified as to the fall caused by the defect in the platform and the injury received. The hole in the platform at the place where the boy says he was injured was visible, and caused by the decay of the timber. Blood was seen near the place where the injury occurred, and he was carried from the spot by those who heard his cries of distress in that direction. The foot or ankle was crushed as the train moved off. That the platform was much out of repair, and had been for a long time, is sustained by the weight of the testimony, and the injury to the boy caused by this defect in the platform that should have been observed and remedied by the defendants' employes. We are satisfied from the testimony that the injury resulted from the causes alleged in the petition, but the appellant, in making out its defense, insisted on proving by appellee and others that he was in the habit of jumping on the cars when they stopped at the station, and had been warned of the danger, and hence the jury had the right to infer that it was the boy's own negligence that caused the injury, and not the defect in the platform.

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If the habit of the boy had been established, as the appellant offered to prove, it would not have authorized the jury to say that he was stealing a ride on the cars, and in getting off caused the injury. It is shown that he was sent to the depot by the lady with whom he lived; that he accompanied the passenger to the train at her instance, and had the right to be on the platform at the place where he was injured. That he was at this particular spot, and was injured by reason of the defective and rotten plank, is sworn to positively by the boy, and his statement corroborated by circumstances that are convincing; and the mere fact that he had been in the habit of exposing himself to danger on former occasions, or had theretofore placed himself in position where he might have been injured in the same manner, was not only insufficient to contradict the testimony on that subject offered by the plaintiff, but was incompetent for any purpose. Neither the boy's habits or his bad character constituted a defense to the recovery. The opinions of one or more witnesses for the appellant were permitted to go to the jury to the effect that the boy was not injured in the manner stated by him, and an instruction given by the court to the effect that if the boy was stealing a ride on the train of appellant, and thereby caused the injury, the company was not responsible. Whether there was proof to authorize such an instruction it is not necessary to determine, but the fact that he had previously been guilty of such negligence threw no light on the issue made. Such misconduct on the part of the appellee did not prevent him from recovering if injured by reason of this defect in the platform.

In Gahagan v. Railroad Co., 1 Allen, 187, the issue presented was as to the negligence of the company in the use of the highway at the time the plaintiff's intestate received the injury for which the recovery was asked. The plaintiff offered to prove the habit of the company at other times in the use of the highway to show negligence, and the court held that it had no legitimate bearing on the issue, and was properly excluded.

There was evidence for both the appellee and the appellant showing the movements of the boy from the time he reached the depot until he was injured, and from that evidence the jury returned their verdict. "As a general rule, therefore, it is inadmissible, where the issue is whether A did a particular thing, to put in evidence the fact that he did a similar thing at some other time. To admit evidence of such collateral acts would be to oppress the party implicated by trying him on a case as to which he has no notice to prepare, and sometimes by prejudicing the jury against him by publishing offenses of which, even if guilty, he may have long since repented, or may have long since been condoned." (1 Wharton on Evidence, section 29.)

The effect of such testimony as was excluded in this case, if permitted to go to the jury, would have been to prejudice the jury, or, at least, lead their minds to the conclusion that, if a bad boy, although injured by the neglect of the company, his measure of compensation should be lessened by reason of his reckless or mischievous habits.

We perceive no objection to the instructions; in fact, they were more favorable for the appellant than they should have been. Nor does the alleged misconduct of the juror or counsel for the defendant authorize a reversal.

The judgment below is, therefore, affirmed, with damages.

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BAILEY, &c. v. BAILEY, &c.

(Filed February 9, 1889—Not to be reported.)

Receivers—Upon application for the appointment of a receiver, as provided by section 298 of the Code, the affidavits filed showed that the land sought to be subjected was in a ruinous condition, owing to the mismanagement of the defendant. The chancellor assigned to the defendant his house, yard, garden, etc., and placed the land in the hands of a receiver. Held—That this was proper.

Wm. Wand for appellants.

T. H. Hines and E. W. Hines for appellees.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Pryor.

This is an action for a judgment or order placing the land sought to be subjected in the hands of a receiver, as provided by section 298, Carroll's Code. Affidavits were filed by the appellee, showing that the land was in a ruinous condition, the fences all destroyed, and a general dilapidation of the entire farm, owing to the mismanagement of the appellant. There are counter affidavits filed by the appellant showing the value of the land, but not of that character as contradicts, except indirectly, the statements contained in the affidavits offered by the appellee. The chancellor, under the facts, assigned to the appellant his house, yard, garden, etc., and placed the land in the hands of a receiver, and in his action we concur.

Judgment affirmed.

CORBETT'S EX'OR v. HOWELL'S ADM'R, &c.

(Filed February 9, 1889—Not to be reported.)

1. Execution sales—Mortgage—Estoppel—H., to indemnify C. and R., his sureties, executed to them a mortgage upon land upon which there was an execution lien. The land was sold under the execution and bid in by C. for the benefit of H., who paid the purchase money, and by consent of C. the sheriff's deed was executed to the wife of H. In this action by C. and R. to enforce their mortgage lien the widow of H. claims that, by virtue of the execution levy and sale, she is to be regarded as owning the land prior to the mortgage; and also, that the mortgagees are estopped to enforce their mortgage by reason of C.'s consent that the sheriff's deed should be executed to her. Held—That the purchase of the land for the husband, and the payment of the purchase money by him, placed the title as if the levy and sale had never been made, leaving the mortgage in full force, and as the transfer to the wife was, in effect, a voluntary transfer by the husband to her, and her condition was in no wise altered upon the faith of C.'s conduct, neither he nor R. is estopped to enforce the mortgage.

2. Appellate jurisdiction—The contest directly involves the title to the land, the widow of H. claiming that her title reaches back and antedates the mortgage; therefore, an appeal lies, although the amount in controversy as to each of the appellants is less than $100.

3. Homestead—The right to a homestead does not exist as against debts created prior to June 1, 1866.

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Bullitt & Bishop and E. W. Hines for appellant.

Appeal from Ballard Court of Common Pleas.

Opinion of the court by Judge Holt.

The admissions in the pleadings and the testimony show substantially this state of case:

Prior to November, 1865, J. Corbett and W. H. Reeves became the sureties of G. W. Howell to one Bird for debt. Another creditor of the principal debtor obtained a judgment, and on November 7, 1865, sued out execution, which was levied upon 100 acres of Howell's land. January 19, 1866, and before any sale under the execution, but after the levy, Howell executed to Corbett and Reeves a mortgage upon the land by way of indemnity as to their suretyship. Subsequently the land was sold under the execution and bid in by Corbett for and as the friend of Howell. Corbett paid the purchase money, but it was furnished to him by Howell. In truth, the latter was the purchaser, and paid the execution debt by paying the amount at which Corbett bid in the land for him. Thereafter Corbett, by the request of Howell, directed the officer who had made the sale to convey the land to Howell's wife, the appellee, Margaret Howell.

In judging of human conduct we must regard the motives and interests of the actors, and while the evidence does not expressly show it, yet all the circumstances warrant the presumption that both G. W. Howell and Corbett then understood that the transfer to Mrs. Howell, and to which Reeves was not a party in any way, was subject to the mortgage. Subsequent thereto Howell died, and Corbett and Reeves were compelled, by reason of the suretyship, to pay each a sum less than $100. The estate of Howell being insolvent, his widow, the appellee, Margaret Howell, brought this action for its settlement. The record shows it will pay but a few cents to the dollar of the indebtedness. Corbett and Reeves became parties to the action, and, by cross petition against Mrs. Howell, sought to subject the land to the payment of what they had paid as sureties. Their claims were allowed against the estate. In fact, the indebtedness was not contested, save a plea of payment as to Reeves' claim was presented. It was not in our opinion, however, sustained by the evidence. The appellee, Margaret Howell, also defended upon the ground that her right to the land, through the execution sale, antedated the mortgage, and that Reeves and Corbett, by reason of the latter's direction to the officer to convey the land to her, were estopped from asserting any claim under the mortgage. In the event, however, they were allowed to do so, she claimed a dower and homestead right in the land.

The claim to the last named right need not be further noticed than to say that it is alleged by the appellants, and undenied, that their debts were created prior to June 1, 1866, when the homestead law became operative.

The right to the land, when it was sold under execution, was in G W. Howell, subject, however, to the mortgage also. It was, in fact, bid in for him at the sale, and he paid the purchase money. The effect of this was to reinvest him with the entire right to it, subject, however, to the mortgage. The claim of the widow to the land can not be regarded as relating back to the levy of the execution, and antedating the mortgage, because the purchase and payment of the purchase money by or for the husband as a matter of fact placed the right and title to the land as if the levy and sale had never

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been made. The mortgage was left in full force, with no outstanding superior claim by reason of the execution sale. Corbett and Howell doubtless thus understood it, and in this condition the land passed to the widow. It was, in truth, but a transfer by the husband to her, and equity will so regard it. The fact that the conveyance was made to her by the request of her husband, but upon the direction or by the consent of Corbett, certainly can not operate as an estoppel as to the appellant Reeves, who was not a party in any way to the transaction. Nor does it have this effect, in our opinion, as to Corbett. He had no interest in the purchase made at the execution sale. It made no difference to him whether the title was in Howell or his wife, as his was now the first lien by reason of Howell having been the real purchaser at the execution sale, and having paid the purchase money. In either case his lien could be enforced. The transfer to her was a voluntary one. No valuable consideration passed. It does not appear that she ever knew of the conveyance to her at the time it was made. She paid none of the purchase money, and has in no respect changed her situation upon the faith of Corbett's conduct. She was not induced to act, and did not upon what he did, nor was her position altered upon the faith of it.

This court has jurisdiction of the appeal. The first section of the act of May 5, 1880 (General Statutes, page 394,) is a general grant of appellate power to this court over the judgments of all other courts of the Commonwealth in civil cases, saving the exceptions therein named. Among them it is provided that no appeal shall be taken to this court from "a judgment for the recovery of money or personal property, if the value in controversy be less than $100, exclusive of costs." It is true the appellants are seeking to recover debts, each less in amount than the sum named, but in doing so the title to land is directly involved, and where this is the case this court alone has appellate jurisdiction. The act creating the Superior Court denies such jurisdiction to it where the title to a freehold is involved. Here the appellants are seeking to subject the land upon the ground that when it was mortgaged to them it belonged to the mortgagor, and that there is no title in the appellee, Margaret Howell, relating back, by virtue of an execution levy or otherwise, to a time anterior to the date of their mortgage. Upon the other hand she asserts that by virtue of the levy and execution sale the land must, in law, be regarded as having belonged to her at a date prior to the mortgage. The contest directly involves the title to the land—as much so as if two contesting parties were each claiming to own it. If the land had, by the judgment below, been subjected to the debts of the appellants, or that of either of them, most certainly Mrs. Howell could have appealed to this court, and could have done so to no other court. If this be so, have not the appellants the same right? A seeks to enforce a mortgage given by B against land as belonging to the latter. C claims it. Such is the case now presented. Surely the statement of it is sufficient, without argument, to show that this court, under the law, is alone vested with appellate jurisdiction. The land is liable to be subjected to the mortgage of the appellants, the dower right of Mrs. Howell being superior to it, however; and the judgment below, so far as it dismissed their cross petition seeking such relief, is reversed, and the cause is remanded for further proceedings in conformity to this opinion.

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THE PORTLAND AND GREENWOOD TURNPIKE CO. v. BOBB.

(Filed February 12, 1889.)

1. A corporation created under chapter 56 of the General Statutes may begin business upon the filing of the articles of incorporation in the county clerk's office; it is not essential to the validity of its acts that the articles shall be filed with the secretary of State. The failure to comply with this statutory requirement can be taken advantage of only in a direct proceeding to annul the franchise.

2. Condemnation proceedings—Under the statute providing the mode of condemning land for railroads and turnpikes, it is not necessary for the corporation to file a petition in forma according to the Code of Practice, but the statement filed by it as the basis of the proceeding must contain not only a particular description of the land sought to be condemned, but an averment that the land is necessary for its use, and that it has been unable to contract with the owner for it. These are jurisdictional facts, and if not stated by the applicant at the outset the proceeding should be dismissed.

3. Appeals to circuit court—While the proceeding upon appeal to the circuit court must be tried de novo, the same cause of action must be tried, and there having been a failure to present a cause of action in the county court, none can be created in the circuit court by amendment.

4. Bar—A dismissal of the proceeding without a hearing upon the merits presents no bar to another proceeding for the same purpose.

Leslie T. Applegate for appellant.

W. M. & C. A. Rardin for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Holt.

The appellant, The Portland and Greenwood Turnpike Road Co., instituted a proceeding in the Pendleton County Court to condemn a right of way for its road through the land of the appellee, Joseph Bobb, under the act of the legislature of April 11, 1882, and which, by its tenth section, is made applicable to the condemnation of lands for turnpike road purposes. The first section thereof provides: "When any railroad company authorized to construct and operate a railroad in this State shall be unable to contract with the owner of any land or material necessary for its use for the purchase thereof, it shall file in the office of the clerk of the county court a particular description of the land and material sought to be condemned, and may apply to the county court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive, and thereupon the said court shall appoint three impartial housekeepers of the county, who shall be sworn to faithfully and impartially discharge their duties under this act." (General Statutes, chapter 18, b.)

The appellant, as the foundation of the proceeding, filed what is styled in the caption, "Descirption of land to be condemned," and which merely gives such description, and asks the appointment of commissioners to assess the damages. It is questionable, perhaps, whether the description given comes up to the "particular description" required by the act, but we will so regard it.

There was no statement in any form filed stating that the company had been unable to contract with the appellee for the right of way, or that it was necessary for such purpose. The commissioners reported, and the ap-

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pellee, having been summoned, appeared and presented both a general and special demurrer. Both were overruled. The ground of the latter was, that the appellant had attempted to incorporate itself by articles of incorporation, filed for record in the office of the clerk of the county court, under chapter 56 of the General Statutes, and had failed to file a copy of the articles with the secretary of State within three months after the filing in the clerk's office, as directed by the statute, and, therefore, had no legal existence as a corporation.

This same question was made by the exceptions filed by the appellee to the commissioners' report, and it is unnecessary to notice it further than to refer to the case of Walton, &c. v. Riley, &c., 85 Ky., 413, in which it was held that a corporation thus created may begin business upon the filing of the articles in the county court clerk's office, and that it is not essential to the validity of its acts that the articles of incorporation should be filed with the secretary of State. In other words, that this failure to comply with this statutory requirement can be taken advantage of only in a direct proceeding to annul the franchise. The exceptions filed by the appellee made no issue as to the need of the land for the right of way, or whether the company had made any effort to obtain it by contract. A jury assessed the damages, and, therefore, the county court rendered a judgment of condemnation. The appellee appealed to the circuit court, and there, upon his motion, the action was dismissed. This was done without any hearing upon the merits, and, if properly ordered, it, therefore, can present no bar to another proceeding for the same purpose.

The judgment does not give the reason for the dismissal. Counsel agree, however, in argument that it was because of a failure, at the institution of the proceeding, to file a petition setting forth the facts necessary to authorize a condemnation. It was not necessary, however, to file a petition in forma according to the Code of Practice. It is a proceeding under a statute to enforce a statutory right, and the statute prescribes how it shall be done.

While, however, the statute says the company "shall file in the office of the clerk of the county court a particular description of the land and material sought to be condemned," and then apply for the appointment of commissioners, yet the same section provides that it can only do so when the land is necessary for its use and it has been unable to contract with the owner for it. If the land be not necessary for its use it can not, under the statute, condemn it; nor can it do so unless it has first, in good faith, made an effort to obtain it by contract. They are conditions precedent to the exercise of the right of condemnation. The power conferred upon the company is an extraordinary one. The sovereign power vests it for certain purposes, and with a view to a public service, with the power of eminent domain; but it does so upon certain conditions, and with these it should strictly comply in view of the extraordinary power given to it over the property of the citizen. It can institute proceedings for its condemnation only when it is necessary for its use, and after an effort to obtain it from the owner by contract. The legislature intended to restrict the exercise of the power conferred to cases of necessity, and to afford the owner an opportunity to contract his land, or the use of it, away, thus avoiding the expense and trouble of a court proceeding. If the conditions do not exist upon which the company has been authorized to condemn the land, then clearly it can not be done. It must show their existence. If an issue be made as to the necessity for the condemnation, or whether an effort has been made prior to the institution

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of the proceeding to obtain the land by purchase, and both do not appear affirmatively, there can be no condemnation. This being so, a proper and reasonable construction of the statute in question requires that the company should at the outset, and as showing its right to institute such a proceeding, not only incorporate in its statement, filed as the basis of the proceeding, a particular description of the land sought to be condemned, but an averment that it is necessary for its use, and that it has been unable to contract with the owner for it. It has no right to appear in court or bring the owner there unless this be so. They are jurisdictional facts, and should, therefore, be stated by the applicant at the outset. They lie at the foundation of the proceeding. Their existence should, at least, be prima facie shown to authorize the court to proceed. Moreover, since a failure to show them upon an investigation would result in a dismissal, common sense dictates that the party should at the start aver their existence, because, if he can not do so, the owner should not be forced into court. The statute not only admits of this, to our minds a reasonable construction, but the spirit, if not the letter, of the section in question requires it.

It is true the proceeding upon the appeal must be tried de novo. The statute so declares. But the same cause of action must be tried; the original jurisdiction is vested in the county court, and there having been a failure to present one there, it could not be created in the circuit court upon appeal by amendment. There was nothing to amend.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. LOGAN.

(Filed February 12, 1889.)

Railroads—Right to eject disorderly passenger—Where the conduct of a passenger on a railroad train is such as to alarm or insult the other passengers, or interfere with the management of the train, or endanger the safety of the passengers or those in charge of the train, it is not only the right, but the duty of the conductor to eject him, and the company is not liable for any injury that may result, provided no more force is used than is reasonably necessary; and this rule applies to an intoxicated person, although he may not be able to take care of himself, and although he was known to be intoxicated when received as a passenger.

The conduct of a drunken passenger on a train being so offensive and dangerous, both to the conductor and other passengers, as to require his expulsion, the company was not required to take him to the next station before putting him off, even though he was so intoxicated as not to be able to take care of himself, which does not appear. All that was required of the company was to use no more force than was reasonably necessary for the purpose, and to place him off the track out of the way of that train; and the company, having exercised the proper care in putting him off, is not liable by reason of the fact that he went upon the track and was run over by another train.

Wm. Lindsay and W. J. Lisle for appellant.

Harrison & Belden for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Chief Justice Lewis.

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Appellee, widow of E. V. Logan, brought this action to recover damages for the destruction of his life by the alleged willful neglect of the servants of appellant, the material facts of the case being as follows:

The deceased, about half past ten o'clock at night, June 19, 1883, at Lebanon, got on a passenger train bound from Louisville to Knoxville, Tenn., to go to a station where he resided, fourteen miles distant. He was, at the time, intoxicated, stumbled or slipped, and fell on the depot platform, was helped upon the car platform, and, in the opinion of two witnesses, too drunk to take care of himself, though he was also boisterous, profane and disposed to be quarrelsome. Upon being requested by the conductor, soon after the train started, to pay his fare, he asserted he had paid it, which was untrue, and in reply to the statement of the conductor he had not, he said, with an oath, he would not; that there were not men enough on the train to put him off, at the same time pulling out his knife, and did not pay until the conductor and brakeman had proceeded with him to the car platform for the purpose of putting him off. After receiving his fare the conductor left him in the smoking car, where his seat was, and proceeded to the ladies' car to collect fare from those who had boarded the train at Lebanon, and while so engaged the deceased, leaving the smoking car, went behind him, having, as some of the witnesses testify, a knife opened in his pocket, and, assuming a menacing attitude, applied to him in a loud tone of voice such profane, opprobrious and threatening language as to cause general excitement amongst the passengers, one lady being so much frightened that she implored the conductor to remove him from the car. The deceased then returned to the smoking car, and upon being soon after approached and admonished by the conductor to keep his seat and be quiet, he drew his knife and threatened to kill him; and after the conductor returned to the ladies' car the deceased again tried to enter it, but being unable to do so because the door had been locked to keep him out, he, on his way back to the smoking car, pulled the bell rope the number of times required to stop the train, and it was, in obedience to his signal, stopped by the engineer. The conductor then went into the smoking car, and telling the deceased, who, though he had first taken his seat, pretended to be asleep, that he would not permit any one to pull the bell rope, and paying back his fare, with the aid of the brakeman put him off the train and left him. The place where it was done is about four miles from Lebanon, two from the nearest station south, about one hundred and fifty yards from a private crossing of the railroad north, and two hundred from the nearest farm house. Early the next morning the mutilated body of the deceased was found about twenty-five yards north of the private crossing mentioned, and his hat, a sack and bucket, which he had the night before, were near the place he was put off the train, his hat being nearest the body. Three trains passed the place where his body was after he was expelled from the passenger train, two going north, one of which passed within about one hour and a half, the other later in the night, and the third going south about daylight. It is plain he was not killed by being struck or run over by the passenger train from which he was ejected; for not only was his body found near two hundred yards north of where he was left by it, but a little more than twenty-five yards north of the place on the track where there was the first appearance of blood, showing conclusively the train by which he was killed was going north.

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Assuming, as the evidence seems to warrant, that he was killed by one of the northbound trains, though by which one of the two does not appear, the first inquiry is, whether any legal liability has been fixed upon appellant on account of negligence of those in charge of it. And as there is no evidence showing at what time in the night, or why he went upon the track in front of a passing train, if he did so voluntarily, nor whether he was in such position at the time of being sturck as to make it the duty of those in charge to stop the train, so as to enable them, by the exercise of proper diligence, to discover him in time to prevent a collision, or at all, and consequently none whatever of any negligence or fault on their part, that question must be answered in the negative.

It thus results that whatever cause of action there may be in favor of appellee arises entirely from the conduct of the conductor of the passenger train, and the liability of appellant therefor, if liable at all, is not dependent upon nor increased by the fact that the train, by which he was subsequently killed was owned and operated by the same company; for, if the act of the conductor was not itself wrongful, it could not be made so by referring it to, or connecting it with the independent act of other employes, to whom no wrong can be attributed.

Counsel argue in effect that when an intoxicated person offers to go upon a railroad train as passenger, the alternative is presented to the company either to refuse permission, or else, having received him and accepted his fare, to answer in damages for whatever calamity to him may follow his subsequent expulsion, though justified by his improper conduct. Although it has been held that a railroad company is not bound to receive and carry a person who is so intoxicated as to be offensive, the power to exclude one from the right of traveling on a train who offers to pay his fare, and though intoxicated, has not been guilty of any conduct as passenger forfeiting the right, is always subject to be called in question, and the company can not, therefore, be fairly held to a strict exercise of it, except where the rights of others are involved. But even conceding the conductor could have forcibly and without incurring any legal liability to him kept the deceased off the train at Lebanon, and committed an erorr in failing to do it, we do not see how, on that account, the right was impaired, or the duty lessened to put him off at any place or time afterwards when his behavior rendered it legal and necessary. And if the deceased, for whose drunken state the company was in no way responsible, acted so as to justify and require his expulsion, it would be a harsh rule to make the company liable, if not otherwise so, merely because the conductor did not assume the risk and responsibility of deciding, even if aware of the fact, that he was too much intoxicated to be allowed to go upon the train at Lebanon. Then regarding the deceased upon the train by his own volition, which the conductor did not nor was bound to oppose, the main question is, whether the willful neglect of appellant or its servants in charge of it to perform any duty it owed to him was the proximate cause of his death.

The law makes it the duty of a railroad company to use all reasonable care in operating trains for both the safety and protection from molestation and insult of passengers; otherwise, orderly and infirm persons and females who, upon the faith of such protection, frequently traveled unattended, would have no security against turbulent, bad men. And as it is obvious a train must be run with skill and system in order to assure safety and comfort, the conduct of any one who interferes with the management, or without

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just cause attempts to do bodily injury to or put in fear those in charge, is reprehensible and unlawful. But a railroad company is not required to keep at hand armed police to arrest and confine on a moving train those who violate its necessary rules or do injury to other passengers, nor can the employes neglect their duties, upon the faithful performance of which the safety of all depends in order to do so; consequently the only effectual remedy for, or security against, disorderly and lawless behavior on board a passenger train, is the immediate and summary expulsion of the wrongdoer. and plenary authority of the conductor to do it is universally recognized, and required to be exercised whenever necessary for the safety or protection of either passengers or employes.

It is clear from the evidence in this case the conduct of the deceased was such as to justify his expulsion; for he not only, with a hostile purpose, left his proper place and pursued the conductor into the ladies' car, where he disturbed, alarmed and offended the passengers, but, baffled in an effort to enter it the second time with the same intent, he wantonly and slyly pulled the bell rope, whereby the train was stopped between stations. Moreover, his behavior to the conductor was without provocation, and such as to afford to him reasonable grounds to believe he was in danger of bodily harm, if not of losing his life; in fact the gravamen of the action as stated in the petition is not based upon the lack of legal cause for the expulsion, but rather upon the circumstances of time, place and manner it was done, in view of the alleged physiclal and mental condition of the deceased. Though the time was at night, it was not too dark to see the railroad track distinctly, nor was the weather either cold or inclement; while it would, in fairness, seem no more than retributive justice that he was put off at the place his own malicious and unlawful act caused the stop, especially as the locality was not unsafe.

The question then arises whether, notwithstanding his continued presence on the train was so offensive and dangerous both to the conductor and other passengers as to justify and require his expulsion, the paramount duty was imposed upon the company, by reason of the mental and physical condition of the deceased, to carry him to the next station, the nonperformance of which is, in legal contemplation, willful neglect.

It was not enough for the jury in this case to find he was too intoxicated to take care of himself, but to constitute wilful neglect, even if the company was under obligation to look after his safety after he had forfeited his right as passenger, it was necessary that the conductor knew, or had reasonable grounds to believe, not, in the language of one of the instructions of the lower court, that to put him off the train "would necessarily expose him to the danger of death from being run over by passing trains," but that such would be the natural and probable result of putting him off. If his actions while on the train, by which alone the conductor could or was required to judge, be taken as evidence of what his actual condition was, he not only had the power of locomotion, as shown by his passing with entire safety to and fro between the cars while the train was in motion, but knew well how to do mischief to others, and was at the same time extremely sensitive of injuries to himself. And it seems to us, in the light of the undisputed facts of the case, unreasonable to charge the company with negligence of any degree in expelling him from the train at the time and place it was done. But as it is proper, we will consider the relation and mutual obligations existing between him and the company, as though it was an open ques-

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tion of fact whether the conductor knew, or had reasonable grounds to believe, he was too intoxicated to take care of himself.

It is well settled by this court, and the certain and just execution of the law and welfare of society require it to be settled, that voluntary drunkenness affords no excuse for the commission of crime, nor is it a valid defense to an action for a civil injury. For in every situation and relation an intoxicated person, like others, should be held to the strict observance of the just and salutary rule which requires each one to so use and enjoy his own as not to injure others. It thus becomes lawful for a landlord to expel from his tavern to the street or highway, at any time, a person who, whether intoxicated or not, endangers the safety, or molests and insults his guests; and no one who question the right of a housekeeper to eject from his domicil a drunken man who maltreats or offends, by indecent conduct or language, his wife and children, provided no more force be used for the purpose in either case than reasonably necessary. Such being a rule of conduct recognized as just and necessary, we do not see why it ought not to be applied, upon the same condition, for the benefit and protection of passengers on a railroad train, nor why they should be given the right to maintain an action against a railroad company for suffering them to be molested, put in fear and insulted on a train by drunken men, while denying the company the right, except at its peril, to resort to the only feasible means in its power to prevent or stop the wrong being done. Common justice would seem to require either that passengers be left without redress against the company for wrong and injury done to them on trains by disorderly and vicious persons, or else that no liability attach or negligence be imputed to the company when the expulsion of the latter is rendered necessary for the safety and protection of the former.

Thus the issue in every such case as this is really between the orderly, infirm and females on the one side and the turbulent and evil-disposed on the other, and the company has the right to terminate the relation of carrier and passenger between it and the latter class whenever and wherever they carelessly put in fear, disturb or insult the former. And, in our opinion, if the deceased went into the ladies' car, and there, by his violence and indecent behavior or language, excited, alarmed, or insulted the other passengers, or if he interfered with the management of the train by pulling the bell rope or otherwise, or if he threatened with an opened knife to take the life or do bodily harm to the conductor, or attempted to deter or intermeddle him while in the performance of his duties, the right existed to put him off the train at the place it was done, and all required of the company was to use no more force than reasonably necessary for the purpose, and to place him off the track out of the way of that train. For although there might be a case where a railroad company would be guilty of willful neglect in the meaning of the statute by ejecting, without imperative necessity, a passenger so drunk as to be helpless when his death would naturally and probably result from agencies, other than his own act, then present and impending, the law does not exact care and precaution against the death of one from remote causes or self-inflicted, whose conduct has afforded legal grounds for his expulsion.

The case of Sullivan v. L. C. & L. R. Co., 81 Ky., 624, is unlike this. There the only cause for expulsion was the failure, by reason of inability to pay the fare, which was twenty cents. Here the deceased was able to pay, but threatened violence because he was urged to pay, and compelled the

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conductor to resort to force to get it. There the delinquent was not turbulent, nor offensive to either passengers or employes. Here the deceased not only insulted and alarmed the passengers, but menaced the conductor and imperiled the safety of all aboard by causing the train to stop. In that case Sullivan was inhumanely put off in a deep snow, the weather being intensely cold, and on account of his helpless condition which the conductor knew of, was unable to escape the injury that was at the time manifestly inevitable. In this case the deceased was killed by his own act in going upon the track at least one hour and a half after he was put off the train, which the conductor had no reason to believe, from his actual condition, as it appeared to him, was probable.

As the lower court refused to give any instruction according with the views here expressed, but instead gave those which are either abstract, or erroneous and misleading, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

TEN BROECK v. FIDELITY TRUST AND SAFETY VAULT CO.

(Filed February 14, 1889.)

Compensation of trustee—A father, as trustee for his daughter, paid over to her, quarterly, for several years prior to his death, the income on the trust fund of $200,000, without making any deduction as compensation for his services. His attention was called to the fact that he was entitled to compensation, and his reply was, in substance, that the condition of his daughter required the entire income, and that the charge could be made at some future time. The trustee having died, his administrator now asserts a claim to compensation for his intestate's services as trustee, for the benefit of his creditors, the trustee having died insolvent. Held—That the father had the right to make his services gratuitous, and the intention to charge at some future day, if conceded, creates no obligation on the daughter to pay for such services, the father having, by his conduct, induced her to believe that he waived his right to compensation. Nor is it any fraud on creditors to refuse, at their instance, to compel payment by the child in a case like this.

Brown, Humphrey & Davie for appellant.

J. K. Goodloe, Dodd & Grubbs and J. C. Dodd for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

H. D. Newcomb, by his last will, devised to John B. Smith and Thomas L. Barret $200,000, to be held in trust and invested in safe securities "so as to yield an income which, after paying all taxes and charges thereon, shall be applied by said trustee to the continual support and maintenance of my wife, Mary Cornelia Newcomb and her children, free from the control, use or employment of any husband she may have, but neither the said trustee nor Mrs. Newcomb, nor any future husband, nor her child or children shall, at any time, have the power, right or authority in any way, manner, or for any purpose, to encumber or anticipate said fund or the said income, or any part thereof, for any purpose whatever, and in case these instructions are

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violated, this bequest at once shall be void and the fund become a part of my residuary estate, and in case of her death without child or children, issue of my marriage with her, living, or leaving descendants, the said fund shall be a part of my residuary estate." The devisor also bequeathed to the trustees for his two infant children the sum of $100,000 cash, and provided that if one of the trustees should die or decline to act, the remaining trustee was invested with the power to appoint another with like power, etc. Barret refused to act as trustee, and John B. Smith selected George W. Morris in his stead. Smith was the father of Mrs. Newcomb, the widow of the devisor, and the actual manager of the trust estate, both for his daughter and her children. Newcomb died in the year 1874 and no settlement was had by Smith as trustee until July, 1882. Up to that settlement no charge had been made by the trustee for his services, either against his daughter or her children. It seems that the trustee had given his notes, payable on demand, for what he had used of the trust money, amounting to $4,000, and the chancellor allowed him as commission, at that time, 5 per cent. on income and 1½ per cent. on investments. After that date, in July, 1882, he continued to charge his grandchildren his commission regularly up to his death, but made no charge against his daughter for managing the trust from which her income was derived.

Smith died in April, 1887, leaving his wife his executrix. The office of trustee becoming vacant by reason of his death, the present appellee, the Fidelity Trust and Safety Vault Co. was appointed trustee in his place, and Mrs. Smith resigning as executrix, the Fidelity Trust and Safety Vault Co., was appointed and qualified as administrator with the will annexed of her husband,. This controversy is, therefore, with this corporation as the trustee of Mrs. Ten Broeck (Mrs. Newcomb having married Ten Broeck) on the one hand and as administrator of Smith on the other. The question arises from the claim made by the appellee as administartor of John B. Smith against Mrs. Ten Broeck, for commission, or compensation to him for managing the trust fund in which she was interested from the year 1882, until his death in 1887.

Smith died insolvent, and this is, in fact, a claim asserted by the administrator for the benefit of creditors. After the death of her father Mrs. Ten Broeck demanded her income, and was told that his commission would have to be deducted; and she, claiming that the services rendered were gratuitous and such as her father had the right to donate to her by reason of the relation between them, that of parent and child, declined to pay the commission, and hence this appeal. The claim of the appellee is, and upon that the chancellor based his judgment, that the father paid to his daughter the whole of each quarterly income, from the year 1882 until the year 1887, without making any deduction for compensation because her necessities demanded it. After the settlement in 1882 he continued to deduct his commission from the income and investments made or paid to his grandchildren, and kept a separate account as to the income of the appellant.

He had made judicious investments of the principal so as to enable him to pay his daughter a quarterly income, that was paid regularly by check, without any deduction whatever. He had a large fund to invest and control for his grandchildren, and may have supposed that his compensation arising from that fund was ample to pay him for controlling the whole, or that looking to the wants and necessities of his daughter he ought not, in justice to her, demand pay for his services. The latter reason, no doubt, prompted

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him to make no charge, and while her income was large, it is apparent, from the facts of the record, that his daughter needed the entire amount. The attention of her father, who was then at the head of one of the leading banking institutions in the city of Louisville, was called time and again to the fact of his failure to make any deductions for services on this income paid to his daughter, and his reply was, in substance, that the condition of his daughter required it, and that the charge could be made at some future time. There is proof tending to show that in the year 1886 he talked of making a settlement, including these charges, but was prevented by the absence of his daughter's attorney from making it, and yet he continued, up to his death, to make the quarterly checks without deduction, and it is plain that, when the opportunity was presented, that he declined to do so because such was not his purpose. His trust had been faithfully executed, the income to a cent paid over, and no charge made.

Besides, such a fund, with the facilities afforded him in his bank for managing it, could not have been attended with much expense or trouble, and under the circumstances we perceive no reason why he should have claimed compensation. He may have intended, at some future time, and doubtless did when the necessities of his daughter for money became less urgent, to exact from her compensation for his services, but it is manifest from the record that such a time had not arrived at the date of his death, and that he was forwarding this money and the daughter receiving it, with no intention on his part to make any charge, or his daughter of paying, until circumstances had changed with reference to her pecuniary condition.

It is true the daughter had no legal or equitable right to exact from her father the discharge of these duties as a mere gratuity, but the father had both the legal and natural right to aid his daughter in the transactions connected with this trust free of charge on his part, and we think that such was his purpose, as is evidenced from his conversations with Burford, and the manner in which he disposed of this income from 1882 until his death. He made regular charges against his grandchildren, and it is not unnatural or unreasonable that he should decline to make any other charge for his services, at the expense of the welfare and happiness of his child. He never changed his intention or purpose with reference to this compensation. The same circumstances appealing to his affections for his daughter and inducing this generosity on his part existed at his death that influenced his whole action from the year 1882. His personal representative will not be allowed to change that intention, or to show that the surrounding circumstances demanded an exaction of compensation during the entire period instead of a gratuitous discharge of services prompted by parental affection. It is no fraud on the rights of creditors, or depriving them of any legal or equitable right as against the father or his estate, to refuse, at their instance, to compel payment by the child in a case like this. He had the right to make his services gratuitous, and the intention to charge, at some future day, if conceded, creates no obligation on the part of Mrs. Ten Broeck to pay for such services.

In Abbey v. Deyo, 44 N. Y., 347, it was held that such gratuitous services did not prejudice the rights of creditors; and in Jones v. O'Driscoll, 2 Bay, S. C., 101, the court, in speaking of a purpose to charge for a benevolent or friendly act at a future day, said "that it will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be after-

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wards converted into a pecuniary demand; it would be doing violence to some of the kindest and best affections of the heart to suffer them afterwards to be perverted by sordid avarice."

The testimony of the bookkeeper explains this whole transaction. The bad health and pecuniary condition of Mrs. Ten Broeck was always referred to as a reason for not making any charge, but coupled with the intention to do so when her condition was improved. The appellant had the right to presume that the father did not contemplate such a charge, and from the proof in the record, if the father had been alive and the demand made for the income in 1887, there would have been no refusal to pay. He had no intention of misleading his daughter by inviting her, in effect, to live up to her income, and after the lapse of years violate the express provisions of the trust by imposing a burden upon it in the way of commissions that would or might, for the time being, have deprived her of any income whatever. The income was in no manner to be anticipated, but paid over to the beneficiary after deducting all charges. This fact is another strong circumstance showing a purpose to make no charge. The declarations of his intention are inconsistent with his whole conduct in the control of the trust estate, and yet only such declarations as any father would likely have made with his surroundings, and still have no purpose of carrying them into effect.

If the purpose, however, was to charge the daughter when her condition improved, this does not authorize his personal representative to create this burden and exact a compensation that the father had, by every act, induced the daughter to believe had been waived.

The judgment below is reversed, with directions to sustain the exceptions to the commissioner's report awarding this compensation to be paid out of either the principal or the income of the fund from which the appellant derives the benefit. Remanded, with directions to reject the claim.

LOUISVILLE & NASHVILLE R. R. CO. v. HOPKINS COUNTY.

SAME v. SAME.

SAME v. CHRISTIAN COUNTY.

SAME v. SAME.

(Filed October 20, 1888.)

1. Taxation of railroads—The rule that railroad property situated in a county is not liable to taxation to pay the subscription of stock made by such county towards constructing the road, does not fully apply when the road has been purchased by and become the property of a new company to which the county does not sustain the relation of stockholder or joint owner. In such a case, whenever the new company has made an addition or accession to the property purchased, whether consisting in completing an unfinished road, or increasing the capacity for business and advantages, and consequently the value of a road already completed, what is thus added or annexed is not exempt, because the county neither contributes to nor has any interest in it.

In this case to the extent the railroad property has, since it was purchased by the new company, been increased in value by the addition or renovation of cross ties, rolling stock and other appendages, and by having been made part of a system doing increased business, instead of an isolated road as was

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the case when purchased, it is liable to taxation in any county where it may be situated, as other property therein. And in imposing the taxation in these cases, the lower court ought to have deducted the value of the property at the time it was purchased from the value as it now exists in the counties seeking to tax it.

2. Taxes paid under a mistake of law can not be recovered back unless the payment was involuntary, and the rule which treats the payment of taxes as involuntary where the tax collector has authority to levy and sell on the refusal to pay, does not apply to the payment of taxes by railroad corporations, as against which the collection must be enforced by judicial proceedings. Therefore the payment by appellant of the taxes it seeks to recover back was voluntary, and not under compulsion, and it can not recover. Moreover, as a portion of the property upon which the taxes were paid was legally liable therefor, the payment was not wholly without consideration, and for that reason the rule allowing a recovery, even if the payment had been under compulsion, would not apply. Nor do these cases belong to that class of cases where honor or good conscience required the taxes to be refunded.

3. Interest is not allowable upon taxes by way of damages.

John Feland for appellant.

Landes & Clarke for appellees.

Appeals from Christian and Hopkins Circuit Courts.

Opinion of the court by Chief Justice Lewis.

As these four cases require the same recital of facts, and directly or incidentally involve the same questions of law, counsel have agreed they be heard and decided together.

In 1851 a corporation, "The Henderson & Nashville Railroad Co.," was chartered to construct a railroad from Henderson, Ky., to Nashville, Tenn.; but after securing the right of way and grading a portion of it, how much does not appear, the work was abandoned on account of the late war. In 1867 a company, "The Evansville, Henderson & Nashville Railroad Co.," was incorporated, and by purchase became the owner of the property and franchises of the first named; and with the proceeds of bonds issued by the city of Evansville and the counties in Kentucky through which the road extends, including Christian and Hopkins, in payment of stock subscribed by them to the capital stock of that company, amounting to about $1,000,000, and the proceeds of a bond of the company for the same amount, secured by mortgage on that portion of it in this State, the road was completed and put in operation. But in 1879, under a decree rendered in the district court of the United States, all that part of the road that had been mortgaged, certain real estate and rolling stock, together with the chartered rights and franchises of the company, were sold and purchased by the Louisville & Nashville Railroad Co., which has owned and operated the road ever since.

The first of these actions in order of time was instituted by the county of Hopkins against the Louisville & Nashville Railroad Co. to recover a balance unpaid of taxes alleged to be due by the defendant on its property situated in that county under a levy made by the county court for the year 1882 to pay interest on the bonds issued in payment of the county's subscription to the capital stock of the Louisville, Henderson & Nashville Road Co. before mentioned, and taxes alleged to be wholly due and unpaid under levies for the same purpose for each of the years 1883-4-5. The second was

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instituted by the county of Christian to recover of the same defendant an unpaid balance of taxes for the year 1882, and the amount for each of the years 1883 4-5 alleged to be due under levies made to pay the interest and principal of bonds that county issued to pay its subscription to the capital stock of the same company. The third, an action in equity, was instituted by the Louisville & Nashville Railroad Co. against the county of Christian to recover back the several amounts of such taxes collected under levies for the years 1879-80 81, and in part for the year 1882, which the plaintiff alleges were paid by it in ignorance of the law and facts and of its rights when it did not owe any part thereof. The fourth, also an action in equity, was instituted by the Louisville & Nashville Railroad Co. against the county of Hopkins to recover back the several amounts of such taxes collected by that county for the same years, and likewise alleged to have been paid by the plaintiff in ignorance of the law and facts and of its rights, no part of which it owed.

In the first and second of these four actions the entire property of the defendant being thirty-one and four fifths miles of road, including land, improvements and equipments in the county of Christian, and twenty-seven and seventy-two one hundredths miles of road, land, improvements and equipments in the county of Hopkins, were adjudged by the lower court liable for taxes levied to pay the said bonded indebtedness of the two counties respectively, as well as for those levied to pay the ordinary county expenses, which were also sued for in each case, but not now disputed by the defendant, and judgments were accordingly rendered in favor of each plaintiff for the amounts severally claimed by them. In the third and fourth actions judgment was rendered in favor of each of the defendants, and the actions were, as to each, dismissed. From all the judgments the Louisville & Nashville Railroad Co. has appealed, and in the first and second cases appellees have been granted cross appeals.

There is no controversy about the assessments of the property in the two counties, as they were made by the county courts according to the rates fixed by the State Board of Equalization for the entire road within the State.

Whether railroad property situated in a county is liable to taxation to pay the subscription of stock made by such county towards constructing the road, is a question which was first presented to and decided by this court in Ernst v. Applegate, 3 Bush, 648. It was there held not to be liable, the following language being used: "If liable for any portion of that subscription it would, to that extent, pay the debt of the stockholders, or remit so much of the amount subscribed to itself, and consequently would get that much less than the subscription to it, or for its use. * * * To tax the road itself for that selfish purpose would be repudiation to the extent of the tax." The rule then laid down does not, however, absolutely and fully apply when the road has been purchased and become the property of a new company, to which the county does not sustain the relation of stockholder or joint owner.

Clark County Court v. Elizabethtown, Lexington & Big Sandy R. R. Co., decided by this court April, 1886 (7 Ky. Law Rep., 761,) was a case where the county of Clark had subscribed to the capital stock of the Lexington & Big Sandy Railroad Co., which, after constructing a portion of its road, became insolvent, and its franchises and property, in an unfinished state, were purchased by the E., L. & B. S. Co., and the right of the county to tax that

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part of the road and its appendages situated therein to aid in paying the subscription of stock, was the question involved. And in the opinion this language was used: "If the payment of the debt entitled it, Clark county, to stock in the new company, there might be some reason for adjudging that it would be unjust to the other stockholders and to the corporation to tax the property of the corporation to pay an indebtedness that entitled the county to stock in the corporation. Such, however, is not the case. The E., L. & B. S. Railroad Co., when it purchased the old company, or rather its rights and franchises, became the owner of the roadbed and the entire property of the old company within the county, and the completion of the road, with all its valuable appendages, is not the property of the old but the new company; and, therefore, the property of the appellee within the county is liable for its part of the burden of this tax except so much of the property as was acquired by the purchase. This ought not to be taxed to pay a subscription that was made to construct it, and in imposing the taxation its value should be deducted from the value of the railroad property of the appellee within the county as it now exists." In that case the road was in an unfinished state when it passed from the old to the new company. In this the road had been completed and was in operation when the new company became the owner. But the same principle applies whenever the new company has made an addition or accession to the property purchased, whether consisting in completing an unfinished road, or increasing the capacity for business and advantages, and, consequently, the actual value of one already completed. What the new company purchases in such case is exempt, because the subscription was made to construct it, and the county, as a stockholder, had an interest in it. But what may be afterwards added or annexed is not, nor ought to be, exempt, because the county neither contributed to nor has any interest in it. Consequently, to the extent the railroad property between Henderson and the State line has, since it was purchased by the Louisville & Nashville Co., been increased in value by the addition or renovation of cross ties, rails, station-houses, switches, rolling stock and other appendages, and by having been made part of a system, doing increased business, instead of an isolated road, as was the case when purchased, it is liable to taxation in any county where it may be situated as other property therein. And in imposing the taxation in these cases, the lower court ought to have deducted the value of the railroad property in Christian and Hopkins counties, at the time it was purchased, from the value as it now exists.

2. In Underwood v. Brockman, 4 Dana, 209, it was held that "when it can be made perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no fair compromise of bona fide and doubtful claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law and a total want, therefore, of consideration or mutuality." In the case of Ray & Thornton v. Bank of Kentucky, 3 B. M., 510, the court, referring to the case just cited, and reviewing all the authorities on the subject, approved of the ruling in that case, but we think stated the doctrine fully and more accurately thus: "Upon the whole we would remark that whenever, by a clear and palpable mistake of law, a fact essentially bearing upon and affecting the contract money has been paid without cause or consideration, which in law, honor or conscience, was not due and payable, and which in honor, or good conscience, ought not to be retained, it was

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and ought to be recovered back." In each of these cases the controversy was between individuals. But the case of City of Louisville v. Anderson, &c., 79 Ky., 334 (2 Ky. Law Rep., 344), involved the question of recovery back of taxes paid in ignorance of the law and of the rights of the person paying, and which there was no legal authority to collect. The property assessed in that case was farming lands which had been unconstitutionally included in the city boundary, and this court affirmed the judgment of the lower court in favor of the plaintiffs. This court, in the opinion then delivered, assented to the general rule that taxes voluntarily paid can not be recovered back, whether legally laid or not, as stated in Cooley on Taxation in accordance with the current of authorities on the subject; but dissented from the proposition that all payments of taxes are supposed to be voluntarily, and recognized the distinction between those cases where there is an apparent means of enforcing the illegal demand, and where it can not be done without a resort to judicial proceedings.

In all the cases wherein it has been decided by this court taxes illegally paid might be recovered back, including Feichheimer Bros. & Co. v. City of Louisville, 8 Ky. Law Rep., 310, referred to by counsel, the payments now regarded as involuntary because the tax collector had authority to levy and sell on the refusal to pay. As said by this court, "the process is summary, and in the hands of the party making the demand, and the taxpayer must submit to the levy or pay the money." The only exception under the statutes of this State exists in respect to railroad corporations, whose property, from consideration of public convenience and necessity, can not be levied on and sold to pay taxes, and the collection must be enforced by judicial proceedings.

The payment by the Louisville & Nashville Railroad Co. of the taxes which it now seeks to recover back from the counties of Christian and Hopkins, was made voluntarily and in no wise under compulsion; and such being the case, we perceive no reason to make in these cases an exception to the general rule laid down in the city of Louisville v. Anderson that a party paying taxes who is entitled to a day in court and can litigate the demand about to be enforced against him, but instaed of doing so voluntarily pays it, is without remedy. Moreover a portion of the property situated in the two counties was at the time of payment of the taxes legally liable to taxation, not only for general county purposes, but for the purpose of paying off the county subscriptions. And, therefore, as such payment was not wholly without consideration, the cases do not come within the rule laid down in the cases heretofore decided by this court. Nor do either of them belong to that class of cases where honor or good conscience requires the taxes to be refunded.

3. It is well settled that interest is not allowable upon taxes by way of damages. (Ormsby v. Louisville, 79 Ky., 202.) And consequently the court did not err in refusing to allow it upon the amount adjudged in favor of the two counties. Wherefore, the judgments rendered in actions one and two in favor of the counties of Christian and Hopkins are, for the reasons indicated, reversed and remanded for further proceedings consistent with this opinion, and affirmed on the cross appeal, and the judgments in the third and fourth actions are affirmed.

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HEBLICK v. JUDGE OF HANCOCK COUNTY COURT.

(Filed February 14, 1889—Not to be reported.)

License to retail liquor—Mandamus—The county judge, having a discretion in the matter, can not be compelled by mandamus to grant a license to keep a saloon with the privilege of retailing spirituous liquors. He is to judge of the necessity for the grant.

Henry Mason for appellant.

W. S. Roberts for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Pryor.

The writ of mandamus is sought in this case to compel the county judge to grant a license to the appellant to keep a saloon in the town of Hawesville, with the privilege of retailing spirituous liquors. It is not alleged that the judge refused to hear the application, but that he refused to grant the license. It is said by the appellee that the power to grant such a license is with the trustees of the town and not with the county judge, but has failed to call the attention of this court to the provisions of the town charter, or to the act under which this power is conferred. It is immaterial, however, in determining the question presented here, where this power is lodged. The county judge nor the trustees are required to grant such a license unless it shall be deemed expedient to do so. They are to judge of the necessity for a grant and not this court.

(General Statutes, chapter 106, section 1 of article 4; Commonwealth v. Boone County Court, 6 Ky. Law Rep., 755.)

The judgment below is affirmed.

MARSHALL v. APPLEGATE, &c.

(Filed February 14, 1889—Not to be reported.)

Assignment for creditors—Homestead—A debtor assigned all his estate for the benefit of creditors, "save and except such as the law will allow me to hold." He now claims as a homestead exemption $1,000 out of the proceeds of a house and lot which has been sold in an action for the settlement of the estate. He was not residing upon this property at the date of the assignment, but had theretofore occupied it as a home. Two years elapsed from the date of the deed until the filing of his petition claiming a homestead. Held—That the appellant reserved his homestead interest by the deed of assignment, but has lost the right by abandonment.

C. H. Lee for appellant.

L. T. Applegate for appellees.

Appeal from Pendleton Chancery Court.

Opinion of the court by Chief Justice Lewis.

In 1884 appellant made a deed of assignment for the benefit of his creditors, which contained a reservation of the estate in these words: "Save and except such as the law will allow me to hold."

It appears that at the date of the deed he owned a lot of land whereon was

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a house, the lower story of which had been used by him for the sale of merchandise, and the upper story had been occupied by him and family as a dwelling place.

In October, 1886, after a sale of the house and lot, under judgment rendered in various consolidated actions by his creditors involving a settlement and distribution of the estate so conveyed by him, he filed in court a petition claiming and asking there be paid to him $1,000 out of the proceeds of the sale of the lot, his homestead right in which he alleged had never been conveyed or relinquished by him. He stated in his petition he was, at the date of the deed of assignment, only temporarily absent therefrom, and that he did not then, nor had since the deed, any home of his own.

One of the creditors filed an answer to the petition, in which he denied appellant and his family were only temporarily absent from the house and lot at the date of the deed, and alleged that appellant had, prior to the assignment, permanently abandoned the property and purchased and removed to other property as his home.

In his reply, appellant denied he had purchased and removed to other property before the assignment.

No proof was taken upon the issue thus formed, and the validity of the claim set up by appellant must be determined by the pleadings.

It is admitted by appellant he was absent from the place at the date of the deed, and although he alleges in his petition he was only temporarily absent, he does not, in his reply, deny the statement in the answer he had then and has ever since had a permanent residence elsewhere, the denial he does make going no further than to put in issue the statement in the answer he had purchased other property for a residence.

Although it may be considered that he reserved in the deed his homestead interest in the house and lot, and might have resisted the claim of creditors to subject it to the payment of their debts, still he may have lost the right by abandonment of the place as his residence. And as he admits he was, with his family, absent from it at the date of the deed, and does not allege he ever subsequently resided there, though two years had elapsed where he filed his petition, we think he has not merely failed to show he was absent only temporarily, as it was incumbent on him to do, but, by his residence for such length of time elsewhere, made it reasonably certain he permanently abandoned it as a residence, and his homestead right must, therefore, be regarded as also abandoned and lost.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

MARCHAND v. YORK.

(Filed February 13, 1889.)

1. Landlord and tenant—Eviction—The appellee used a rented house for the purpose of keeping a hotel or saloon. Under an attachment for rent, which was wrongfully obtained, all of the tenant's personal property in the hotel and saloon was taken and sold, so that he was practically disabled from continuing his business. Held—That the tenant can not elect to treat this

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wrongful conduct as an eviction. To constitute an eviction the action of the landlord must relate to the premises themselves, making them unfit for occupancy.

2. Same—The sheriff, when he made the levy on the furniture, demanded the keys of the house, and ordered the tenant to vacate the premises, which he did, but it affirmatively appears that neither the landlord nor his attorney had given the sheriff any direction to demand the keys or to take possession of the house. Held—There was not an actual eviction.

Sweeney & Son for appellant.

George W. Williams & Son and Owen & Ellis for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bowden.

1. There is no evidence sufficient to make a reasonable man even hesitate in saying that York was not actually evicted. The utmost that could be inferred was that the sheriff, when he made the levy on the furniture, demanded the keys of the house, and ordered York to vacate the premises, and that Marchand's agent heard afterwards that he had vacated. But there was no evidence that the agent had given the sheriff any direction to demand the keys or to take possession of the house, or that he had any notice afterwards that the sheriff had done so, while both the agent and attorney show affirmatively that they had no agency whatever in the matter. The sheriff sustains them, testifying that when he asked one of them how he should retain possession of the goods without possession of the house, the answer was that that was his business, but that he must keep the goods.

2. The evidence showed that York rented the house for the purpose of keeping a hotel and saloon, and justified the inference that this purpose was known to the landlord's agent, by whom the contract was made. It had been decided that the attachment for rent was wrongful, and the evidence showed that under it all of York's personal property in the hotel and saloon was taken and sold, so that he was practically disabled from continuing his business. Did this wrongful conduct constitute an eviction at York's election? We think not. While actual entry and physical preclusion are not indispensable to an eviction, the act of the landlord must relate to the premises themselves, making them unfit for occupancy. It does not work an eviction if the landlord assaults the tenant and so disables him that he can not profitably use the rented place; or, if he wrongfully takes the tenant's personal property, without which the place can not be conveniently occupied. For such wrongs the remedy is an action at law for damages. All of the cases cited by counsel related to acts done by the landlord on or to the premises, affecting their use by the tenant. This is true of Dyett v. Pendleton, 8 Cowen, 727, cited by Taylor, Landlord and Tenant, section 316, and cases following it, where the act done consisted in tainting the moral atmosphere by keeping lewd women in an adjoining room. That was a nuisance created by the landlord most seriously affecting the premises; but even that case has been considered extreme, though it strongly commends itself to the moral sense. (Royce v. Guggenheim, 106 Mass., 201; Etheridge v. Osborn, 12 Wend , 529.)

The judgment is reversed, with directions to grant the appellant a new trial.

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SUPERIOR COURT ABSTRACTS.

MARDIS, &c. v. HOFFMAN.

Filed February 20, 1889. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Landlord and tenant—In this action against a tenant and his sureties upon a rental bond, the defendants claim that the dates fixing the beginning and termination of the rental year were blank when they signed the paper, and were afterwards inserted without their knowledge or consent. Held—That under the evidence the writing must control.

2. Same—If the tenant had the right in any event to surrender the possession and terminate the lease, he must do so at the end of a year, and as the rental year ended in November in each year, and the tenant occupied the premises from November, 1884, to February, 1887, he and his sureties are liable for the rent for the year ending November, 1887.

Collins & Fenley for appellants, O'Hara & Bryan for appellees.

SHANNON v. PENNINGTON.

Filed February 20, 1889. Appeal from Metcalfe Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Pleading—The petition, which sought the sale of a tract of land, was defective, perhaps, in not describing the land more accurately, but as the defect did not reach the cause of action, either as to the person or to the thing, a demurrer to the petition could not have been sustained. The defect could have been reached only by motion to make more specific.

2. Judicial sales—Judgment—The fact that there was no pleading in the record from which the court was authorized to adopt the description of the land that it did adopt in the judgment, or to show that the land described in the judgment is the same as that referred to in the petition, does not render the judgment erroneous. Whether the same or not, the defendant has not been prejudiced. If it is the same, the defendant is not injured, and if not the same there is a way he can show the fact and obtain relief, the judgment, in that event, being void.

3. Same—The judgment of sale ought to describe the land so as to enable the officer who is directed to execute it to identify the land from the judgment alone, without reference to the pleadings or exhibits.

J. C. Muncie for appellant; H. H. Beauchamp for appellee.

MOORE v. CARPENTER.

Filed February 20, 1889. Appeal from Bullitt Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. County judge—Guardian's bond—The duties imposed upon a county judge by sections 13 and 14 of article 1, chapter 48, General Statutes, in the matter of taking security from guardians, are judicial, and neither the judge nor his sureties are liable for his act or failure to act as required by said sections.

2. The death of a surety in the guardian's bond neither affects the right of the guardian to hold and exercise the trust, or the liability of the estate of the surety for the delinquency of the guardian.

N. J. Weller for appellant; Fairleigh & Straus for appellees.

GRIFFITH, &c. v. BRIGHTWELL.

Filed February 20, 1889. Appeal from Carroll Circuit Court. Opinion of the court by Judge Barbour, reversing.

Pledge—Change of possession—G., a tenant, agreed with S., who repre-

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sented the landlord, that S. should take, hold and sell the tobacco, which was then on the rented premises, pay the landlord's debt, and pay over the balance, if any, to G., and a writing was executed by G. to evidence the pledge of the tobacco. Under this agreement G. removed from the premises, leaving the tobacco there. After this he was employed by S. to handle the tobacco, and while doing so he mortgaged it to appellee. Held—That G. transferred the possession of the tobacco by leaving it on the surrendered premises with intent to transfer; and, therefore, at the time appellee's mortgage was executed S. was in the actual possession of the tobacco, holding it in pledge to secure the payment of the amount owing by G. to the landlord, and he can not, therefore, be affected by the mortgage.

Masterson & Gaunt for appellants; J. A. Donaldson for appellee.

PRYSE v. TITUS, &c.

Filed February 20, 1889. Appeal from Lee Circuit Court. Opinion of the court by Judge Barbour, affirming.

School commissioner—Sureties—A school commissioner, who was sheriff in the county at the same time he was commissioner, being indebted to the State on account of the revenue which he, as sheriff, had collected and failed to pay over, drew an order requesting the auditor to place to his credit as sheriff as much of the amount due him as commissioner as would meet his deficit on account of the revenue. This was done and the balance remaining of the school fund was paid to the commissioner. In this action by a teacher of the common school against the commissioner and sureties to recover the amount due him from the common school fund, the sureties claim that they are not liable because the commissioner never received the portion of the school fund due the county. Held—That as the money was to the credit of the county, and could have been collected by the commissioner, and he failed to collect it and pay it over to the teachers, or collected it and misappropriated it, he violated the conditions of his bond, and he and his sureties are liable to the teachers for the amount due them.

J. B. White for appellant; Hargis & Eastin for appellee.

COMMONWEALTH v. BUTTON.

Filed February 20, 1889. Appeal from Barren Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Indictment—Allegation as to time—If there was no law in force under which the defendant could have been punished for the offense charged, if committed at the time alleged in the indictment, the court, upon demurrer, is authorized to assume that the offense was committed at the time charged.

2. Liquor selling—Between the passage of the act of May 17, 1886, which repealed the act of May 8, 1884, and the passage of the act of March 31, 1888, there was no law in force prescribing a penalty for the sale of spirituous liquors in quantities less than a quart when not drunk on the premises or adjacent thereto, and, therefore, an indictment charging such a sale in September, 1887, does not charge an offense

John G. Craddock, Commonwealth's Attorney, for appellant.

DOHONEY, &c. v. BANK OF COLUMBIA.

Filed February 20, 1889. Appeal from Adair Circuit Court. Opinion of the court by Judge Bowden, reversing.

Deeds—Consideration—Parol testimony—A deed recited that of the consideration of $5,000, $1,500 was paid by the grantee and her husband, conveying to the grantor 236 acres of land, and the remaining $3,500 evidenced by the note of the husband of the grantee. In this action to enforce the lien reserved to secure the payment of the note, it was alleged that it was agreed when the deed was made that the 236 acres was not taken by the grantor at $1,500, but at such sum, not less than $1,200, as he might be able to get for it; and that soon after the deed was made it was agreed he should take it at $1,200, and

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that the husband of the grantee thereupon gave his note for $300, to secure the payment of which a lien on the land was asserted, and adjudged by the court to exist. Held—That this was error. Parol testimony was not competent to change the recited value of the 236 acres from $1,500 to $1,200, thereby increasing the sum to be paid.

James Garnett for appellant; H. C. Baker for appellee.

ANDERSON v. FRENCH.

Filed February 20, 1889. Appeal from Bullitt Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Burden of proof—The burden was on the defendant to prove that, in the settlement resulting in the execution of the note sued on, he did not receive proper credits, and that there was no consideration for the note.

2. Alteration of written instruments—It seems that the rule in regard to apparent alterations and mutilations, which makes it the business of the holder to show how they happened, can not be applied to a case where it is admitted by the obligor that he wrote the words, and where the only question is as to when he did it. In such case it seems more reasonable to assume that they were written by the obligor when the paper was signed, but it is not necessary to so decide that question here, as it appears that the interlined words were a part of the original agreement, and, if omitted from the writing, were omitted by mistake.

Charles Carroll for appellant; Fairleigh & Straus for appellee.

MILLERSBURG DEPOSIT BANK v. THORP, MASTER COMMISSIONER.

Filed February 20, 1889. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Bowden, affirming.

Assignment for creditors—Negligence in presenting claim—After a party has stood by while a court is ascertaining how to distribute the estate of an insolvent debtor, he can not demand that the work shall all be done over and a new judgment rendered, merely because he had a claim which he negligently failed to present.

Thos. Kennedy for appellant; W. P. Ross for appellee.

COMMONWEALTH DISTILLERY CO. v. COMMONWEALTH.

Filed Feburary 20, 1889. Appeal from Fayette Circuit Court. Opinion of the court by Judge Bowden, dismissing.

Appeals—To give the court jurisdiction of an appeal in a misdemeanor case, the transcript must be filed within sixty days after the judgment. The extension of time for filing bill of exception does not extent the time for filing transcript.

C. H. Stoll for appellant; C. J. Bronston for appellee.

COMMONWEALTH v. GRAY.

Filed February 20, 1889. Appeal from Edmonson Circuit Court. Opinion of the court by Presiding Judge Ward, dismissing.

Appeals—Where it does not appear when the judgment in a misdemeanor case was rendered, the court can not know that the transcript was filed in sixty days after judgment, and, therefore, the appeal will be dismissed.

Chapeze Wathen, Commonwealth's Attorney.

YORK v. RIGGAN.

Filed February 20, 1889. Appeal from Edmonson Circuit Court. Opinion of the court by Presiding Judge Ward, dismissing.

Appellate jurisdiction—As there is nothing to show that the personal property in dispute is worth as much as $100, the court has no jurisdiction of the appeal.

L. M. Hazelip for appellant; W. E. Settle for appellee.

BOATMAN'S FIRE AND MARINE INSURANCE CO. v. JAMES & REDFORD.

Filed February 27, 1889. Appeal from Mercer Circuit Court. Opinion of the court by Judge Bowden, reversing.

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1. Insurance—A policy of fire insurance provided that it should be void if the assured "shall sell or transfer the property insured." In this action on the policy the defendant alleged that the plaintiffs had sold "some interest" in the property. Held—That this did not constitute a defense. The condition was that the policy should be void if the assured sold all the property.

2. Same—The policy provides that the company may cancel it "if the assured shall have neglected to day the premium." The defendant alleged that the plaintiffs, having failed to pay the premium at the time agreed, it canceled the policy and notified plaintiffs of the fact. Held—That while the premium was a debt, which the company could have collected, remaining liable on the policy, yet it had the right, under the provision quoted, to rescind the contract, and if it did so, and notified the plaintiffs of the fact, it is not liable.

3. Same—The plaintiffs can not avoid the effect of having taken additional insurance by showing that the company which gave it might have avoided its policy if it had seen fit to do so.

4. Same—Agents—As it was a disputed fact as to whether the person to whom the plaintiffs claimed to have given notice of additional insurance was the agent of the company, the court erred in assuming, in its instructions, that this was not a material fact.

5. Same—The mere fact that one solicited insurance, representing himself to be the agent of the company, is not competent to prove that he was agent, and his act as pretended agent was not ratified by the mere issual of the policy when applied for by him, as it does not appear whether, in his applications, he assumed to be the agent of the plaintiffs or of the company.

Breckinridge & Shelby for appellants; E. H. Gaither for appellee.

AKERS v. CENTRAL KENTUCKY LUNATIC ASYLUM, &c.

Filed February 27, 1889. Appeal from Louisville Law and Equity Court.

Opinion of the court by Presiding Judge Ward, affirming as to asylum and reversing as to other appellees.

1. Contracts—Pleadings—The plaintiff was to furnish the defendants the bricks for a certain building, to be paid for at a certain price "measured in walls." The bricks were to be subject to the inspection of the architect with power of rejection, and were to be made within specified times They were to be paid for upon the certificate of the architect—80 per cent. to be paid at the finish of each kiln and the remainder "when measured in walls at completion of brick work on building." The petition alleges that plaintiff made the brick according to plans and specifications; that they were delivered at the building, and had been received by the architect, and that there was a balance due; but it is not alleged that the bricks had been inspected by the architect, or that they had been measured in the wall, or that the architect had given a certificate as to quantity or quality; nor is it alleged that the plaintiff had been prevented from a full performance by the defendant, or that the building could, by ordinary diligence, have been completed at or before the institution of the suit. Held—That the petition is not good. If the purpose was to rely on a complete performance, the allegations of the petition should have been as specific as the undertakings; if it was to rely upon a performance as near complete as it could be on the part of plaintiff, the allegations should have been specific to that extent, and also shown a willingness and ability to do all, and a preventing reason imputed to the party in default.

2. Sales of personal property—The vendor of goods, able and willing at the time and place of delivery to perform his contract, may tender them to the vendee, and upon his refusal or inability to receive them the vendor may set them apart in some reasonably safe place as near to the place of delivery as can be, as the goods of the vendee, and thereupon recover the contract price.

In this case, if the bricks in the kilns were as near to the place of actual delivery as they could be well and safely put, and the plaintiff was ready

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and willing to have delivered them at the very place named, and was prevented from so doing by the unwillingness or inability of defendant to accept them, then he was entitled to recover as in case of performance.

3. Same—The fact that defendants were enjoined from erecting the building or from receiving the bricks at the place agreed upon is, no defense. They were a special commission, authorized by the State to contract for the erection or the building somewhere on the asylum grounds, and as to parties contracting with them, their selection of the place of delivery is conclusive. If they made a selection they had no right to make, it is their misfortune.

4. Accord and satisfaction—In a second paragraph the plaintiff sues for the contract price of lumber furnished defendants. The defendants plead that plaintiff has accepted a certain sum, less than that sued for, "as full payment" for the lumber. Held—That the answer is not good as a plea of entire payment, or as a plea of accord and satisfaction, no facts being alleged showing a consideration to support an agreement to take less than the sum agreed to be paid.

5. Set-off—If the amount paid plaintiff for bricks in excess of the 80 per cent. which he was to receive thereon, as the bricks were furnished, could have been pleaded as a set off against the claim for lumber, it was not done, and, therefore, can not be allowed.

6. Parties to actions—The "Central Lunatic Asylum" was improperly joined as a defendant. If any cause of action exists against that corporation on account of bricks used by it, it should have been sued in a separate action.

N. G. Rogers for appellant: Brown, Humphrey & Davis for asylum; Helm & Bruce for appellees, Long & Stewart.

HERDICK, &c. v. PETERS, &c., ADM'R.

Filed February 27, 1889. Appeal from Bath Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Husband and wife—Separate estate—Where the wife, with the consent of the husband, holds and claims as her separate estate personal property which she has purchased with her own money, her claim, when free from any taint of fraud, will be upheld as against the husband's creditors, and this is true, although the property thus held be live stock used by the husband on land rented by him, and from which the stock necessarily receives subsistence.

R. Gudgell & Son for appellant.

NORTHWESTERN NATIONAL INSURANCE CO. v. DAVIS & PETERSON.

STANDARD FIRE OFFICE v. PETERSON & DAVIS.

Filed February 27, 1889. Appeals from Marion Circuit Court. Opinion of the court by Judge Barbour, reversing.

Insurance—Increased risk—A policy of insurance on a stock of goods provided that "if the risk be increased by the erection or occupation of neighboring buildings without the assent of the company indorsed hereon, then this policy shall be void." After the contract of insurance was made, one of the assured, who was the owner of the storehouse in which the goods were insured, bought a small frame building, which was located a short distance from the storeroom, and moved it up to and connected it with his storehouse, making an ell of it, and with an opening from the storehouse into it he used them as one building. The company had no knowledge of this until after the fire. The fire which destroyed the building and the goods originated in this ell. Held—That the risk was increased, and the policy rendered void. The increased risk to the house was also an increased risk to the goods.

Thompson & McCord and Samuel Avritt for appellants; Thomas, Harrison & Belden and Russell & Avritt for appellees.

MAYSVILLE & BIG SANDY RAILROAD CO. v. COMMONWEALTH.

Filed February 27, 1889. Appeal from Greenup Circuit Court. Opinion of the court by Judge Barbour, reversing.

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Indictment—An indictment must set forth the offense with such certainty as to apprise the defendant of the accusation upon which he is to be tried, and to constitute a bar to any subsequent proceedings for the same offense.

Under its charter the appellant had the right, in constructing its railway, to intersect and cross a highway, and change the location of such highway during the construction; but was required upon the completion of the work to restore the highway to its former state, or in a sufficient manner not to destroy its usefulness, and at a grade not exceeding the heaviest grade upon said road existing when the road was appropriated. The indictment charges the appellant with the offense of unlawfully creating and maintaining a public nuisance by taking possession of, altering and destroying a certain part of a public highway. In specifying the acts complained of it avers that the defendant took possession of the road for railroad purposes, and provided what is termed a "substitute" road, but avers that the substitute so provided was not as good as the old road, and that it is now, and has been for a long while, impassable and unfit for public travel, and was so rendered by the defendant making excavations and cuts below it. Held—That the indictment is insufficient, as it can not be determined with certainty with what defendant is charged.

B. F. Bennett for appellant; B. E. Roe for appellee.

HARRIS v. HARRIS.

Filed February 27, 1889. Appeal from Larue Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Gifts—A father gave to his son, who lived with him, a mare. The son owned and controlled the mare, bred her and paid for the season. The father was indebted, if at all, but for a small amount, which he was amply able to pay. Held—The gift was, under the circumstances, not an unreasonable one, and was good against creditors, there being an actual change of possession.

2. Sales—Change of possession—The father sold to the son a sow, from which he raised certain hogs in controversy, which the father's creditors are seeking to subject. There was an actual, visible change of possession of the property, known and understood in the neighborhood. Although the son was an infant, the proof shows that the father allowed him to work for himself. Held—That the son is entitled to hold the property against the father's creditors.

3. Exceptions to depositions not acted on by the lower court are treated on appeal as waived.

I. W. Twyman for appellant; D. H. Smith for appellee.

ROWE, &c. v. BISHOP.

Filed February 27, 1889. Appeal from Ohio Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Payment—As the evidence showed that the note sued on was overpaid, judgment should not have been rendered for any part of it.

2. Same—The defendants were entitled to credit by the amount paid by them to discharge a lien upon the property for which the note sued on was executed.

J. Edwin Roe and W. B. Roe for appellants; E. D. Guffy for appellee.

FARMERS' BANK v. THE CITY OF NEWPORT.

Filed February 27, 1889. Appeal from Campbell Chancery Court. Opinion of the court by Judge Bowden, reversing.

Taxation of banks—The Farmers' Bank of Kentucky is not liable to be taxed for city purposes upon real estate purchased by it at execution sale in satisfaction of a judgment held by it. It can not be subjected to any tax whatever, except that provided by its charter.

G. R. McKee and A. Duvall for appellant; E. W. Hawkins for appellee.

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KENTUCKY COURT OF APPEALS.

WOLF, &c. v. McHARGUE, SHERIFF.

(Filed February 16, 1889.)

Taxation—As the residents of a town receive benefits from, and exercise privileges under, both the municipal and county governments, they can be required to contribute by taxation to the support of both.

The fact that the residents of a town are taxed to keep the streets of a town in repair does not exempt them from the payment of a tax imposed by the county, under legislative authority, to keep the public roads in repair.

W. A. Morrow for appellants.

J. L. Colyer for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Holt.

The legislature, by an act approved March 10, 1886, authorized the levy of an annual tax of 10 cents on each $100 in value of the real and personal property in the county of Pulaski for the purpose of repairing and keeping in repair its public roads. (Acts 1885-6, volume 1, page 581.)

The appellants reside, and their property is situated, within the corporate limits of the town of Somerset, in said county. The municipality levied a tax of 40 cents on each $100 in value of property within its limits for municipal purposes for the year 1886, one of those purposes being the keeping in proper repair of its streets; and the appellants claim that by reason thereof their property is not subject to the county road tax of 10 cents upon each $100 in value of property, levied for 1886, and that if the act be applicable to them, then it is unconstitutional, and, therefore, invalid. The question is, therefore, presented, whether the residents of the municipality, and their property situated within its limits, are exempt from the tax for road purposes generally because they pay a special tax for municipal purposes, among which is the improvement of the streets of the town.

The right to tax is based fundamentally upon benefits received. The gov-

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ernment imposes the burden upon the citizen, and he, in turn, is entitled to the protection and advantages arising from its existence. The State, as to taxation, can exercise no mere favoritism. No one can have exclusive privileges save in consideration of public services. Equality in taxation is the rule, and exemption from the burden is the exception. One citizen can not be taxed more than his fellow-citizen for the like benefit; and the complaint is now made that the inhabitants of the municipality are twice taxed, or made to carry a heavier burden than other citizens of the county without receiving any additional benefits. But is this true? The charter of the town confers certain privileges and benefits. A franchise or special privilege is granted to its inhabitants, and in which the other citizens of the county do not share. The benefits arising therefrom warrant additional taxation. It is a quasi purchase of them. The grant authorizes the resident of the municipality to exercise certain privileges, and invests him with certain rights which are denied to the other citizens of the county. The municipality makes its own laws; it elects its own officers and exercises other privileges too numerous to mention. In addition, the citizen of the municipality is also a citizen of the county. He has a voice in its government. He receives benefits from, and exercises privileges under, both the municipal and county governments. In consideration of this dual right he is liable to double taxation—that is, he must help to support both the municipal and the county governments. It must, of course, be imposed as equally as is possible upon all the inhabitants of the municipality alike; but they can not say because in consideration of municipal benefits they pay municipal taxes, that, therefore, they are exempt from county taxation. They but pay a bonus for extra privileges, and are only taxed in proportion to the benefits received. Any other rule would lead to a virtual exemption of the citizen of the town from county taxation altogether; and instead of its being unjust and unequal taxation as to him he would, if exempted from it by reason of the payment of municipal taxes, secure exclusive privileges, and obtain the benefit of the county government without paying for it. The people of the town are especially interested in the county roads. They bring trade to them. They serve to build up their town. They aid in increasing the value of their property. Not only are they benefitted by them, but, as citizens of the county, they have a voice in their control; and in consideration of their being both citizens of the municipality and of the county, and receiving benefits from each, they can constitutionally be required to contribute by taxation to the support of both.

Judgment affirmed.

CRITTENDEN v. BECK.

(Filed February 16, 1889—Not to be reported.)

Judicial sales—Equity of redemption—Where land has been sold under decree to satisfy a lien, and has brought less than two-thirds of its appraised value, it is proper for the court, upon motion of the plaintiff, to order the sale of the equity of redemption to satisfy the unpaid balance of the judgment, after crediting the judgment by the amount realized from the first sale.

J. H. Dorman and J. J. Orr for appellant.

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J. A. Duncan for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor.

We perceive no error in this case to the prejudice of the appellant. The title he should be compelled to accept; and it was proper, as the judgment was not satisfied, to sell the equity of redemption. The appellee had a lien on the land for the purchase money. It was sold under a judgment of the court to satisfy the lien, and brought less than two-thirds of its appraised value. The appellee then asked that the equity of redemption be sold to satisfy the balance due on the judgment, to which appellant objected. The equity was sold after crediting the judgment by the amount realized on the first sale. This was proper. The statute provides: "If the judgment, in pursuance of which such sale is made, be not satisfied by such sale, the right of redemption herein provided for may be sold in satisfaction of the residue of said judgment, and the said right of redemption shall also be liable to sale under execution," etc. The rights of third parties had not intervened in any manner before the sale was ordered, and as between the parties to the judgment the sale was properly ordered.

Judgment affirmed.

HENNESSY v. COMMONWEALTH.

(Filed February 28, 1889.)

Indictment—Under an indictment for obtaining money under false pretenses it is not material whether the money thus obtained belonged to the person alleged in the indictment to be the owner of it.

A. J. Speckert for appellant.

P. W. Hardin for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and convicted of the crime of obtaining $15 in money from Bettie Cook by false pretenses. The manner of obtaining said money was as follows: That Barbara Yutzi, mother of Bettie Cook, had instructed him to get $15 from said Bettie for the purpose of buying offal at the pork house in the city of Louisville; that upon said representation said Bettie let him have said money, which representation was false, etc. It was developed on the trial that Mrs. Bettie Cook was a married woman, and had no separate estate. Therefore, it was contended as her husband was the owner of the $15 by virtue of the marital relation, the variance between the allegations in the indictment and the proof was fatal. Section 28, Criminal Code, provides: "If an offense involve the commission of, or an attempt to commit, an injury to person or property, or the taking of property, and be described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, or as to the owner of the property taken or injured, or attempted to be injured, is not material.

Here the indictment prescribes specifically the property obtained by the

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false pretense, and that it was not the property of the accused. Therefore, whether or not it belonged to Mrs. Cook or her husband, it having been obtained from her by false pretenses, is wholly immaterial.

The judgment is affirmed.

STEWART, &c. v. MULHOLLAND, &c.

(Filed December 15, 1888.)

1. The marriage of a woman does not revoke a will previously made by her where the will was made with the consent of the intended husband, and he subsequently, by an antenuptial contract, relinquished all interest in her estate, and agreed that she should hold it to her separate use, and have the power to dispose of it by will. As the reason for the statute (General Statutes, chapter 113, section 9) does not exist in such a case, it does not apply.

In this case the intended husband having consented to enter into such an antenuptial contract, the wife made a will before the contract was executed, and notified the husband of the fact. Three days thereafter the proposed contract was executed, and on the same day the marriage ceremony was performed. After the marriage the wife, in the presence of her husband, handed the will to a friend for safe keeping, telling him that it was her will, and afterwards repeatedly recognized it as her will. Heirs of the testator who were not provided for in the will object to its probate. The husband does not complain. Held—That the execution of the will and contract and the performance of the marriage ceremony were so directly connected as to make the whole but one transaction; but, even if not, the statute, under the circumstances, does not apply, and the marriage did not revoke the will.

2. Where a will has been once revoked new life can not be imparted to it except by a re-execution; mere recognition is not sufficient.

If the will in this case had been revoked by the marriage, it would not have been revived by the subsequent recognition, although a holographic will.

Brown, Humphrey & Davie for appellants.

James S. Pirtle for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

Mrs. Mary Hall Jacob being about to intermarry with James R. Stewart, was desirous of entering into an antenuptial contract, by which she could secure to herself the right to hold and own her property as her separate estate, and to make such disposition of it as she saw proper by last will and testament. She communicated her wishes to her intended husband, and, obtaining his consent, prepared a will in her own handwriting, by which she devised her estate—one-half of it to her future husband, Stewart, and the remaining half to her two nieces, excluding from the general devise an interest in a dwelling house in Elizabethtown; that she devised to her nephew. She had three brothers and a nephew, who were not made the beneficiaries by that instrument, and who are now contesting its probate. A sister of Mrs. Jacob had died many years before the date of the will, leaving children, and among them two infant daughters, one eight days old and the other two years of age. These children were taken charge of by Mrs. Jacob,

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and raised by her to womanhood, and are made, together with her husband, the objects of her bounty in the disposition she has made of her estate. The will is dated on the 9th of January, 1876. The marriage contract seems to have been written on the 11th of January, two days after the will was written, and signed by the contracting parties on the 12th of January, the next day, and the same day on which the marriage ceremony was performed.

After the ceremony was over and the parties made man and wife, the wife, on her way from Elizabethtown to Louisville, on the same day she was married, handed the paper, inclosed by an envelope, to a friend of hers, telling him to keep it safely, that it was her will. This was in the presence of her husband. This friend, the husband of her deceased sister, took charge of the paper and placed it in the vaults of a bank, where he kept it for three or four years; and Mrs. Stewart having removed to Wisconsin, it being her husband's home, wrote, after the lapse of three or four years, to her friend to send her the will. This he did. The will was received by her and kept in a tin box in her custody and that of her husband until offered for probate. The paper is identified by Samuels, the friend with whom it was left, as the same paper he had the custody of, he having read it, and is identified as the same paper received by Mrs. Stewart from Samuels, and the same taken from the tin box after her death. That she spoke of her will often while living in Wisconsin is abundantly established, and that the paper offered for probate is the paper alluded to by her is settled beyond controversy. The preparation and the execution of this paper by Mrs. Stewart on the eve of her marriage is not, in fact, controverted, or, if denied, is a fact well established.

The propounders of the paper as the last will of Mrs. Stewart are met with the objection by her three brothers, who are the contestants, that the marriage of their sister with Stewart revoked her will by reason of an express provision of our statute in regard to wills, and the court below, adopting that view of the case, denied its probate. The 9th section of chapter 113, General Statutes, title "Wills, provides: "Every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative or next of kin." Section 11 of the same chapter also provides that "No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived, otherwise than by re-execution thereof, or by a codicil executed in the same manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown thereby." It is manifest under these two sections of the statute that a will once revoked can only be revived by a re-execution of the instrument in the manner pointed out by the statute. It is, in fact, the making of another will, and must be executed in the same manner in which the original will was required to be executed.

The will offered for probate is all in the handwriting of the testatrix, who, at the time of its execution, was the widow of Jacob; and, it being holographic, it is contended that its preservation by Mrs. Stewart for so many years, and her frequent recognition of the paper as her will, so often made during a long period of time, amounts not only to a republication of the paper as her will, but such a re-execution of the instrument as makes it a complete will. There can be no doubt, from the testimony of those intimately acquainted with the testatrix, that she always, from the date of the

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execution of the paper until her death, regarded it as her last will, and as having given her property to those whose claim upon her affections made them the objects of her bounty. This manifest intention, however, plain on the part of Mrs. Stewart, will not be permitted to override the plain letter of a statute that was enacted for the purpose of preventing a litigation over the question of intent, and admitting to probate a paper, already revoked, that has no stronger proof of its validity than the mere intention of the maker to impart a new life to the instrument.

The statute in regard to wills, and particularly the two sections referred to, with their meaning and purpose properly understood, leaves but little room for construction. This court, in the case of Porter v. Ford, 82 Ky., 191, 6 Ky. Law Rep., 60, where testatrix executed a paper in her own handwriting, purporting to be her will, while she was a married woman, and, after she became discovert, not only recognized the paper as her will, but made indorsements upon it to that effect, held that, as she was then capable of making a will, such a recognition made it a valid instrument, and, being all in her own handwriting, there was nothing in the statutes requiring the paper to be rewritten or resubscribed by her, after her disability was removed, in order to make it a testamentary paper. It was also held in this case, in construing the section of the statute in regard to revocation, that the section did not apply because the paper at no time, during the coverture, was valid, but absolutely void, and its recognition, after the death of her husband, gave to the paper, for the first time, legal vitality. That case, relied on as authority in this case in support of the will, is not analogous, because the question here involved is whether this will of Mrs. Jacob had ever been revoked, for, if revoked, new life could never be imparted to it by mere recognition or a republication, because the statute requires, when a will has been once revoked, there must be a re-execution, and the will of Mrs. Jacob can not well be held to be the will of Mrs. Stewart, if that paper was revoked by the marriage with Stewart. By the rule of the common law the marriage of a woman revoked a will previously made by her because, if allowed to stand, it would affect the marital rights of the husband, and, during marriage, no power existed by reason of the disability of the wife either to revoke, alter or make another will. At common law, however, when the wife had the right of disposing of her separate estate by an antenuptial agreement, her will previously made as not revoked by her subsequent marriage, and in this State a married woman may dispose of her separate estate by last will and testament. (General Statutes, section 4, chapter 113, title Wills.) In this case the power to make a will during the marriage, and the creation of a separate estate in the wife, was, by reason of the antenuptial contract between Mrs. Jacob and her intended husband, executed on the 12th of January, 1876, the day on which the marriage ceremony was performed, and two days after the date of the will. It is, therefore, contended that, as the will of Mrs. Stewart, then Jacob, as executed on the 9th of January, it was revoked by the marriage, and not having been re-executed, her estate descends to her heirs at-law.

This position is based on the section of the statute referred to, by which a will made prior to the marriage is revoked unless made under a power to dispose of property that would not, if undisposed of, pass to the heirs and representatives of the donee of the power, the argument being that it is immaterial how the power to make such a will is conferred, whether by a contract between the wife and a stranger, or by reason of an antenuptial

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contract; if the property disposed of by will before the marriage is the property of the wife, the subsequent marriage revokes it. That the statute is imperative, and no contract, by which a will is made prior to the marriage, can affect its provisions, although the will is made by the consent of the husband and under a contract that fixes definitely the marital rights of husband and wife. It must be conceded that the wife at no time, from the date of the will until her death, was disqualified by the disability of coverture, or from any other cause, so far as appears in the record, from making a valid disposition of her estate by last will and testament; and while this same fact exists in regard to her husband, we perceive no reason why the parties, when about to consummate the marriage, may not agree that the wife may, by will, dispose of her estate as she sees proper, or that a will already made may retain its legal virtue after the marriage, and particularly in a case like this. The will was executed by the intended wife in pursuance of the antenuptial contract. It was made and published by the consent of the husband, he having, by the marriage contract, relinquished all interest in her estate. It was executed as if the contract had been signed and the marriage ceremony performed, and was so directly connected with those two events as to time, place and circumstance, as to make the whole but one transaction.

The intended husband, before he left his home in the northwest to consummate the marriage, had agreed that the wife's estate should be secured to her. On the 10th of January, 1876, after reaching her home in Kentucky, she told him that she was then writing her will, or had written it. The antenuptial contract is dated on the 11th, but executed by both parties on the 12th, the day on which the ceremony of marriage took place. After the marriage, and on the same day as she was leaving her home, the wife, in the presence of her husband, confided her will to the custody of her friend in Kentucky in pursuance of the contract, and we must presume with a full knowledge of the statute on the subject of the revocation of wills, and from the date of the marriage until the death of the wife, the paper in question was recognized by both as the will of the wife, although the husband was not aware of its contents. Giving to the statute in question a reasonable construction, is there any rule of law that would require a court to sever the dates of the two writings, and the date of the marriage, with a view of determining that the will of the wife was revoked by the marriage, and the testamentary disposition made by the wife under such circumstances disregarded? The will was in execution of the marriage contract; that contract was signed on the day the marriage took place. It was delivered, although dated on the 9th, to the friend of the wife on that day for safe keeping, and must be regarded as a part of the entire transaction.

The reason for the enactment of this statute was to prevent fraud upon the husband or wife by reason of a will executed by the one or the other prior to the marriage, and the disturbance or change that would necessarily arise from such an act on the marital relation, in so far as it affected the right of property, and, in case of an unmarried woman, for the additional reason that after the marriage the wife would be incapable of making, revoking or attesting her will. In this case the marriage never deprived Mrs. Stewart of the power to revoke the will made, or the power to make a new will. This right she could have exercised at any time, and when the husband surrenders, at the same time, his marital rights, even if these transactions can not be said to have taken place on the day of the marriage, who has the

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right to complain but the husband? His marital rights are preserved or relinquished at his own instance and by the agreement, and the statute can not apply because the very reason for its enactment has been removed. It is not a question here whether the will was properly executed, for its validity prior to the marriage ceremony is not controverted, nor does the question arise as to whether or not a holographic will, once revoked, can be revived by a republication when the statute requires a re-execution, but the question is, was the will of Mrs. Jacob revoked by her marriage with Stewart? It is conceded that by a contract the property rights of either could be regulated and fixed, but when a will is made in pursuance of that contract, and in this instance, where it is directly connected with the act of marriage, we are asked to say that the marriage revoked the will because dated two days prior to the antenuptial contract and the marriage ceremony. The marital rights having been settled (and we are proceeding now on the idea that we can not regard the entire action of the parties from the 9th to the 12th as one, so far as these contracts are concerned), by their agreement, and no one else being interested directly or indirectly but the husband, why should the will of the wife be revoked? It could have no effect on after-born children because, by section 24 of chapter 113, they take the estate and not the devisee, unless the child should die under age, and unmarried and without issue. Was the statute intended to apply to any such case as this? It is argued that the exceptions made by its provisions excludes the idea of any other exception. Should such a construction be given its provisions?

If there had been no exception then the language of the statute might have been held to embrace every will made by a married woman, whether under the exercise of a power or not, and to remedy this the statute was enacted, making an exception where the marital rights could not be affected by the execution of the power. It was to protect the marital rights of parties that the statute was enacted, and it was never designed to prevent parties, by written contract, from fixing their marital rights, and to give to one or both, by an antenuptial contract between the two, the power to dispose of their estate by will. It is idle to say that, by a deed evidencing a marriage contract, the parties about to consummate it can, before marriage, fix and determine their right to property by reason of the marital relation that is binding on both, and can not, under the same contract, agree that the one or the other shall dispose of their property by a will already executed, if made as the statute requires. The will made by the wife in this case was as much a part of the marriage contract as if it had been inserted in it. In the case of Phaup v. Woolridge, 14 Gratt., 332, relied on by counsel for the appellee, the testator made his will, that was properly signed and attested in the year 1852. Some two years thereafter he intermarried with Mrs. Bass, and by an antenuptial contract she surrendered all interest in his estate. The question in that case, under a statute similar to ours, was whether the marriage to Mrs. Bass revoked the will of Phaup. The wife was not a party to the litigation, but the will was assailed by the heirs. The court held that the marriage did revoke the will, and that the recognition by the testator, in the presence of one of the witnesses, of the instrument as his will, was not a re-execution, the court further holding that marriage alone, save in the exception made, was an absolute revocation, and that the marriage settlement in no wise affected the construction to be given the statute. While the construction in that case sustains the views of counsel and the judgment below, the facts are not at all analogous to the case being consid-

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ered. There the will of Phaup was made long before his marriage, and when he was about to marry Mrs. Bass, two years after, an agreement was entered into by which the wife was empowered to devise her estate, and in consideration of that fact relinquished all interest in his estate. She made no will, nor was she asserting any claim to his property, nor did they contract with reference to the will already made by the future husband. It was a naked proposition, submitted to the court as to whether or not the marriage revoked the will. If Mrs. Bass in that case, in pursuance to the power given her to make a will by the marriage contract, had, in the exercise of the power, and on the eve of the marriage, executed her will, we are inclined to doubt that the court would have permitted the husband to have asserted his marital rights, and held the will void because dated two days before the marriage, when made in pursuance of the antenuptial agreement, still the reasoning of the court in that case, and the construction given the statute, would lead to the conclusion that the will would have been held to have been revoked.

In the case of Osgood v. Bliss, 141 Mass., 474, the parties were married in the State of Indiana, and, on the eve of the marriage, made an antenuptial contract, by which it was agreed that the marriage should not revoke a will that had been made by the intended wife. The husband had never seen the will, and knew nothing of its contents, yet he signed the agreement. The statute of Indiana contained no exceptions, but provided: "After the making of a will by an unmarried woman, if she shall marry, such will shall be deemed revoked by such marriage." The wife dying, the husband claimed about $12,000 in money or choses in action that she had disposed of by her will, on the ground that the marriage rendered the instrument a nullity. The Supreme Court of Massachusetts held that the marriage did not revoke the power to make the will. It is true in that case the court draws the distinction between the execution of a power and the execution of the will, and bases its conclusion on that distinction. They proceed to say that the reason given for holding that marriage is deemed to be a revocation of a woman's will is, because, by the marriage, she divests herself of the power of revoking it and destroys the power to change or alter it. It is argued that such reasoning does not apply to an appointment by will, and for that reason it was held that the marriage was not a revocation. The argument is well founded and based on the common law rule, and the statute but follows it, and as such reasoning can not apply to the exercise of the right by a married woman to make a will when she, at all times before and after the marriage, had the legal capacity to make a will, that case supports directly the principle recognized in this case. Besides, the marital rights of both the husband and wife are fixed by the very contract under which the disability of coverture, in so far as it stands in the way of the execution by her of a will, is entirely removed.

We are satisfied that a proper construction of the statute should not confine the court to the one exception of the exercise of a power to make a will by a married woman when disposing of the property of another, or of property that would not pass to her heirs, but that the contract rights of husband and wife determining the right of property and fixing the status of the marital relation in that respect before the marriage, although it may recognize the execution of a will then made, if properly executed, should be regarded, and that such cases are not embraced by the statute. The statute of Wisconsin provided, in reference to such wills: "Excepting only that nothing

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contained in this section shall prevent the revocation implied by law from subsequent changes in the condition of the testator." The court held that the revocation implied by law evidently means such as would be implied at common law—"the marriage of a woman was the revocation of a will previously made." Ann Ward, living in Wisconsin, made a will during her second marriage, by which she gave her property to her children by her first husband. She had no issue by the second or third marriage. By the laws of that State a married woman has the right to dispose of her estate by will. Having made the will during her second marriage, she married Ward, her third husband, and shortly after died. Her will was admitted to probate, the Supreme Court, to which the appeal had been taken, saying: "To hold that marriage of itself revoked a former will of the wife under the circumstances here presented, when, on the next day after the marriage, she had the power to reinstate the same writing as her last will and testament, would seem to be absurd." (Will of Ward, 70 Wis., 257.)

In view of our statute it seems to us that it would be trifling with the rights of the husband and the devisees of Mrs. Stewart to so construe its provisions as to destroy the testamentary act of the testatrix, and if no other reason exists for denying the probate of this paper it should be admitted to probate as the last will of Mrs. Stewart, formerly Jacob.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

HENDERSON BUILDING AND LOAN ASSOCIATION v. JOHNSON, &c.

(Filed February 2, 1889.)

Building and loan associations—Usury—The provision in the charter of a building and loan association that "no dues, premiums, interest or fines that may accrue to the association in accordance with its charter shall be deemed usurious, and the same be collected as other debts," is partial legislation, and, therefore, unconstitutional in so far as it authorzies the recovery of more than the legal rate of interest upon money loaned.

In this action by appellant (the charter of which contains such a provision) against appellee, one of its members, to recover money loaned, it is entitled to recover only the amount loaned with the legal rate of interest, and not the amount authorized by its charter in the way of premiums, fines, etc., which would amount to many times the legal rate of interest.

Montgomery Merritt for appellant.

John Young Brown for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Pryor.

The question presented in this case involves the validity of section 8 of the appellant's charter, in so far as it provides that no dues, premiums, interest or fines that may accrue to the appellant in accordance with its charter shall be deemed usurious, and the same may be collected as other debts, etc. The appellee, Thomas L. Johnson, subscribed for nine shares of stock in the Henderson Building Association of $100 each, to be paid for in weekly installments of 25 cents on each share. He discounted the shares to the association at and for the sum of $675. He was also to pay 50 cents per month

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on each share as interest installments, and in case he failed to pay his periodical dues for the period of three months, the association had the right to forfeit his shares of stock, and collect at once the amount of money obtained from the association. The appellee executed, on the 25th of August, 1884, a mortgage on his house and lot in Henderson to secure the payment of $675, the money then obtained, and failing to pay his dues for three months this action was instituted to foreclose the mortgage. It is alleged in the petition, and the account made out in accordance with the charter and by-laws of the association shows, that of date September 16, 1887, he owed the association the sum of $679.97 on this loan of money, or, as appellant alleges, by reason of this partnership, of which appellee was a member. The appellee only received $607.40 in money, as by the rules of the association he was entitled to the benefit of the earnings from the — day of March, 1884, although he did not become a member until August, 1884. The attorney's fee for examining title and the clerks fees had to be and were deducted from the amount of money received by him.

The appellee, in defense to the action, alleged that this was a simple loaning and borrowing of money at a usurious rate of interest, and that, although sanctioned by the legislature, it was such partial and favored legislation as violated the fundamental law of the State, and the chancellor below so holding, gave the appellant its debt with legal interest only, of which it now complains. It is insisted that the object of such associations is to enable the mechanic and laborer, for wages, to acquire a home, or secure one for the benefit of his family by the payment, in weekly and monthly installments, of 25 and 50 cents, and that no other corporation or individual would likely hold out such inducements to those who are unable to furnish personal security for the performance of their obligations. Counsel for the appellant has produced many authorities from courts of last resort, and such as are entitled to great weight, sustaining the powers conferred by appellants charter in like corporations, basing their conclusions (some of them at least) on the fact that the actual transaction between the member and the association is not made upon any usurious consideration. (Patterson v. Workingmen's Building Association, 14 Lea, 677; Merrill v. McIntyre, 13 Gray, 157.)

Experience may demonstrate the necessity for such organizations, and the peculiar benefits to be derived by the laboring classes from the liberal provisions contained in their charters, but the facts of this case are by no means convincing that either benevolence or charity constitute the basis of this association. The members who abstain from bidding the enormous premiums for the loan of money must necessarily profit by the investment, but those who are so unfortunate as to become borrowers, and required to pay the interest exacted in this case must ordinarily forfeit their stock, with the homes they have mortgaged sold, and the proceeds applied to the benefit of those who act from motives of gain, and not from the love of mankind.

The appellee in this case owned no real estate but that embraced by the mortgage. He obtained this loan of $675 on the 25th of August, 1884, to enable him to pay a debt of $600 to a creditor who was pressing him for payment. From the time of the loan in August, 1884, up to the 1st of January, 1886, he had paid the association at various times, in the way of dues and interest, the sum of $297.85, and on the 14th of July, 1888, when the report of the comissioner was made, by which the appellant was only allowed the

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legal rate of interest on the loan, and the appellee credited by what he had paid, the latter owed the association $482.46, to satisfy which the chancellor ordered the property mortgaged to be sold.

The appellant complains and says that, following the articles of association, the appellee would be indebted, by way of discount, dues, interest and fines unpaid, in the sum of $1,138.52, subject to a credit of $459.25, the amount of dues, etc., that should have been paid by the appellee, with which he stands charged, leaving a balance still due the association of $679.27 as of the date of the commissioner's report. This result is reached by charging the appellee with the premium agreed to be paid on the money loaned for the time the loan had been made, which was $123.72. This sum, added to the dues, fines and interest, which amounted to $416.25, makes $538.93 that defendant had paid, or was bound to pay by the laws of the appellant and the regulations of its order, leaving applleee still in debt in the sum of $679.27.

Calculating this debt and its interest, and the claim of the association against the appellee in the way of premiums, fines, etc., as authoirzed and required by the charter, and the appellee would be compelled to pay for the loan of $675, from the 25th of August, 1884, until the 1st of January, 1888, a period of three years, four months and six days, $598.93, leaving him still in debt $679.27.

The debt borrowed was secured by a mortgage on real estate, and we are inclined to adjudge that the appellee could have had no difficulty in obtaining such a loan from either a natural or artificial person with money to loan, especially upon a mortgage lien, with a law protecting the lender against any reclamation of usury by the debtor; nor will it be pretended that such special privileges could be conferred on an individual or corporation under our constitution, and, at the same time, deny to others a like privilege. The legislature has suspended the general law in regard to usury for the benefit of the appellant, seemingly to promote the benevolent objects in view. The profit made does not ultimately benefit all the stockholders. Those who can live without borrowing from the association, and whose stock is not liable to be forfeited for the nonpayment of dues, will ultimately realize the large profits resulting from such usurious loans at the expense of those who have paid from 20 to 50 per cent. for the use of the money. The fact that the money is loaned by the corporation to one of its members can make no difference. The entire transaction is against the letter and spirit of the statute against usury. The charter of appellant is delusive. It proposes to practice benevolence, and, at the same time, exacts the most exorbitant rates of interest. The borrower is made the victim of the delusion, and, instead of being protected, is made penniless by reason of these usurious exactions. It is certain that those who fail to borrow prosper under the workings of this association, but they do so on the needs and misfortunes of their fellow members. A loan to members at the legal rate of interest, with reasonable dues for the maintenance of the organization, could not be held usurious, but such power as is conferred on the corporation in this case, or upon its managers, in the loan of its money, evidenced by the transaction in question, divests the appellant of its benevolent character and converts it into an organization, under the forms of law, for the purpose of filling its treasury by imposing oppressive burdens on its members who have been solicited to become the objects of its benevolence.

This court, in the case of Herbert v. The Kenton Building Association of Covington, 11 Bush, 296, adjudged such a transaction to be usurious. (Bur-

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lington Mutual Loan Association v. Heider, 55 Iowa, 424; Association v. Wilcox, 24 Conn., 147; Williar v. Baltimore Butchers' Loan Association, 45 Maryland, 546; Forest City Association v. Gallagher, 25 Ohio State, 208; Association v. Blackburn, 48 Iowa, 385.) In addition to these authorities, in the case of Gordon v. The Winchester Building Association, 12 Bush, 110, it was held that the section of appellee's charter in that case investing it with the power to charge a greater rate of interest than was allowed by the general law of the State was unconstitutional, and whether regarded as an exclusive privilege or partial legislation it was in violation of the fundamental law. In that case it is true the borrower was not a member of the association, but the power was given by the fifth section of its charter to loan money at such rates of interest as might be agreed on by the parties, preference being given in all cases to the members of the association. The object of that organization was to enable its members to acquire houses and other property, and if the benevolent object in view justified the legislature in permitting its members to borrow money of the corporation at a usurious rate of interest there is no reason why, in order to accomplish such a purpose, it should not be authorized to make the same character of loans to those not members. The power given a natural person to offer his money at auction for loan to the highest bidder, making valid by legislative enactment the agreement to pay any amount of interest agreed on, would be deemed usury under the general law, and the repeal of the usury law as to him, however laudable the motive, would be open to constitutional objection. There is no difference in the exercise of such powers by a corporation and an individual. If invalid as to the one it is equally so as to the other, and no such special privilege can be conferred upon either under our Constituiton. The Supreme Court of Illinois, in a well considered case, held that where a sum of money, in addition to the interest allowed by law, is bid for a loan by one of its members from the corporation, and included in the note, the transaction is usurious, and a provision in the charter exempting the same from the operation of the usury law of that State was held to be unconstitutional. (Monticello Loan and Homestead Association v. Smythe, 9 Rep., 714.)

We concur in the judgment below holding that all the appellant was entitled to recover was the money loaned, with the legal rate of interest.

Judgment affirmed.

GRUNDY v. THE PINE HILL COAL CO., &c.
PINE HILL COAL CO. v. GRUNDY.

(Filed October 16, 1888—Not to be reported.)

1. Compensation of officers of corporations—Where the charter of a corporation provides for the election of a president, and further provides that his salary shall be fixed by the board of directors, one who is elected president, and renders services as such, is entitled to a reasonable compensation for his services if the board of directors fail to fix his salary.

2. Settlement of partnership accounts—As this action involves the settlement of partnership accounts, and the accounts are so made up, and the evidence as to certain items is so unsatisfactory that the court can not determine whether the report of the commissioner upon which the judgment was based is right or wrong as to these items, the judgment as to them is reversed, and

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cause remanded, with directions to refer it to a competent bookkeeper as commissioner, in order that he may investigate these matters, as to which the court is now unable to form an opinion. As to other items the judgment is affirmed.

W. B. Harrison for Grundy.

W. O. Bradley for Pine Hill Co., &c.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Bennett.

On the 18th day of March, 1879, the appellant bought of W. T. Crooke his one-fourth interest in the Pine Hill mining property, the appellee, C. Crooke, owning the other three-fourths interest therein. The said W. T. and C. Crooke held and owned said property in partnership, and the appellant, upon his said purchase, became the partner of the appellee, C. Crooke, to the extent of one-fourth interest, and the appellee to the extent of three-fourths interest in said property. The appellant, in part consideration of the purchase price of said fourth interest, conveyed to the Pine Hill Coal Co. some land which he owned, and which adjoined the Pine Hill property, known as Ricketts' Mines, and the Pine Hill Coal Co. executed to W. T. Crooke its notes for the price, and the appellant executed to said Crooke his note for the balance of the purchase money, which he thereafter paid.

By an act of the legislature of this State, passed at its session of 1878-9, said Pine Hill Coal Co. was incorporated, with the consent of the appellant and appellee, C. Crooke, with power to elect a president, agent, treasurer and board of directors. In September, 1879, said company was organized in accordance with the provisions of said charter. The company, as thus organized, did business in mining coal, etc., until some time in 1882, when that branch of the business was suspended; but the business of merchandising, which was carried on in connection with mining, was continued for some time longer. The appellant, in 1881, filed his petition against the appellee, C. Crooke, for the purpose of having the partnership matters settled, etc., in which suit he claimed that appellee, who had the entire control of the business, had mismanaged the same, and had wrongfully appropriated to his own use large amounts of the partnership funds, and that in consequence thereof he was largely indebted to the appellant. A denial of these allegations necessitated a reference of the case to a commissioner, upon whose report the chancellor gave judgment for appellant for about the sum of $2,300, and also adjudged that the appellant pay his portion of costs and taxes. From this judgment he has appealed, and the appellee has filed a cross appeal. It is agreed that, in addition to the consideration above mentioned, the appellant was to pay one-fourth of the existing indebtedness of said firm; but the appellant contends that W. T. and C. Crooke represented that the books of the firm would show all of its indebtedness, upon which he relied, and with that view he employed McElroy, a competent clerk, to examine said books in connection with said Crookes and their clerk, Proctor; and that a judgment debt of about $4,000, that was in favor of Dillion against said Crookes, was not on said books; nor did the Crookes or the appellee's clerk make known the existence of said debt, nor did he otherwise know of its existence; that afterwards the firm had said debt to pay. He claims that

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said conduct on the part of said Crookes was a fraud upon him, and that no part of it should be charged to the firm, but that C. Crooke should pay the whole of it.

We can not sustain the contention of the appellant—first, because there is direct and positive evidence that it was not represented that the books would show the entire indebtedness of the firm, but that the appellant agreed to pay one-fourth of all the indebtedness of the firm, whether appearing on said books or not, and that the appellant was told of the existence of this very debt; but he was also told that they had appealed the case to this court, and that their attorneys had advised them that they would get clear of paying it. This latter fact the appellant admits in his pleading; so we must affirm the action of the chancellor in reference to this matter.

The chancellor allowed the appellee, C. Crooke, about $9,000 as salary for his services as agent and president of the mines. The proof is overwhelming that the allowance was reasonable. The appellant objects to this upon the ground that he did not agree that the appellee should have any compensation for his services, and that he employed McElroy to act as clerk as an offset to the appellee's services, and that neither the charter nor by laws fix any salary for the appellant. Therefore, without an express agreement, or the charter or by-laws fixing the appellee's salary, he is entitled to none. It is true that there is no express agreement proven, nor does the charter or by-laws expressly fix any salary for the appellee. But the charter does provide for the election of a president, agent and treasurer of said company, and for the board of directors of the company, fixing their respective salaries. There is no dispute about the appellee having been elected president and agent of the company, and that he rendered the services mentioned, and that they were reasonably worth the sum allowed by the chancellor. Now, it was the right and duty of the board of directors to elect; they did elect, and it was their duty to fix a reasonable compensation for his services; and he having rendered services under said election, in the absence of a salary fixed by the board of directors, the law raised an assumpsit on the part of the company to pay the appellee a reasonable compensation for such services. (Walker v. The Bank of Kentucky, 3 J. J. M., —; Angell and Ames on Corporations, 10th edition, section 317.) So we find no error in reference to this matter.

The appellant also contends that the appellee represented at the time of said purchase that the firm had on hand $2,000 in cash, and that there was nothing showing that he, as agent and sole manager of the firm's business, had charged himself with this sum. If he has charged himself with it, we are unable to discover the fact. Also, that it does not appear what the appellee did with the $3,500, borrowed from J. R. and C. Crooke. The record as to this matter is in confusion. Also, it does not appear whether the $2,775.05 for props was included in the item for daily and monthly laborers. Also, in reference to the $9,650.56 credit as expenses for entries, it does not satisfactorily appear whether either of these items was credited in the items for daily and monthly laborers. Also, the credit of $2,775.05 for railroad iron, it does not satisfactorily appear whether this item was included in the credit allowed for merchandise. Also, as to the credit allowed of $706.50 as the price of beef cattle, it does not satisfactorily appear what was done with the $1,006.50 proceeds. Also, as to the item of $15,757.66 allowed as a credit for outside coal, it does not satisfactorily appear what became of the proceeds.

The appellee footed up the total expense account, for which he received

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credit at $241,206.44. The items of notes and ledger accounts due the firm and cash on hand amounting to $15,515 05 were added to the sum of $241,-206.44, making $256,721.46. The total receipts are put down at $251,560.60, which sum was deducted from the total expenditure, including the $15,515.05, which made the firm owe $5,160.86. It appears to us that the appellee, down to this point, gets credit for the $15,515.05 without its being shown that he was ever charged with it; and that it properly belonged to the items of $251,560 60. The appellee attempts to explain it by showing that said $15,-515.05 were offset against other items, making $20,675.91. But we do not understand this manner of making up a balance sheet. We can not determine whether it is right or wrong. We are rather inclined to the opinion that it is wrong.

As to the foregoing matters, commencing with the item of $2,000 cash on hand, the case is reversed on original appeal, and the same is remanded, with directions to refer the case to a competent bookkeeper as commissioner, in order that he may investigate said matters, using the books of the firm and the evidence already taken in this case, or he may take other evidence in reference to said matters, and make out a correct balance sheet, and report to the chancellor.

We find no error prejudicial to the appellee, Crooke, on his cross appeal. The judgment on said appeal is affirmed.

LOUISVILLE & EVANSVILLE MAIL CO. v. BARBOUR, SHERIFF, &c.

(Filed November 1, 1888—Not to be reported.)

1. Taxation of corporations—Under chapter 32 of the General Statutes (old edition), the stockholders in corporations were required to list and pay taxes on their stock in every case in which the corporation itself was not expressly required to report and pay tax; and where the stockholders were required to list and pay tax on their stock, the corporation was not liable for tax on its property. And it is immaterial whether the stockholders had or not listed their stock for taxation, as required by the statute.

In this case it is held that the stockholders in appellant, and not the corporation itself, were, under the statues as they existed during the years (1875 to 1882) for which the tax is sought to be imposed, required to list their stock for taxation, and, therefore, the property of appellant can not be taxed.

2. Construction of statute—The provision of the "Auditor's Agent Act" making it the duty of the auditor's agent when any person has failed to give in his list or a proper list of his taxable property, to give information of the same to the county court, and making it the duty of the court to assess the property, etc., not being penal in its nature, should be construed not strictly, but in such manner as to accomplish the purpose of its enactment, and effectuate the intention of the legislature.

1. Taxation—Demand—In order to justify the proceeding under that section, it is not necessary that there should have been a demand by the assessor upon the taxpayer to give in his list of property for taxation.

4. Practice—Objection waived—Appellant can not, in this action to enjoin the collection of the tax, make the objection, even if sufficient, that the information upon which this proceeding against it was based was not in writing, for having failed to make the objection before the county court, it must be regarded as waived.

Brown, Humphrey & Davie and G. A. Winston for appellant.

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Helm & Bruce for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Lewis.

October 2, 1882, in a proceeding, styled "The Commonwealth on relation of M. S. Barker, Auditor's Agent against The Louisville & Evansville Mail Co.," a summons was issued by the judge of Jefferson County Court, requiring the defendant to appear before the court and give in a correct list of its taxable property for the year 1875 to 1882 inclusive, in so far as it had failed to do so, or show cause to the contrary. September 10, 1883, in that proceeding, after reciting that the defendant had been duly summoned to appear before the court and list its property for taxation for the years named, and that it appeared, from the evidence, it had failed to so list, and such taxes had not been paid, the county court entered an order assessing and fixing the aggregate taxes at the sum of $1,392. And the same having been placed in the hands of J. D. Barbour, the sheriff, for collection, this action was instituted by the Louisville & Evansville Mail Co. against him and Barker, the auditor's agent, and an injunction was obtained, restraining the sale of a steamboat levied on to pay the taxes, and all other proceedings under the order mentioned. Not only was the legality of the proceedings in the county court denied, but it was stated by the plaintiff in the action that it was a corporation, and its various stockholders for each of the years mentioned counted and included the amount and value of the stock owned by them respectively in the corporation in giving in their annual lists of taxable property, and thus and thereby paid the taxes on the value of their said stock, as required by law.

Upon final hearing the chancellor rendered judgment, dissolving the injunction, except as to $35, which it was decided had been included in the list and paid by one of the stockholders, and, therefore, should be a credit on the amount of the assessment by the county court.

Before considering the liability of the property of the corporation to be assessed as such for taxation, we will determine the preliminary question, whether the proceeding in the county court was such as to authorize the enforced collection attempted by the sheriff. The statute under which the proceeding was had is "An act authorizing the auditor to appoint agents to attend to revenue matters," approved April 29, 1880, section 2 of which is as follows: "That in addition to other duties imposed by law, it shall be his duty, when any person of this Commonwealth has failed to give in his list or a proper list of his taxable property, to give information of the same to the county court of the county where such list should have been given; and said court shall issue a summons against such person to appear before said court in ten days after service, and list his property for the year or years he has failed to do so; and if, upon hearing, the court is satisfied of such failure to list and pay taxes, it shall assess and fix the value of the same, with interest at 10 per cent. per annum, and certify same to the auditor, and place it in the hands of the sheriff or collector, who shall collect or account for the same as for other taxes. The court shall also adjudge the costs of the proceeding against the party in default: Provided, The party may, when notified, list his property and pay taxes due, with interest as aforesaid, to the agent of the auditor and save costs." The statute not being penal in its

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nature, should be construed, not strictly, but in such manner as to accomplish the purpose of its enactment, and effectuate the intention of the legislature.

We do not think it necessary, as argued, that, in order to justify the proceeding under the section quoted, there should have been a demand by the assessor upon the taxpayer to give in his list of property for taxation. For the statute, properly construed, comprehends every case of a previous failure by either a corporation or natural person to do so, whether the result of his own or the negligence of the assessor. In fact, the necessity for this peculiar statute arises from, and it was intended to operate especially in case of, neglect of the regular assessor to do his duty. Nor can appellant now make the objection, even if sufficient, that the information upon which the proceeding against it was based was not in writing, for having failed to make it before the county court it must be regarded as waived. The main question is, whether the specific property of the corporation, consisting of steam boats, or the stock held by its members, was, during the years mentioned, required to be listed and made subject to taxation; and that question must be determined by the law then existing, which is comprised in chapter 92, General Statutes, edition of 1881. The property of the corporation is not included in the list contained in section 4, article 1, nor in article 2, the title of which is "Specific taxation on real and personal estate;" nor in article 3, the title being "Revenue specifically devoted to the Sinking fund;" nor in article 12, which enumerates the various corporations, the property of which, instead of the stock held by the stockholders, is required to be listed for taxation. If the property of appellant is subject to be listed with the assessor, and taxed as such at all under the statute, it is so in virtue of section 5, article 5, which is as follows: "The assessor, after having taken the lists of all property required to be listed as above, shall require each person on oath to fix the amount he or she is worth from all other sources on the day to which said list relates, after taking out his or her indebtedness from said amount; and the said assessor shall take from said amount so assessed and listed the sum of $100, and set down and list the balance for taxation. This section includes all property not exempt from taxation, other than that mentioned in section 4, whether manufactured, produced, purchased or otherwise procured, such as spirituous liquors, and all mixtures thereof; the produce of mines, farms, forests and other productions of the earth; manufactured articles of all kinds, and all property of every sort and description; notes, accounts, bonds, bills of exchange and choses in action; debts and demands of every kind; but does not include lands or other property not within the State subject by law to tax and actually taxed by the State or county where situated; nor bank or other stocks, when the bank or other institution or corporation in which it is held is required to pay tax on the same."

It must be assumed that it was not intended by the section quoted, both the property of a corporation and the stock of each member of it should be taxed at the same time and for the same purpose. For though it is not always practicable to make taxation entirely equal and uniform, the legislature has no power to directly impose double taxation. It seems to us, therefore, that if the stockholders are thereby required to list and pay tax on their stock the corporation is not, nor was intended to be made liable for tax on its property. Otherwise, each stockholder, and also the chief officer of the company, would be subject to the penalty imposed by section 20, article 5,

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for failing to list with the assessor when legally called on, and likewise liable to be summoned under the statute authorizing the present proceeding. We are satisfied such confusion and injustice as would result from making both the company and stockholders liable was not contemplated by the legislature, and the section should not be so construed as to tolerate it. The purpose of that section was to make such property as had been previously included under what is understood and called the equalization law; that is, property not visible and tangible. And although the sweeping language used might be made by implication to include, and should be construed to include the property of such corporations as the appellant, if it could not be directly or indirectly reached otherwise, still the stocks are so plainly and expressly made liable that it is impossible to avoid the conclusion they were intended to be listed, and consequently that the tangible property of the corporation was not. For not only are terms used which accurately and fully describe stock in corporations, but the exception from the operation of the section of "bank or other stocks when the bank or other institution or corporation in which it is held is required to pay tax on the same," makes it conclusive that all other stocks were intended to be listed with the assessor. And the same intention to require stockholders in corporations to list and pay taxes on their stock in every case not otherwise expressly provided, is shown by section 8, article 12, which says that individual stockholders of these companies which are required by that article to report and pay tax, shall not be required to list their shares in such companies for taxation, the necessary implication being that all others are.

That such was the legislative construction is shown by an amendatory act, approved April 22, 1884, in which it is provided that thereafter all corporations shall, in the manner provided by article 12, chapter 9, General Statutes, list their property with the assessor of the county in which such property is situated.

It is not material in deciding the question before us whether the stockholders have or not listed their stock for taxation, for if they have not, it is because the statute has not as it might have been enforced. Nor is it the province of the court to determine which mode of taxation is the most convenient and productive of revenue. For the intention of the legislature, when ascertained, must govern in respect to both the property to be taxed and the mode of ascertaining and assessing it for taxation.

We do not think the case of Louisville & Nashville Railroad Co. v. Commonwealth, 1 Bush, 250, cited, is analogous to this. There the question decided was, whether a corporation, like natural persons, was subject to taxation under section 1, article 5, chapter 83, Revised Statutes, which simply prescribed the form of the tax book, and it was held the road of the company, being in its nature real estate, was required to be listed for taxation as land. But in section 5, article 6, which was intended to include property taxable under equalization, no mention was made of any other besides bank stock. Nor was there in that section or elsewhere in the Revised Statutes language showing, as is done in the sections of the General Statutes referred to, an intention to tax and require listed the stock in all corporations not expressly required to list for taxation the tangible property.

As, in our opinion, the stockholders and not this corporation were, under the statutes as they existed during the years named, required to list their stock for taxation, the assessment made by the county court and the levy by

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the sheriff were illegal, and, therefore, the judgment of the chancellor must be reversed and cause remanded, with directions to perpetuate the injunction.

CHENAULT'S GD'N v. CHENAULT'S EX'ORS.

(Filed November 23, 1888.)

Death of devisee before making of will—Where a devisee, whether he be a sole devisee or one of a class, is dead at the making of the will, or thereafter dies before the testator, leaving issue, who survive the testator, such issue take the estate devised as the devisee would have done if he had survived the testator, unless a different disposition is required by the will, and extrinsic evidence is not competent to show the testator's intention in that respect.

Following certain special bequests was this provision in a will: "The remainder of my estate I desire equally divided between the children of my brothers and sisters, except in the case of my two living sisters. I desire the portion going to their children go to my sisters or sister, as the case may be." A son of one of the brothers of the testator had died before the making of the will, leaving a son, who seeks by this action to recover the share of the estate his father would have received if living at the death of the testator. Held—That he is entitled to recover. (Sheets v. Grubbs, 4 Met., 339, overruled.)

C. F. & A. R. Burnam for appellant.

John Bennett for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Chief Justice Lewis.

In 1885 David C. Chenault died, leaving a will dated September, 1878, to which was, in June, 1885, added a codicil. Following large bequests for sustaining Baptist preaching and to the Southern Baptist Theological Seminary is this provision in the will: "The remainder of my estate I desire equally divided between the children of my brothers and sisters, except in the case of my two living sisters, Elizabeth Bennett and Nancy Munday. I desire the portion going to their children go to my sisters or sister, as the case may be, for their or her sole and separate use, both to enjoy and dispose of by will or otherwise." By the codicil the executors therein named were directed to reduce the whole estate of the testator to cash, and further provision was made in regard to the shares intended for Mrs. Munday and her children, that need not be here set out in full. There were two brothers and three sisters, of whom Josiah P. Chenault, Waller Chenault, Sr., and Mrs. Oldham were dead at date of the will, and Mrs. Bennett and Mrs. Munday survived the testator. This action was instituted by the guardian of Waller W. Chenault, grandson of Waller Chenault, Sr., and son of Waller Chenault, Jr., who had died previous to execution of the will, against the executors and other devisees of the residuary estate to recover for him one thirty-third part thereof; and the question presented is, whether he is entitled, under the clause quoted, to the share his father would have received if living at the death of the testator.

The evidence offered for the purpose of proving, by oral declarations of

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testator, he did not intend him to have any part of the estate was properly rejected; for, according to an established rule, the intention in that respect must be ascertained from the proper meaning of words of the will, and not from extrinsic evidence.

As the residuary devisees take per capita, the children of each brother being more numerous, will necessarily receive as a class more of the estate than those of either sister. But although such result must have been foreseen by the testator, it does not have any bearing upon the question before us, nor can that be satisfactorily determined from anything else in the will or codicil, consequently it must be decided according to statutory rules of construction.

At common law the import of the term "children," used as descriptive of persons to take under a will, could be enlarged so as to embrace grandchildren in two cases only—first, from necessity where the will would be otherwise inoperative; second, where the testator had shown by other words that he did not intend to use the term childrren in its proper actual meaning, but in a more extended sense. (Roper on Legacies, volume 1, 69.) The same rule of construction prevailed in this State without question before there was statutory regulation on the subject. (Philips v. Beal, 9 Dana, 1), and has since been recognized. (Churchill v. Churchill, 2 Met., 466; Sheets v. Gruhbs, 4 Met., 839.)

The right enforcement of that rule, in connection with the doctrine of survivorship, often resulted in defeating the intention of testators to provide for those most in need of their bounty, and for whom they were, in fact, desirous of making provision. Thus, in case of a devise to children as a class, the death of one or more of them before death of the testator formerly inured to the benefit of the survivors coming within the description to the exclusion of descendants of those deceased, merely because the testator inadvertently failed to provide expressly and in apt terms to the contrary.

Another mode of thwarting the real intention of testators previous to legislative interference was the lapse of the common law whereby, in case of death of a designated devisee before that of the testator, the property devised was diverted from his issue and fell, if personalty, into the residuum, or, if realty, back to the general estate. To remedy, in some measure, these defects in the law, and, as said in Gates v. Gill, 9 B. M., 200, "to promote equality in the distribution of estates, and subserve the probable intention of testators under a change of circumstances not expressly provided for, only, as it might be presumed, because express provision was not understood to be necessary," the following statute was passed in 1839: "That hereafter legacies and devises to children and grandchildren shall not lapse by the death of the legatees or devisees before the testator, provided such legatees or devisees shall have children living at the death of the testator who would have taken as heirs by descent, or as distributees of the legatee or devisee." (Loughborough's Digest, 400.)

It was contended in argument in Gates v. Gill that the use of the term "lapse" indicated intention by the legislature to apply that statute only in case of a devise to a person specially named who died before the testator, but this court held it was passed as well in view to the case of one of a class of devisees so dying, and that under it children of such deceased devisee were invested with the same interest as the parent would have taken if living at the death of the testator. It is, however, proper to say the question did not arise in that case what should have been the effect under the statute of the death of the devisee before the making of the will. But although the object

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of that statute was to thereafter prevent both the survivorship and lapse of the common law, and thus allow a construction of wills more in harmony with the usual and natural feelings and views, and, therefore, presumed intention of testators, the change was not deemed by the legislature radical enough, and hence the two following sections were made parts of the Revised as they now are of the General Statutes:

"When a devise is made to several as a class, or as tenants in common or joint tenants, and one or more of the devisees shall die before the testator, and another or others shall survive the testator, the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees, unless a different disposition is made by the devisor. A devise to children embraces grandchildren when there are no children, and no other construction will give effect to the devise." (Section 1, article 2, chapter 50.)

"If a devisee or legatee dies before the testator, or is dead at the making of the will, leaving issue who surives the testator, such issue shall take the estate deivsed or bequeathed as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof is made or required by the will." (Section 18, chapter 113.)

It will be seen the statute of 1839 is so changed in express terms by the latter of the two sections quoted, that the issue of a devisee or legatee who may be dead, even at the making of the will, takes the estate as such devisee would have done if alive at death of the testator, and if that section was applied in this case the infant plaintiff would be clearly entitled to a share of the estate. This court has, however, decided it was intended specially to prevent lapsed legacies, and relates to devises made to a sole or several devisees, not to those of a class, to whom the other section intended to prevent suvivorship more properly applies. But, as said in Dunlap v. Shreve, 2 Duvall, 334, "these two kindred and simultaneous enactments should be considered in pari materia, and construed in juxtaposition as an entire expression of legislative intent."

The statutes on decent and distribution, chapter 80, General Statutes, make that disposition of the estate of a person dying intestate which, by common consent, he ought to have made, and by common understanding he would have made. Hence, upon the death of such person, his estate passes by law to his children living and to the descendants of those who are dead.

The two sections quoted, intended as statutory rules of construction, practically operate to make disposition by law of such portion of the estate of a person dying testate as he failed to fully and clearly dispose of himself, and that it is fair to presume the legislature intended should pass in the same manner and to the same persons it would have done if there had been no will. For whether a person dies intestate as to the whole or part of his estate, it is to be presumed, in the absence of a clear expression to the contrary, he desires an equal division per stirpes between his living children and the descendants of those dead, no matter when they died. And as it was the object of neither of the sections we are considering to defeat, but of both, one as much as the other, to effectuate the probable design of testators who may not have made their intention clearly understood as to persons who are to take under their wills, it seems to us no construction should be given to either that would exclude any within the natural and usual range of parental affection and solicitude, especially as those to be generally prejudiced thereby are infants.

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In the case of Churchill v. Churchill, the question was upon this clause of a will: "If Lucy Churchill dies without children her part is to be divided amongst all my children." And it was held, that the son of one of the children who had died before the will was executed did not take a share, because the word children could not at common law be made to embrace grandchildren. But no reference was made in that case to the two sections quoted.

In Sheets v. Grubbs, the devise was to the children of the testator's sister, and the question was, whether the daughter of one of them who died before execution of the will was entitled to any part of the estate. And it was held she was not, because it could not be presumed the testator intended to give any portion of his estate to a person he knew was not living when he made his will. Still it was said if the devise had been to the children by name, or to a given number of children, the issue of such as were dead at the making of the will would have taken under the statute.

It seems to us the conclusion was reached in that case by an erroneous process of reasoning. For the self-evident fact the testator in that particular case did not mean to devise any part of his estate to a child known by him to be dead, by no means involves a presumption he intended to disinherit the issue or descendants of such deceased child. And the proper inquiry in that case, as in every such one, is, whether there is any reason for a difference in the construction and application of the two statutes which is satisfactorily answered in Dunlap v. Shreve, thus: "Then carefully considering the reason and object of these two enactments against lapse and survivorship when there may be 'issue' or 'descendants,' and allowing a liberal and consistent interpretation of the letter of that against survivorship, we are strongly inclined to the conclusion that to give full effect to the legislative purpose, a devise to 'children' as a class unqualified by the context, or by any extraneous fact should here now be construed as a devise to issue, heirs or descendants. And on this hypothesis the common law rule of construction should be inverted so as to require some other proof that by 'children' the testator intended the devise for such only as were living when he published his will." For there is no necessity for making the words "shall die before the testator" refer merely to such as die subsequent to the date of the will, where they can be fairly construed to embrace as well those who die before.

It is true the words "is dead at the making of the will" are used in section 18, chapter 113; but it seems to us, with the same consistent purpose to change the common-law rule and relieve "issue" or "descendants" from the harsh operation of the doctrine of survivorship, the following words are added to the other section: "A devise to children embraces grandchildren when there are no children and no other construction will give effect to the devise."

In our opinion the construction given to the statute in Dunlap v. Shreve is proper, and the case of Sheets v. Grubbs should be overruled. It, therefore, follows that the issue or descendants of those children of the testator's brothers and sisters who were dead at the death of the testator, whether they died before or after the will was executed, are entitled to the respective shares of the estate which their several ancestors would have taken if alive, and as Waller W. Chenault has a right to the share that his father would take if alive, the judgment of the lower court is reversed and cause remanded for further proceedings consistent with this opinion.

Judge Pryor not sitting.

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VERSAILLES AND NICHOLASVILLE TURNPIKE CO. v. THE TOWN OF VERSAILLES.

(Filed January 15, 1889—Not to be reported.)

Turnpikes—Repair by town—Where the limits of a town have been so extended as to include a part of a turnpike road, the turnpike company can not claim exemption from the original undertaking to keep in repair that part of its road thus included within the town limits, until it clearly appears it has ratably diminished its tolls. And the town being compelled, in order to avoid indictment, to keep in repair the street upon which the turnpike road is situated, and thus to do what in the past it was the duty of the turnpike company to do, but which it failed and refused to do, the town is entitled to recover of the turnpike company so much of the amount thus expended by it as was necessary to put the road in the condition required by the charter of the company, for the use it was intended, the turnpike company having claimed and enjoyed the benefit of the full amount of tolls on its road.

J. D. Hunt and Ed. M. Wallace for appellant.

D. L. Thornton and W. O. Davis for appellee.

Appeal from Woodford Circuit Court.

Opinion of the court by Chief Justice Lewis.

The trial of this action being submitted to the court without a jury, the following conclusions of fact were found and stated in writing: That appellant, under its charter granted by the legislature in 1848, constructed a turnpike road from Versailles to Nicholasville, beginning at a point within the corporate limits of the first named town called Dean's corner; that although the limits of Versailles have been extended from time to time by acts of the legislature, the last one having been passed in 1868, whereby about 200 yards of the turnpike road was included, appellant continued, from the date of its construction, to control and keep it in repair fit for public use its entire length until 1878, when that portion lying within the boundary of Versailles was abandoned, and by reason of the neglect and inattention of appellant, became greatly out of repair and unfit for public use; that during the years 1879, 1880, 1881 and 1882 the appellee caused work to be done upon it to the value of $1,471.43, and instituted this action to recover that sum. But the lower court found that more work was done and materials furnished than necessary to put the road in the condition required by the charter of the company, for the use it was intended, the surplus expenditure having been made to put it in the condition required for a street, and rendered judgment for only the sum of $847.50, the estimated value of the work required and done for a turnpike road. It was, by the charter, made a condition of the right of the Versailles and Nicholasville Turnpike Co. to exact toll to keep its road in proper repair and fit for public use, from one terminal point to the other, and as the toll it was authorized to collect was in the first instance fixed in the ratio of the length of its road, it necessarily follows that as long as the full amount of toll authorized by its charter is collected, the duty exists to keep in repair and fit for the use designed the whole and every part of the road. While, therefore, the duty is imposed upon the town of Versailles to keep its streets in a condition fit for public use, and the power is given to levy and collect necessary taxes for the purpose, including the street upon which appellant's road now is the turnpike company is not released from its obliga-

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tion. nor can it claim exemption from its original undertaking to keep in proper repair that part of its road within the town limits, until it clearly appears it has ratably diminished its tolls. It can not claim and enjoy the benefit of the full amount of tolls on its road, and at the same time shift the burden of keeping it, or any part of it, in repair to the town of Versailles.

It is not a material inquiry whether the company had or had not the right originally to construct and control a turnpike within the corporate limits of the town; for, having actually done so without question, and enjoyed the benefits of that part of its road since 1848, it is now estopped to deny its obligation to perform the condition upon which it has, without hindrance, exercised that right.

As the duty was imposed upon the town to keep the street in repair upon which the road of appellant is situated, and the town authorities were liable to indictment for failing to perform that duty, and they were thus constrained to do what in part it was the duty of appellant to do, but failed and refused to do, and what was to that extent of value to it, in our opinion there can be no question of the right of appellee to recover the amount adjudged by the lower court.

Judgment affirmed.

(Response to petition for rehearing—Filed March 10, 1889.)

Whether the Versailles and Nicholasville Turnpike Co. can relieve itself of the obligation imposed by the charter to keep in repair that portion of its road within the corporate limits of Versailles, by the mere act of reducing its tolls ratably, was not necessary for the decision of this case, and we do not deem it proper to decide it. It may be necessary for the company to procure an amendment to its charter, in order to be exempted from the duty, but we do not decide whether it is so or not.

Petition for extension of the opinion overruled.

GORDON v. MORROW, &c.

(Filed January 17, 1889—Not to be reported.)

Contested wills—Instructions—Under the peculiar facts of this case it was error to instruct the jury that, in order to sustain the will in contest, they must believe the testatrix had sufficient mind, or a mind "in a proper state" to dispose of her estate with reason, etc., as the instructions may have been understood by the jury as referring to the mind of the testatrix with regard to her feelings or prejudices, and as authorizing them to find against the will because the testatrix disliked some of her kindred, there being testimony tending to show that she disliked some of her kindred, who were excluded by the will, while the bulk of her estate was given to others related to her in the same degree.

Edward W. Hines for appellant.

Ben T. Perkins, Jr., for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Pryor.

While the instructions given by the court below on the question of mental

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capacity and undue influence are, in the main, unobjectionable, and the testimony so conflicting as to leave the issue to be determined alone by a jury when properly instructed, there are such peculiar features connected with the execution of the paper in controversy and those who were made the objects of testatrixs bounty as necessitates a reversal of this case.

It seems that the testatrix gave the bulk of her estate to two of her aunts and one uncle, excluding others related to her in the same degree. There was proof conducing to show that she disliked Mrs. Crittenden, one of the devisees, and had reasonable grounds to dislike some of those who were not mentioned in the will; that one of them had not visited her while sick, and although a sister of the father of testatrix, had not attended his funeral. What her frame of mind was in regard to the aunt she had not mentioned or those she had made the objects of her bounty is not shown, but such facts were disclosed on the trial as would lead to the conclusion that her mind was not in a proper state, by reason of the supposed neglect of her kindred, to make such a disposition of her estate as she would have made if all had the same claims upon her affections. Her likes and dislikes did not destroy her capacity to make a will, and while her feelings and prejudices might have gone to the jury upon the question of mental capacity, the fact that she disliked some of her kindred afforded no reason for invalidating her will if the offspirng of her own mind, with the mental capacity at the time to know her estate, and those who had claims upon her bounty, and to dispose of that estate according to a fixed purpose of her own. How the jury understood the instructions on this point we can not determine. In Tudor v. Tudor, 17 B. M., 383, a like instruction was condemned, this court saying: "If the expression, 'proper state of mind,' is to be understood as referring to mental capacity alone, it is not objectionable, but if it refers to testators mind, with regard to his feelings, passions or prejudices, it assumes a position that can not be maintained.

We can readily perceive the manner in which the court below intended the instruction to be considered by the jury, but how they did consider it is a question we can not answer. This is certainly a case where the jury might have been misled by it, and for that reason the judgment is reversed and the cause remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

PEOPLES v. COMMONWEALTH.

(Filed January 26, 1889.)

Costs of appeal—Upon the affirmance of a judgment of conviction in a felony case, a judgment for the costs of the appeal may be rendered against the appellant.

Baker, Kinney & Kinney, S. M. Bernard and Ben S. Robbins for appellant.

Frank Parsons for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Mary A. Peoples, being under conviction for a felony, appealed to this court, where the judgment was affirmed. A judgment for the

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costs in this court was rendered by it against her. She now claims that it was unauthorized by law, and is, therefore, void. The motion now made is to quash the execution upon it for this reason.

It is, of course, true, as counsel contend, that a judgment for costs can not be rendered without warrant of law. The General Statutes, which went into force December 1, 1873, are silent upon the subject. The chapter upon "costs" merely provides: "A defendant convicted of a misdemeanor shall be adjudged to pay the costs." (Chapter 26, section 11.) The criminal Code, which became operative January 1, 1877, is not, however. Section 361 provides: "On the affirmance of a judgment, if the appeal be taken by the defendant, and on the reversal of the judgment, if the appeal be taken by the Commonwealth, a judgment for costs shall be rendered against the defendant."

It is clear the statute authorized the judgment in question. The other sections in the same article show that it can not be construed as not applying to a felony. We see no reason why this should not be the law. When the conduct of the accused, whether it be felonious or of a less degree, causes the cost, his property, if he have any, should answer for it. But let the matter of policy be one way or the other, the legislature has furnished the rule to which we must adhere.

The motion to quash the execution is overruled.

MAKIBBEN v. ARUDT, &c.

(Filed January 29, 1889.)

Judicial sales—Redemption—Where property is sold under a judgment enforcing a mortgage lien, and afterward redeemed by the debtor, the plaintiff can not have an order of resale to satisfy the unpaid part of his judgment, the first sale having failed to satisfy it. The mortgage lien ceases to exist whenever the sale is made enforcing it. If the first sale fails to satisfy the debt the mortgagee may at once take steps in the same suit, or by execution on his judgment, to subject the equity of redemption, if it exists, and thus protect himself.

Charles J. Helm for appellant.

George Washington and J. Creutz for appellees.

Appeal from Campbell Chancery Court.

Opinion of the court by Judge Holt.

The mortgage lien of the appellant, T. P. Makibben, was inferior to that of the building association. The property was sold under the judgment on November 24, 1885, and for the satisfaction of both liens. The appellant purchased it at $2,200, being less than two-thirds of its appraised value, but a little more than the debt of the building association, and the sale was confirmed. He took no steps, either by further proceedings in the suit or an execution upon his judgment, to sell the equity of redemption during the year of its existence following the sale. It was redeemed upon the last day allowable, the mortgagor then conveying it to a third party, who mortgaged it and thus obtained the money to redeem it from the appellant. Shortly after the year for redemption had expired the appellant filed a supplemental petition asking a resale of the property to satisfy the unpaid portion of his judgment. After one or more amendments to this pleading, it was dis-

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missed upon demurrer, and he has appealed. He now contends that the redemption from the sale, although it was made to satisfy both mortgage debts, left the unsatisfied portion of his judgment in full force as a lien upon the property. This contention is based upon the fact that the statute declares the sale "null and void" from the time of the redemption. (General Statutes, chapter 63, article 8, section 3.) We can not assent to it. His lien was of contract. The legal title to the property was merely in pledge to him for the payment of his debt, and in pledge for what it might bring merely, when sold. In such case the creditor may sell once, and then may also subject the equity of redemption, if there be any. The statute gives him this latter right. He can not, however, sell and resell and sell again and so on ad infinitum, by virtue of the mortgage lien. He can not thus, in effect, cut it up into slices. The redemption is a recovery of the legal title; and it, by reason of it, repasses to the mortgagor. The mortgage lien ceases to exist whenever the sale is made enforcing it. The right to the property passes to the purchaser, subject to confirmation by the court, and subject also to be divested in favor of the debtor by redemption within the time allowed, if it be a case where the right exists.

The fact that the statute declares the sale shall be a nullity in case of redemption, does not re-invest the mortgagee with his mortgage lien, and, therefore, with the title by way of security for his debt. The redemption restores the title to the mortgagor, and to this end the law declares the sale a nullity. If the effect were to revive a lien already exhausted there would be little effort by the debtor in this direction. If, however, the sale extinguishes the lien, then the debtor may be able to raise the money to redeem his property by putting it in pledge. It gives him a chance. The parties to the mortgage contract understand, at its inception, that the property is liable to be sold once by virtue of it, and it is not for a court to make a contract for them of greater continuing force. Its right and power to sell is based upon the mortgage lien alone, and one exercise of the power is an exhaustion of it. The lien can not survive the sale for its enforcement. A sells the land of B under a mortgage lien. A portion of the judgment is unsatisfied, and the property, not having brought two thirds of its appraised value, there is an equity of redemption. If C, another creditor of B, subjects this right of redemption to sale under his execution, as he may do, certainly A can not claim that, notwithstanding the foreclosure sale, he still has a mortgage lien for the unsatisfied part of his judgment.

It was said in Todd v. Durey, 60 Iowa, 532: "By the sale of the land upon forclosure the mortgagee exhausts his remedy against the land, and can neither again sell it upon the judgment, nor redeem from the sale, either before or after redemption by the mortgagor." Jones on Liens, section 4.8, cites this case approvingly and says: "If a vendor, who has entered into a contract to convey upon the payment of the purchase money, elects to foreclose his contract of sale, he can not, after the land has been sold and bid in by him for a part only of the judgment, and then redeemed by the purchaser, still claim to have a vendor's lien upon the land for the balance of the purchase money."

If the rule were as the appellant contends, or if such a rule would be correct in principle, then the debtor should not be allowed to redeem by paying the amount of the purchaser's bid and interest, but, to avoid cost and litigation, he should be required to pay the amount of the judgment and interest upon the bid. The lienholder has, however, ample opportunity to protect

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himself by the one sale made under his contract. Notwithstanding this, the statute also gives him the right, in the event his judgment is not thereby satisfied, to at once take steps in the same suit, or by execution upon the judgment, to sell the equity of redemption if it exists. (General Statutes, chapter 63, article 8, section 4.) He may, at the first sale, fully protect himself by bidding more than two thirds of the appraised value, thus cutting off the right of redemption. The law did not intend to give the creditor all the advantages. If he has reasonable chance to protect himself from loss and fails to avail himself of it, it is his own fault, and furnishes no reason for harassing the poor debtor with additional cost and litigation. If the debtor redeems, it will often work to the advantage of the former lienholder, whose judgment is in part unsatisfied. If a stranger has purchased for a trifle, and the debtor redeems and holds the property, it adds that much to his estate, to all of which, save the exempt portion, the creditor may look for the balance of his judgment, aided by execution upon it.

In this instance, if the appellant loses, it is his own fault. He has slept over his rights, or been negligent of them. He failed either to bid the amount of both mortgage debts for the property, or two-thirds of its appraised value, or to take any step whatever looking to the sale of the equity of redemption. He has no right to an order of resale and the judgment is affirmed.

CHISM v. TRENT.

(Filed February 2, 1889—Not to be reported.)

1. Adverse possession--Under our statute a continued adverse and actual possession for fifteen years not only tolls a right of entry which others not under any disability may have had, but it confers upon one so in possession a right of entry and a right of action to recover the possession from another who may have wrongfully acquired it.

2. Same—In this action to recover land the plaintiff, in his petition, bases his right upon an alleged paper title, and also upon a possessory title. The first link in his chain of title is a title bond executed by A, who was a married woman at the time of its execution. The defendant, to defeat a recovery, offers in evidence a deed executed to him by the heirs of A. Held—That the plaintiff's paper title fails by reason of the coverture of A; and as he and those through whom he claims have not been holding adversely to the title of A, under which the defendant also claims, but have been claiming the land through it, as is shown by the petition, the claim of a possessory title also fails. Besides, A was under disability, and it does not appear when she died or when her children became of age, and, therefore, it does not appear that there has been the required adverse holding against persons not under disability.

C. C. Fairleigh for appellant.

J. H. Trent, Jr., for appellee.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Holt.

The appellee, R. R. Trent, brought this action on February 14, 1887, to recover from the appellant, N. B. Chism, the possession of two lots in the ittle village of Wolf Creek. The land once belonged to John Finch, and

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was deeded by him in 1850 to his daughter, then Elizabeth Troutman, afterwards Elizabeth Angel, by reason of her marriage to Berry Angel. The title was, beyond question, vested in her. The petition bases the claim to recover it upon both an alleged paper title and a possessory one, the appellee claiming the latter by reason of an alleged actual and adverse possession for more than fifteen years prior to the bringing of the suit. The petition sets out the derivation of the paper title under which he claims. It is first a bond executed by Angel and wife to Wm. Curl on February 25, 1870. Next a deed from the latter to Sarah E. Lewis on July 13, 1870, and then a deed from the latter and her husband to the appellee, executed August 12, 1886. The title bond was a nullity as to Mrs. Angel, owing to her coverture; and the title being in her, not even the equitable title to the lots passed to Curl.

Moreover, it is manifest from the bond itself that it does not embrace the lots in contest, and even if there were a mistake in its execution no effort has been made by pleading or proper mode to correct it. The claim of the appellee, therefore, fails, so far as it is based upon the so called paper title, leaving his claim of a possessory one to be considered.

Under our statute a continued adverse and actual possession for fifteen years not only tolls a right of entry, which others not under any disability may have had, but it confers upon one so in possession a right of entry and a right of action to recover the possession from another who may have wrongfully acquired it. When the possession has been of such a nature and for such a length of time as to take away from others all legal remedy to recover the land, it also imparts to the possessor a right to it. The right of entry attaching to the outstanding title is divested, and enures not only to the possessor, but also to those to whose use his possession enures.

It is somewhat questionable whether the possession of the appellee and those under whom he claims has been of such a character as to bring it within the legal meaning of actual possession. The land has never been inclosed. It has laid out in commons, and appears to have been used at will by any and all persons for the storage of lumber and other articles. From the time of the Lewis purchase, however, in 1870, it was known as the Lewis lot. Not long after her purchase the husband of Mrs. Lewis had posts put around it, or at least a part of it, preparatory to fencing it, but nothing further was done, and after a while he had the posts removed. He, however, continued to claim the land, and offered at various times to sell it to different persons. In fact, the appellant appears to have recognized that Lewis was in control of it, because he offered at one time to buy it from him if he would make him a good title. Upon another occasion he said Lewis was asking too much for it; and again, having some four or five years before the bringing of this action, erected a cooper's shed upon it, he said to a neighbor that he "reckoned Lewis would not object."

The appellant also claims to have been in possession of the property for some twelve years before the bringing of the suit. Like others, he used it for depository purposes. He appears to have owned the adjoining land, and in building he erected his cook house and the porch of his house upon the land in contest. He, however, testifies that he did so under the impression that they were upon his land, which adjoined. Mrs. Angel, however, having died intestate, leaving a husband and but two children, the appellant, on October 6, 1886, obtained a quit claim deed from them to the land in contest, and although not pleaded in defense, as the answer is but a denial of the averments of the petition, yet it is offered in testimony by him to defeat a

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recovery. It is manifest that the title of Mrs. Angel passed upon her death to her heirs, and that by virtue of the deed from them to the appellant, he is now invested with it and the right to the possession, which he now has, unless he or those through whom he claims have been divested of this right by the adverse possession of the appellee and those under whom he claims. In other words, the only ground upon which the appellee can stand successfully or base a right to recover is that of actual uninterrupted and adverse possession upon his part and those through whom he claims for the statutory period necessary to confer upon him the right of entry and to the possession.

Conceding that the Lewis possession was an actual one, yet the appellee has not based his claim to recover merely upon the deed made by Curl to Lewis in 1870, but has gone further back and placed it originally upon the Angel bond to Curley. This attempted derivation of right is set forth in his petition, showing beyond question that he claims through the same source of title as the appellant. He thus expressly shows that he and those through whom he claims have not been, as a matter of fact, holding adversely to the Angel title, but looking to it for their right and a title, and claiming the land through it. Added to this is the fact that Mrs. Angel, by reason of her coverture, was not sui juris, but under disability to sue, and it does not appear when she died or when her children became of age. In other words, the appellee, who can recover only upon the ground that his holding and that of those under whom he claims has been adverse to parties having the right of entry, and who were not laboring under disabiitly, expressly shows that he and his vendors in point of fact have all the time and are now looking to these same parties for a title; and also shows that Mrs. Angel was, in 1870, under disability, but fails to show when she died or when her children became of age.

Under this state of case, the recovery had in the lower court can not be sustained upon the ground that the appellee manifested a possessory title and a right of entry by virtue of it; and the judgment below is reversed, with directions to dismiss the appellee's petition.

SINGLETON v. TRUSTEES SCHOOL DISTRICT, NO. 34, CRITTENDEN COUNTY.

(Filed February 9, 1889—Not to be reported.)

1. Dedication—A parcel of land was dedicated by the owner for the use of the common school district by being surveyed and the boundary thereof described by marked corners, and the trustees of the district signified their acceptance by immediately erecting a school house thereon. Held—That the dedication, though made by parol, was valid and complete.

2. Misjoinder—Election—In this action by the trustees to recover possession of the land from one who had deprived them of it after they had been in the adverse possession of it for fifteen years, the plaintiffs had the right to prove, as evidence of their superior title and right to recover the possession, either or both the dedication and adverse possession. And consequently the court did not err in refusing to require them to elect which cause of action they would prosecute, there being but one.

3. Adverse possession—Possession of a parcel of land for school purposes for such a length of time each year as a school is taught, is to be regarded as "actual, continuous and adverse" so as to give perfect title if continued for

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fifteen years, being such possession as is necessary for the use the property is applied to.

4. Construction of deed—As the deed to the remote vendor of defendant from the owner who dedicated the land in controversy to the school district reserved this parcel of land, no title to it passed, and, therefore, the defendant acquired no title thereto. The fact that the reservation was in the habendum clause of the deed is not material, as the common law rule rejecting the habendum of a deed, when it is totally repugnant to the granting clause, never applied to the mere description of the quantity or kind of property conveyed. But in any event this court will give effect to the grantor's intention when ascertained by looking to the whole instrument.

5. Evidence—The lower court permitted witnesses to testify that the trustees were deterred by the claim of defendant from building a new school house or repairing the present one so that a school might be taught there in the winter time, whereby some of the children were deprived of attending the school. Held—That as the evidence, if illegal, was not objected to and may not have influenced the jury in fixing the damages, this court will not reverse on account of the amount of damages found, which was $50.

Blue & Blue for appellant.

Nunn & Cruce for appellees.

Appeal from Crittenden Circuit Court.

Opinion of the court by Chief Justice Lewis.

In 1869 Dempsey, the owner, conveyed to Newcomb, remote vendor of appellant, a tract of land, reserving in the habendum clause of the deed one and one-half acres thereof, described by metes and bounds, for "a school house seat in 34th school district for the only use of same." It appears the small parcel of the land described and reserved in the deed had been, in 1866, dedicated by Dempsey for the use of the common school district by being surveyed and the boundary thereof described by marked corners, and that the trustees of the district signified their acceptance of it by immediately erecting a log school house thereon, which has been occupied and used for school purposes a portion of each year ever since. But in the deed from Newcomb to Beck, and that from Beck to appellant, no mention or reservation of the parcel so dedicated was mentioned. Nevertheless, as the dedication, though made by parol, was valid and complete, and the parcel of land was in the actual possession of the trustees of the school district when the deed was made to Newcomb, and has so continued ever since, they had, when this action was commenced, a complete title, both in virtue of the dedication and by adverse holding. While, on the other hand, as Newcomb never had any title to the parcel whatever, his vendees could not acquire any from him.

The trustees having alleged they were the owners of the small parcel of land and entitled to the possession, of which appellant had, without right, deprived them, they had the right, this being in the nature of an action in ejectment, to prove, as evidence of their superior title and right to recover the possession, either or both the dedication made by Dempsey and adverse possession and claim for fifteen years. And consequently the court did not err in overruling the motion to require the plaintiffs to elect for which cause of action they would prosecute, there being but one.

The lower court permitted witnesses to testify to the fact that the trustees of the school were deterred, by the claim of appellant to be owner of the

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land, from going to the expense of building a new school house, or repairing the present one, so as to enable a school to be taught in the winter time, whereby some of the children were deprived of the privilege of attending the school. That consideration may possibly have had some influence on the jury in fixing the amount of damages found for the plaintiffs, which was $50, but as the evidence, even if illegal, was not objected to by appellant during the trial, and may not really have been considered by the jury, we don't feel authorized to reverse the judgment on account of the amount of damages found.

We do not think the common-law rule rejecting the habendum clause of a deed, when it is totally repugnant to the granting clause, ever applied to the mere description of the quantity or kind of property conveyed, but simply to the character and kind of estate or interest conveyed. But the rule has not been so rigidly applied by this court as to defeat the intention of the parties when ascertained by looking to every part of the instrument. The parcel of land in contest in this case never was intended to be conveyed by Dempsey to Newcomb, but was intended to be and was expressly reserved, and, therefore, no title to it passed.

It has been repeatedly held by this court that a possession, such as the nature of the real estate will admit of and is necessary for the use it is applied to, may be regarded actual, continuous and adverse, though not in the actual use or occupancy of the owner all the time. And accordingly possession of a parcel of land for school purposes, for such length of time each year as school is taught, is to be regarded such in the meaning of the law as will, if continued for fifteen years, give a perfect title.

Judgment affirmed.

THACKER, &c. v. BELCHER.

(Filed February 21, 1889—Not to be reported.)

1. Vendor and vendee—In this action to recover land, it appears that the plaintiff exchanged the land in controversy with defendant for another tract of land under an agreement that this land was to be restored to him if the defendant could not make him a good title to the land taken in exchange. The defendant had no title to the land he sold to plaintiff, and it has been recovered from plaintiff by the holder of the paramount title. Held—That the plaintiff is entitled to recover.

2. Champerty—The champerty statute does not apply to a conveyance made in compliance with a bond for title executed before the adverse possession began.

A. J. Auxier for appellants.

Connolly & Cline for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Bennett.

The proof in this case clearly establishes the fact that the appellee swapped a tract of land that he owned on Lick Creek to the appellant, John A. Thacker, for a tract that he claimed on Ferrell Creek; that if the appellant could not make a good tltie to the Ferrell Creek land, the appellee was to have the Lick Creek land back. The proof is clear and positive that the

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appellant had no title to the Ferrell Creek land, nor could he make a clear title to the same. It also clearly appears that the Ferrell Creek land was recovered from the appellee in an action of ejectment by its true owners. It is also clear that the appellee could make no successful defense to said action, for the plaintiffs in the ejectment suit owned the paramount title to said land. Also, by the terms of the agreement, the appellee was not to part with the title to the Lick Creek land until the appellant was able to make and did make him a clear title to the Ferrell Creek land, and upon the appellant's failure to do so, the appellee had the right to be restored to the Lick Creek land.

The plea of champerty is not available in this case; for, while the deed shows that it was made to the plaintiffs in the ejectment suit while the appellee was in the adverse possession of said land, yet it also clearly appears that the plaintiffs in the ejectment suit held a bond for a title to said land long before the appellee took possession of it. Therefore, as has been repeatedly held by this court, the champerty statute does not apply. There is nothing in the plea of champerty in reference to the other tract of land.

The judgment is affirmed.

McKINSEY v. EDWARDS, &c.

(Filed February 21, 1889.)

The plaintiff sues upon the following note: "The directors of the Jonesville and Glencoe turnpike road promise to pay to Andrew Hearne $200, this note bearing 10 per cent. until paid." No official designation is attached to any signature to this note. The action is against the persons whose names are signed to the note, the petition being in the usual form when based upon a promissory note. A demurrer was sustained. Held—That the writing must be regarded as the undertaking of the persons whose names are signed thereto, and the question of individual or corporate liability must be raised by answer, and not by demurrer. To maintain an action against the corporation upon the note it would be necessary to aver a mistake in its execution, and ask a reformation of the obligation.

J. J. Landram for appellant.

J. W. Greene for appellees.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Holt.

The appellant, R. McKinsey, as the assignee of the obligation, seeks to obtain a personal judgment upon this note:

"Jonesville, Ky., August 12, 1879.

"The directors of the Jonesville and Glencoe turnpike road promise to pay to Andrew Hearne $200, this note bearing 10 per cent. until paid.

"J. W. EDWARDS,
"G. W. HERNDON,
"JOSEPH BROCK,
"J. L. GREEN,
"LEMUEL BEATTY,
"JOHN McKINSEY."

The petition is in the usual form when based upon a promissory note. A demurrer was sustained to it, and the action dismissed upon the ground

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that the writing is the obligation of the corporation, and not of the signers as individuals. We find no case decided by this court where the obligation sued upon was exactly similar. In the cases of Trask v. Roberts, &c., 1 B. M., 201, and Whitney v. Sudduth, &c., 4 Met., 296, the promise of the defendants to pay was both joint and several. The obligations were clearly of this form, and the cases were made to turn upon this point, as it was held that the several promise could not be otherwise than personal. The case of Yowell v. Dodd, 3 Bush, 581, is distinguishable from the one now before us. In that case the obligation reads thus:

"Twelve months after date the president and directors of the Hustonsville and Bradfordsville Turnpike Road Co. will pay Leroy Yowell $1,200 for value received, at 6 per cent. interest from date. This 16th day of November, 1865.

"E. J. DODD, Pres.,
"JAMES YOWELL,
"JAMES J. DRYE,
"M. P. DRYE,
"WM. L. McCAIN."

It was held to be the obligation of the company. The differences between it, and the writing now in question, are italicised above. It does not appear that the president of the company united in the execution of this one. This, however, may not be material. The record does not disclose whether it is so or not. The word, "company," however, does not appear in it, and no official designation is annexed to the name of any one of the signers. Upon the other hand, no personal pronouns or words expressly indicating a personal liability are used. No action could, however, have been maintained upon it against the corporation without an averment of mistake or fraud in its execution. No company is mentioned. Upon the face of the note there is no one to sue but the makers of it. A petition, founded upon it against the corporation, would not have been sufficient, if drawn in the usual form of one upon a note. It would have been necessary to aver a mistake in its execution and ask a reformation of the obligation. The party would have been compelled to set up the omission as a mistake in the drafting of the note, and that by inadvertence or for some other reason it did not show the real and true obligor. The face of the obligation does not show that the corporation received the consideration, or that it was applied to its benefit; and an action could not be maintained upon it against the corporation without averring, and proving, if denied, that it was executed and received as its obligation, and that by a mutual mistake in its execution this fact was not made to appear. Upon the face of the note the corporation is not prima facie liable. It can not properly be said that upon its face it purports to be the note of the company. The "company" does not promise to pay it. As it would have been necessary to make these independent averments to maintain an action against the corporation upon it, it necessarily results that the writing must, upon its face, be regarded as the undertaking of the parties whose names appear to it as obligors; and the question of individual or corporate liability must be raised by a proper answer and not by demurrer. (Pack, &c. v. White, 78 Ky., 243.)

Judgment reversed and cause remanded, with directions to overrule the demurrer and for further proceedings consistent with this opinion.

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McADAMS v. MITCHELL.

(Filed February 21, 1889—Not to be reported.)

1. Fraudulent conveyances—Homestead—An insolvent debtor executed to his wife a conveyance of his homestead, the value of which exceeded $1,000. The conveyance was voluntary, and made after the debt of appellant against the grantor was created. Appellant seeks by this action to subject the property thus conveyed. Held—That the property should be sold, first paying to the wife of the debtor out of the proceeds $1,000, and then applying the balance to appellant's debt; or, if the wife desires it, so much of the homestead as is of the value of $1,000 should be allotted to her, and the remainder sold to pay appellant's debt.

2. Fraudulent conveyances—An insolvent debtor, as the pretended agent of his son, purchased several tracts of land, and the son, at the instance of his father, directed the conveyance to be made to his mother. It being apparent that the father paid for the land, and that his purpose in having the deeds executed to his wife was to avoid the payment of his debts, in this action by one of his creditors the deeds are set aside and the property subjected to the payment of plaintiff's debt.

W. S. Roberts for appellant.

G. W. Williams & Son for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted in the court below to subject certain land conveyed by the husband to the wife through the intervention of a trustee to the payment of appellant's debt, alleging that the debt had been reduced to a judgment upon which an execution issued and was returned no property found. A. G. Mitchell, the husband, owned a tract of 151 acres of land that was conveyed by him to his son, J. F. Mitchell, in trust for the separate use of the grantor's wife. The conveyance was voluntary, and made while the debt of the appellant was in existence. The defense is, that the land conveyed was the homestead of the appellee, A. G. Mitchell, and he had the right to make the conveyance, because it was not of greater value than $1,000. In order to avoid the claim of homestead, the appellant attempted to show that the debt originated prior to the passage of the homestead law, and on this point there is much conflict in the testimony, so much so that the chancellor was justified in holding that the conveyance passed to the wife the homestead if not of greater value than $1,000.

The appellant also claims that this land, or a part of it, was purchased by the appellee, A. G. Mitchell, of his father, and that the latter had a lien on the land for the sum of $500, and when he sold the land to his son, A. G. Mitchell, the latter undertook and agreed to pay the debt due the appellant in extinguishment of the lien held by his father on the land, the latter being, in fact, the principal obligor in the debt. The appellees admit the agreement to pay, and that a lien was retained on the land as alleged, but say that the father of A. G. Mitchell released this lien, and took the individual obligation of his son that he would pay appellant. This was all done prior to the institution of this action, and the father of A. G. Mitchell having released the lien, none exists in favor of the appellant. There can be no substitution to the rights of the father, because he has no lien that he can enforce.

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It is further alleged by the appellant that a son of the appellee (A. G. Mitchell) was made the instrument through which his father purchased a tract of 100 acres of land, known as the Tabor tract, and the son, by the direction of his father, had the conveyance made to his mother, in whom was already vested the title to the homestead of 150 acres. An amended petition was also offered to be filed, but rejected and not made part of the record, in which it is alleged that a fourth tract was purchased by the son in the same manner. This branch of the case we can not consider, as the amended petition is not properly before the court, except as an additional fact, in the way of testimony, showing the intent of these parties in vesting the absolute title in the wife of A. G. Mitchell to all this land.

The facts on which the charge of fraud is based are these: In the year 1884, about two years prior to the judgment on the debt due the appellant, the appellee, Mitchell, conveyed the two tracts of land to his wife, with a lien on it to secure the debt in controversy, or rather its payment. This lien his father released shortly after so as to leave his wife the absolute owner. In May, 1885, the Tabor tract of land was purchased, as is alleged, by the son of A. G. Mitchell, who had it conveyed to his mother, vesting in her the fee, and in a short time thereafter the Dejarnett tract was purchased to be conveyed in the same way, but the purchase money has not all been paid. The negotiation and contracts for these lands seem to have been made by A. G. Mitchell, and the wife, to whom the several conveyances were made, seems to have been in utter ignorance of the transactions, and, as to some of the conveyances, did not know they were executed until this suit was brought. The son claims to have made the money paid for the land by his labor on the farm and the sale of the farm products, when it is apparent that not a greater sum was made in any one year than would have clothed the family. The son had no means of his own outside of the results of his personal labor, and his father was engaged in making contracts and having deeds executed as the pretended agent of his son, when it is evident, from the character of these successive transactions, the details of which are given by both the father and son, that the purpose was to execute these deeds to the wife and mother, in order to avoid the payment of A. G. Mitchell's debts. Why the son was laboring on the farm where they all lived, in the accumulation of money necessary to purchase this land, and then convey it absolutely to the mother, reserving no right or interest in himself, is a question that, from the facts in this case, can be answered only in one way. The father was making the purchases in fact, and then causing the deeds made to his wife in order to avoid the payment of his debts. It is evident that the homestead cost him greatly more than $1,000, and equally plain that he purchased the Tabor land. He first conveyed land to his wife that was worth more than $1,000. His father had a lien on it for $500, out of which this debt in controversy was to be paid. This lien was released so as the creditors could not reach it. Then he negotiated with Tabor for the land purchased at commissioner's sale, and the deed was made to his wife. He worked on the farm with his son; was under fifty years of age; made or had the money, and it is perfectly apparent that the sole purpose of these extraordinary transactions was to place this property in a condition so creditors could not reach it.

The chancellor should have rendered a judgment subjecting the Tabor land, or so much of it as might be necessary to pay appellants' debt, and if

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this is insufficient, the homestead should be sold to pay the balance, if any, first paying to the wife $1,000, or alotting to her so much of the homestead, if she desires it, as is of the value of $1,000, and selling the remainder.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

JAMES, &c. v. COX, &c.

(Filed February 21, 1889.)

The affidavit for the appointment of a guardian ad litem required by section 38 of the Code may be made by either the plaintiff or his attorney, whether the plaintiff is in the county or out of it, it being expressly so provided. Therefore, section 550 of the Code, providing that an affidavit required to be made by a party may be made by his attorney when he is absent from the county, does not apply to the affidavit provided for by section 38. But the court is not inclined to adjudge that even if section 550 applied, the judgment would be void because of the failure of the attorney's affidavit for the appointment of a guardian ad litem to show that the plaintiff or his client was absent from the county.

Wm. Carroll for appellants.

John D. Carroll for appellees.

Appeal from Henry Circuit Court.

Opinion of the court by Judge Pryor.

There is no appeal from the judgment rendered in this case, but the appeal is prosecuted from the order confirming the report of sale made by the commissioner. Section 38 of the Civil Code provides, where the defendant is an infant, that no appointment of a guardian ad litem shall be made until an affidavit of the plaintiff is filed or of his attorney, showing that the infant has no guardian, curator, etc., residing in the State known to the affiant. The affidavit may be filed in court or with the clerk. In this case the affidavit was made by the attorney, but in it he failed to state that the plaintiff (his client) was absent from the county, and, therefore, it is claimed the proceeding against the infant is void.

Section 550 of the Code provides that where the Code requires or authorizes a party to make an affidavit, it may be made by his agent or attorney if the party is absent from the county, unless otherwise expressed, etc. It will be observed that section 38 authorizes either the party or his attorney to make the affidavit, and, therefore, this case is not embraced by the provisions of section 550. If the party had been authorized to make the affidavit provided for in section 38, then the attorney, by reason of section 550, could have made the affidavit, if the plaintiff was absent from the county. In a case like this, either the plaintiff or his attorney can make the oath, whether the plaintiff is in the county or out of it, as this is the express provision of the Code. Nor are we disposed to adjudge that the judgment would be void if the section 550 applied to this case. We perceive no error in the record either as to the service or manner of service on the infants that would render the sale void, and, as the appeal is from the order of confirmation alone, the judgment below is affirmed.

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MILLER v. SMALL.

(Filed February 21, 1889—Not to be reported.)

Reformation of deed—Where parties by agreement have divided a city lot owned jointly by them, and one of them has entered upon his lot according to the division made and erected improvements, the deed executed to him will be reformed so as to conform to the verbal division thus made and acted upon, as to confine the parties to the deed, which by mistake divided the lot in a different way, would entail great loss and inconvenience.

Owen & Ellis for appellant.

Geo. W. Jolly, J. A. Dean and R. A. Miller for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted to reform a conveyance that had been executed nearly ten years before the suit was filed. The facts alleged are that the plaintiff and the defendant were the joint owners of a vacant lot in the town of Owensboro, with the legal title vested in the plaintiff. In order to a division, the plaintiff had to make to the defendant a conveyance for his half, and, as is alleged, the agreement was to divide the lot by running the line the long way, so as to make each lot front a certain number of feet on Eighth street; that by mistake the draftsman of the deed so framed it as to divide the lot by running the line the short way fronting on Center street; that the lot was fenced and built on the division line, it being the long way, and it was not discovered until within the last two months that t e deed was not drawn in accordance with the agreement.

The proof is conclusive from the act of the parties that they recognized the division as alleged by the plaintiff, and that a building was erected on the lot in pursuance of that understanding, and, if divided as the deed recites, the building of the plaintiff or his vendee would be on defendant's part of the lot. The defendant lived in the same city with the plaintiff, and saw the vendee of the plaintiff erect the building. The plaintiff had made to Mrs. Duffy, his vendee, a deed for one-half the lot running the long way the division line, and the defendant examined the premises when she was building, to see if she was encroaching on his ground, and made no objection. The testimony of the lawyer drafting the deed sustains the plaintiff in his statement as to the transaction. Still we find the deed dividing the lot one way and the parties dividing it another way, by both fencing and building upon it, or the one building with the knowledge of the other. It is true that the plaintiff should have read the deed written by his attorney before signing it, and his own neglect would result in his loss if any one was prejudiced or injured by this want of diligence. He says the reason he did not read it was, that his attorney had prepared a deed dividing the lot the short way, and he told him he must write another, and this the attorney did, and promised to leave it at the clerk's office, where the plaintiff found it and signed it, supposing it was all right. The attorney says he must have taken the deed first written instead of the last, and hence the mistake.

No one has been injured, and the parties, by their own action, have fixed the division line. The defendant offered to sell his lot, describing it as a

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long lot, and, from the testimony, was as ignorant of the contents of the deed as the plaintiff until the mistake was discovered.

The calls of the deed would no doubt control the division after the lapse of so many years, if there was no other reason for not discovering the mistake but the failure of the vendor to examine or read the deed before signing it, and there had been no entry on the premises by either party, and a division made in accordance with the parol agreement. Here the plaintiff or his vendee enters, erects the division fence, builds a house on his half of the lot with the knowledge of the defendant, and the latter never discovers that he has any other right until a survey is made shortly before this suit is brought, and it is ascertained for the first time that the division is not made in accordance with the deed. It would be inequitable, under the circumstances, to require the plaintiff to remove the building, or to eject him from premises that the defendant has, in effect, conceded belongs to him. It presents a case of joint owners dividing their land by deed in one way, and taking possession under a division made in a different way, each getting one half of the land in quantity and value.

By permitting the division to stand as actually made by the entry upon and improving the premises, no harm has or can result to either party, and by confining the parties to the deed, the one making the improvements will be required to remove them, sustaining great loss, without any benefit to the party who claims that the deed is the best evidence of what he owns.

Judgment affirmed.

JOHNSON v. JOHNSON, &c.

(Filed February 21, 1889.)

1. Judicial sales—Exceptions—In an action against infants and their guardian to sell land owned jointly by the plaintiff with them, the plaintiff, after the sale, but before confirmation, filed an amended petition, seeking to set aside the sale because of a mistake in the description of the land sold. The infant defendants, by their guardian, entered their appearance to the amended petition, but did not controvert the facts therein stated, nor resist the relief sought; nor did the purchaser resist the setting aside of the sale. Held—That it was competent for the infants, by their guardian, to waive the filing of formal exceptions to the report of sale, and adopt the paper filed as an amended petition as exceptions. Therefore, the court did not err in setting aside the sale or in entering a supplemental order for a resale, giving a true boundary, although the amended petition was filed more than sixty days after the original judgment, and, therefore, after the expiration of the time within which the Louisville Chancery Court has control over its judgments.

2. It was not unconstitutional for the legislature to empower the Louisville Safety Vault and Trust Co., a corporation, to act as the statutory guardian of infants, upon the execution of its own bond, without other security than its capital stock; and the provision of its charter conferring this power is broad enough to cover the bond provided for by section 493 of the Code.

Carey & Spindle for appellant.

G. A. Winston for appellees.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

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The appellant instituted this action in equity against the infant appellees and their statutory guardian, the Louisville Safety Vault and Trust Co., for the purpose of procuring a sale of the lot of ground in controversy, which is owned jointly by the appellant and infant appellees. The sale was sought on the ground that the lot was indivisible, etc. A judgment was rendered directing the sale of the lot. The lot was sold under this judgment, but before the sale was confirmed the appellant filed an amended petition, in which he sought to set aside the sale, upon the ground that there was a mistake in the distance of one of the lines of the lot as set out in the petition and judgment. The distance as therein set out was represented as being one hundred and five feet on Breckinridge street, when the correct distance was only ninety-five feet on said street. The infant appellees, by their statutory guardian, entered their appearance to the amended petition, but did not controvert the facts therein stated; nor did they resist the relief sought; nor did the purchaser resist the setting of the sale aside. Thereupon the sale was set aside, and a supplemental order, or judgment, was filed, setting forth the correct boundary of the lot and ordering a resale of it. At this sale W. W. Hite became the purchaser, which was duly reported to the court. Thereafter the purchaser, W. W. Hite, filed exceptions to the report of sale, only two of which it is necessary to notice. The first one is, that the amended petition having been filed more than sixty days after the rendition of the original judgment, which was final, the supplemental judgment, or order, was void, for the reason that, by section 772 of the Civil Code, the chancellor had no control over his judgments longer than sixty days from the time of their rendition.

Under the circumstances of this case we can not consent to this proposition. The amended petition did not seek to set aside the judgment theretofore rendered. It only sought to set aside the sale. It informed the court that there was a mistake as to the correct quantity of land sold, and pointed out in what particular the mistake consisted. The procedure, adopted to make known the mistake, was called an amended petition instead of an exception to the report of sale. The appellees by their statutory guardian, consented to this manner of procedure, which brought the matter of the mistake as fairly, fully and completely before the court as could have been done by exceptions to the report of sale. It was competent for the appellees, by their statutory guardian, to waive the filing of formal exceptions and adopt the paper filed as an amended petition as the exceptions to the report of sale; and as the paper had the effect of exceptions to the report of sale, to the truth of which the appellees, by their statutory guardian, assented, the court committed no error in setting the sale aside. So the sale having been rightly set aside upon the ground that the length of the line on Breckinridge street was ninety-five feet instead of one hundred and five feet, the court resumed the absolute control of the lot, with the distance of said line corrected, for the purpose of a resale of it in accordance with its true boundary. And it would follow, as a matter of course, that the court would have the power, by a supplemental order (call it a judgment if you please), to order the resale of the lot in accordance with its true boundary.

The appellee, W. W. Hite, also contends that that part of the Louisville Safety Vault and Trust Co.'s charter that authorized it to qualify and act as statutory guardian of infants upon the surety of its capital stock for the faithful discharge of its duties is unconstitutional. It is certainly competent for the legislature to decide as to what security shall be sufficient in

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such cases. By section 493 of the Civil Code it is provided that, as a precedent condition of obtaining the sale of an infant's real estate by his statutory guardian, such guardian shall execute bond, with at least two sureties worth not less than double the value of the property to be sold, etc. The legislature would certainly have the right to repeal or amend this section, and enact in its stead that only one surety or security other than personal sureties should be sufficient. Here the legislature saw proper to create a corporation with power, among other things, to qualify and act as the statutory guardian of infants upon the execution of its own bond, with the pledge of its capital stock as security for the faithful discharge of its duties. If it be constitutional for the legislature to confer upon this corporation the power to act as statutory guardian, and we think it is constitutional, it follows that the legislature has the power to prescribe the terms upon which it may act as such guardian.

It was decided by this court in the cases of Phalan v. The Louisville Safety Vault and Trust Co., ante, page 663, and Bank of Commerce v. Payne & Viley, ante, page 43, that the provision of the charter in reference to empowering the company to act as guardian upon its own bond was broad enough to cover the bond mentioned in section 493 of the Civil Code.

The judgment of the lower court is reversed and the cause is remanded, with direction to set aside the judgment setting said sale aside, and set aside the order setting aside the order confirming the report of sale and for other proceedings consistent with this opinion.

JULIAN v. STEPHENS, &c.

(Filed February 23, 1889—Not to be reported.)

Tax sale—This is an action to recover land purchased at a tax sale, for which the plaintiff had obtained a deed from the sheriff. The court below dismissed the petition, upon the ground that the sheriff failed to comply with any of the requirements of the statute in regard to the collection of taxes before resorting to a sale of land for that purpose. Held—That this was proper.

W. H. Julian and G. W. Craddock for appellant.

W. H. Posey for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, under a sale for taxes, purchased a small tract of land containing ten acres belonging to Walker Stephens for $13 and obtained a deed from the sheriff. He then instituted this action of ejectment to recover the land, and the law and facts having been submitted to the court, a judgment was rendered for the defendant. The court below based its judgment on the fact that the appellee had personal property out of which the taxes could have been made. Further, that the sheriff knew of the personal property and never went upon defendant's premises to make the levy. That he failed to tender any tax receipts when demanding the taxes, or to comply with any

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of the requisites in regard to the collection of taxes before resorting to a sale of the land for that purpose.

The judgment below is affirmed.

NIXON v. WRIGHT.

(Filed February 23, 1889—Not to be reported.)

1. Prejudicial error—In an action for slander the plaintiff, failing to make out his case, was not prejudiced by the refusal of the court to strike out a part of defendant's answer.

2. Slander—As the testimony showed that the words spoken were not intended to charge plaintiff with larceny, but merely with permitting his sureties to pay money for him when he could have prevented it, and that they were so understood by the hearers, as defendant alleged, the verdict for defendant was proper.

3. Pleading—The plaintiff, during the trial, offered two amended petitions, alleging special damages by reason of the words spoken, or words of like import, and the court refused to permit them to be filed. Held—That this was proper, as there was no reason shown why the plaintiff had not prepared his pleadings in the first instance so as to present this issue.

R. Gudgell, C. W. Goodpaster and W. S. Gudgell for appellant.

H. L. Stone, J. S. Hurt and J. J. Nesbitt for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Pryor.

The appellant brought this action of slander against the appellee, alleging that the latter charged him with having stolen $400 from certain parties named in the petition; that he was not honest, and would not do to trust with public affairs, etc.; that appellant was then a candidate for jailer of Bath county, and the words spoken were intended to injure his reputation, etc. Malice is alleged, and all the averments requisite to a good petition made.

There was a denial in the proper mode of the words spoken, and then in a separate paragraph of the answer the defendant set forth the statements that he did make of and concerning the plaintiff at the time mentioned, and those statements were to the effect that the plaintiff had permitted Commissioner Wright, etc., to pay $400 as sureties for him for the rent of a tollgate, which was dishonest, etc., and that those present so understood the meaning and purport of the words used. There was no special damage alleged. This last paragraph the appellant moved to strike out, insisting that it was only a denial in a specific way of the words charged, and not in justification or in mitigation of the alleged slander. The court refused to strike the paragraph from the answer, but eliminated from the petition, on motion of the defendant, certain averments that were mere surplusage, and did not affect the cause of action, as stated.

It seems to us, in view of the testimony introduced, that it is not necessary to determine the question presented, as the testimony for the plaintiff clearly shows the nature and purport of the charge made, and that there was no intention to charge the plaintiff with the offense of larceny, but to charge the plaintiff with permitting, when he could have prevented it, his sureties to pay the rent money. This was the manner in which the only witness

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present understood the language used, and in this he is supported by the testimony of the defendant, the two being the only witnesses examined as to the particular slander charged. During the progress of the trial the appellant offered to file two amended petitions, in which he alleged special damage by reason of the words spoken, or words of like import, and the court refused to permit the amendments to be filed. This was proper. The appellant had gone into the trial on the distinct charge made in the petition, and there was no reason why he had not prepared his pleadings in the first place, so as to present the issue tendered in the amended pleadings. Nor did any harm result from the statements made in the paragraphs of the answer objected to. If they were true, the words charged had not been spoken, and those who heard the statements when called as witnesses could have testified to, and did testify that the statements were true, showing that no slanderous words were uttered. The plaintiff failed to make out his case, and although a peremptory instruction was refused, the explanation given by the defendant as to the words spoken, corroborates the statements made by the witness for the plaintiff, and the jury properly returned a verdict for the defendant.

Judgment affirmed.

TODD v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed February 23, 1889—Not to be reported.)

1. Practice—There can be no reversal for an error of the court in rejecting evidence unless the error is relied on in the written grounds for a new trial.

2. Same—The refusal of the court to permit a witness to answer a question propounded to him is not a reversible error, unless there was an avowal as to what the answer would be and that answer would have been favorable to appellant.

Masterson & Gaunt for appellant.

Wm. Lindsay and Winslow & Winslow for appellee.

Appeal from Gallatin Circuit Court.

Opinion of the court by Judge Bennett.

The appellant alleged that the appellee negligently ran its train against him, and knocked him off the abutment of its bridge, near Sparta, on which, and the track leading to the bridge, he was traveling by the license of the appellee to the public to use said track and bridge as a passway. These allegations were denied. Upon the conclusion of appellant's evidence, the lower court instructed the jury to find for the appellee. The giving of this instruction and the refusal of the court to allow the appellant to prove that the track and bridge, by license of the appellee, were used by the public as a passway, constitute the grounds urged here for a reversal of the case. The appellant made the giving of the instruction the principal ground in his written grounds for a new trial, but he failed to embody the rejection of said evidence in his written grounds for a new trial.

It was essential, in order for the appellant to maintain his action, to prove that he had a right of way on the appellee's track and bridge by its license to

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the public to use them as a passway; without such proof he was on the abutment of the bridge as a trespasser, and could not, under the circumstances of this case, recover damages for the injury. The refusal of the court to allow the witness to answer the question as to whether the track and bridge were used as a passway by the license of the appellee, occurred on the trial of the case, and the refusal, if an error at all, was an error at law, which, under the Civil Code, must, if relied on as a ground for a new trial, be embodied in the written grounds for a new trial; otherwise, the error will be considered as waived. Also, it has been repeatedly decided by this court that the action of the lower court in sustaining an objection to a question put to a witness, although the question is in proper form and germane to the issue, will not be reviewed by this court, unless it also appears what the evidence would have been had the witness been permitted to answer, and his evidence would have been favorable to the party propounding the question; otherwise, this court might reverse the case upon an immaterial issue, for the witness might not be able to give any evidence to the interrogatory, or his evidence might be adverse to the propounder of the interrogatory.

The judgment is affirmed.

FORBES & BRO. v. COOPER & CO.

(Filed February 23, 1889.)

1. Set-off—Where a plaintiff is a nonresident or insolvent, a demand for unliquidated damages may be used by the defendant as a set off, although, as a general rule, such a demand can not be the subject of a set off.

2. Counterclaim—A demand which the defendant has against the plaintiff can not be used as a counterclaim, unless it arises out of the contract or transaction stated in the petition as the foundation of plaintiff's claim, or is connected with the subject of the action.

Dulaney, Mitchell & DuBose for appellants.

Galloway & Sims for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Holt.

This is an action of assumpsit, brought by the appellees, Cooper & Co., against the appellants, Forbes & Bro., for the price of merchandise. The correctness of the claim is admitted by a nondenial; but the appellants sought to defeat a recovery by the assertion of a larger claim, unliquidated in character, and for damages arising from the nonperformance by the appellees of a building contract made by them with the appellant. The lower court gave judgment for the appellees, having sustained a demurrer to the answer. Its averments must, therefore, in considering this appeal, be taken as true. It sets forth the appellants' claim in proper form, and avers that the appellees are nonresidents, and have no property in this State. It attempts to rely upon the claim, both by way of set-off and counterclaim. It is manifest it does not constitute the latter. The two claims are entirely distinct. Such a thing as a counterclaim had no existence prior to the adoption of the Code of Practice. We must, therefore, look to it alone for its

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meaning. It defines it to be: "A cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition as the foundation of the plaintiffs' claim, or which is connected with the subject of the action." (Civil Code, section 96.)

Was it then available as a set-off? This presents the question, whether, upon the admitted facts of this case, it could be relied upon as a defense, although for unliquidated damages. The doctrine of equitable set-off existed long prior to the adoption of the Code; and it was well settled that a court of equity would apply it, where the demands were connected, or where the one sought to be set-off formed the consideration of the other. The exception to this rule was, that if the claim proposed to be set-off was one of unliquidated damages, the court would not, on account of the connection between the demands, first liquidate the damages, and then make the set-off, provided there was a plain and adequate remedy at law. If, however, any fact existed calculated to impair the efficacy of the legal remedy, such as insolvency or nonresidence, then the chancellor would liquidate the demands, and make the set-off. (Taylor & Son v. Stowell, &c., 4 Met., 175.) It was accordingly held by this court in Williams v. Gilchrist, 3 Bibb., 49, and other cases decided prior to the adoption of our Code, and in which no extraneous circumstances was shown such as insolvency, that an unliquidated demand could not be used as a set-off; and this was so even where such circumstances was shown, unless the demand was connected with the subject of the action. The reason for the rule was to prevent confusion resulting from the trial of distinct matters in the same action. This under the present practice is frequently done, however, to prevent circuity and multiplicity of actions. Indeed, our Code of Practice and the present mode of procedure looks especially to this end.

Section 96 of the present Civil Code provides: "A set off is a cause of action arising upon a contract, judgment or award in favor of a defendant against a plaintiff, or against him and another; and it can not be pleaded except in an action upon a contract, judgment or award." This is substantially like the provision of our original Code of Practice, under which it was held in Shropshire, &c. v. Conrad, 2 Met., 143, that a demand for unliquidated damages, although arising upon contract, could not be the subject of a set-off. In that case, while the claim attempted to be asserted as a set-off was distinct from the subject of the action, yet no extraneous fact, such as insolvency or the like, existed, which was likely to defeat the ends of justice, unless entire relief was afforded in the one action.

It is certainly unconscientious for an insolvent party to coerce the payment of his claim, when he is owing the other party an equal or larger sum, and thus leave the latter remediless. Nor should a nonresident be allowed, under like circumstances, to enforce, through the agency of the courts, the collection of his debt, and compel the other party to seek a foreign jurisdiction for relief, and then perhaps find the debtor insolvent. If the object of litigation be the attainment of justice, assuredly such results should be prevented. Indeed, the doctrine of equitable set-off, to the extent it was formerly applied, was based upon moral justice and to meet such cases as the above, thus preventing wrong. It was then not uncommon to stay an insolvent or nonresident debtor in the collection of his claim until damages, to which the complainant might be entitled against him, were liquidated under the order of the chancellor, and then apply them in satisfaction of his independent debt. In some of the States it has been held that the resident

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debtor may proceed by attachment in an independent suit against his nonresident debtor, and garnishee the money owing by him in his own hands, and then answer his adversary by relying upon the attachment. It has, however, been held by other courts that he could not do so, because it would bring him within the rule that a party can not sue himself. Numerous cases, however, may be found in which it has been held that the party may, by injunction, stay his insolvent or nonresident adversary in the collection of his claim until damages claimed are liquidated by a judgment, and thus gotten in form to satisfy the independent demand. Thus we see that under the former practice it was recognized that a nonresident or insolvent plaintiff should not ex equo et bono be allowed to compel payment when he was indebted to his adversary in a larger sum. It strikes the mind at first blush that a court should not lend itself to such an end. But why the need of multiplication of remedy to prevent it? If, because the claim be independent, injunction or attachment must be resorted to until the damages as to the one can be liquidated, then we have what seems to us to be a needless multiplicity of action. The work of the court is increased; the parties are involved in needless expense and cost. Certainly these objections to such modes of procedure are not overcome by any confusion which could possibly arise from the consideration of two separate matters in the same action. A, a nonresident or an insolvent, has an uncontested claim against B and sues upon it. The latter has a larger one, founded upon contract against A, but it is for unliquidated damages and independent of the subject-matter of A's action. Now, unless B can use it as a set-off, there must be at least three suits in court, granting he can be thus protected, where it seems to us one should suffice, or else he is remediless.

The object of rules of practice is to secure justice; and while we think great respect and regard should be shown for the established ones of remoter times, yet it should not be done, in the absence of a statutory rule, at the expense of justice. For this reason many of the technical rules of a former day have been either modified or altogether disregarded. Our Code of Practice does not forbid one, when sued by an insolvent or a nonresident, from using defensively an unliquidated claim, although founded upon a transaction independent of the subject of the action; and in our opinion, the ends of justice dictates that he should be allowed to do so. We perceive no principle of reason, justice or policy superior to the considerations in favor of his being permitted to do so, when the equitable circumstances exist to which we have alluded.

Judgment reversed, with directions to overrule the demurrer to the answer as amended and for further proceedings consistent with this opinion.

KENTUCKY SUPERIOR COURT.

KENT, ADM'R v. DEPOSIT BANK OF OWENSBORO.

(Filed February 13, 1889.)

Husband and wife—Descent—Where a married woman holds bank stock to her separate use it passes, upon her death, under section 15, article 4, chapter 52 of the General Statutes, to those who, as her heirs, would take her real

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estate, and not to her husband, who is not her "heir" within the meaning of the statute.

In this case the mother, brother and sister of the deceased wife are entitled to dividends declared after her death upon bank stock held by her to her separate use, and, even if her husband, as administrator, could recover a dividend declared before her death, but not paid, it would be necessary, in order to show his title, to allege that it had been declared before her death, which is not done in this case.

Sweeney & Son for appellant.

Weir, Weir & Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bowden.

W. P. Kent, as administrator of his deceased wife, Belle W. Kent, sued the Deposit Bank of Owensboro for $250 as a dividend declared about January 1, 1888, on stock in the bank held by his deceased wife to her separate use. The mother, brother and sister of the deceased wife were made parties, and filed an answer, in which they showed that they were her heirs-at-law, and in which they claimed that they were entitled to the stock and the dividend. By an act approved February 16, 1838 (3 Statute Law, 251), it was provided: "That it shall be lawful for any person who may desire to make an annual provision for a resident female friend, relative or connection in such manner that the provision will be for the exclusive use of the female, and not transferable, nor liable to vest in the husband, nor be subject to his debts, to transfer or cause to be tranferred to such females tock in any of the banks or other corporation created by this Commonwealth, and have it expressed on the face of the certificate of stock, and on the transfer book of the bank or corporation, that such stock is for the exclusive use of such female, and an annual provision for her support. And no such stock shall be transferable during the life of the female, nor liable to the debts contracted by her, nor shall it vest in her husband, nor be liable to his debts, nor shall he be entitled to it as her administrator, but it shall pass to the same persons who would take her real estate as heirs-at-law, provided that if she be a feme sole she may dispose of it by last will and testament, and, if a feme covert, may devise it with the consent of her husband."

This statute contemplated a purpose to create not only an equitable separate estate, but to go further and make it inalienable during the female's life. It provided that such purpose might be accomplished by having the certificate and transfer book to show that the stock was for the exclusive use and annual support of the female. The indorsement was evidence of the intention to which the statute gave effect. If the intention had been shown by words of the indorsement, clearly meant to create a separate estate, the result would have been the same. The object was not to declare that to be a separate estate, which the language used did not clearly make such, but also included such estates accurately described. The stock was not only to be inalienable during the life of the beneficiary, but it was not to be liable for her debts, though she might be unmarried; she could not divest herself; creditors could not subject it. While she lived it was an inevitable provision for her; if she was married it was the same. The stock should not vest in the husband, nor should it be liable for his debts. At that time the hus-

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band was not declared to be the sole distributee of his wife's surplus personal estate, but as her administrator he could receive it, and could hold it because no one else could recover it from him. The statute completely cut him off by declaring negatively that he should not be entitled to the stock as administrator, and by declaring affirmatively that it should "pass to the same persons who would take her real estate as heirs-at-law." By either the negative or affirmative provision it is clear that the husband was not to succeed, but by the latter only is it declared who should. Thus the statute determined what persons should have the stock after the death of the female; but it provided that by last will or deed of trust a different designation might be made.

The act of 1838 remained in force till the Revised Statutes took effect. In chapter 47, entitled Husband and Wife, in article 4, entitled Curtesy and Dower, and in section 16 it is provided: "If any stock in any of the banks or other corporations of this State is taken for or transferred to any female, and it is expressed on the face of the certificate or transfer book of such stock that it is for the exclusive use of such female, for her annual support, no husband she then has or may thereafter have shall take any interest in such stock or the dividends thereon; and the same, at her death, shall pass to her heirs, but if unmarried she may dispose of it by will; or, if married, so dispose of it with the consent of her husband, or without such consent if so provided in the deed or will creating the trust." Condensation was a chief object in the revision. Every essential provision of the act of 1838 is preserved. By another general provision, applicable to all separate estates created by will or deed, alienation was prohibited; and while it would not apply to such estates otherwise created, it is deducible, from the language of the section quoted, that the female could not alienate stock taken under it. This is indicated not only by empowering her, though unmarried, to dispose of it by will, but by declaring that the stock so taken—not what remains of it, nor if any remains, but "the same"—shall pass at her death to her heirs, if not disposed of by will. For the same reason, it could not be taken for her debts; for that, and a much stronger one, it could not be taken for his debts; he does not "take any interest in such stock." This is quite as preclusive as the provision of the original act: "Nor shall it vest in her husband, nor be liable for his debts." The stock was to remain intact "at her death," and then it was to go as her will directed, if she left a will; and if she did not, it was to "pass to her heirs."

Who are the heirs? The original act defined the word as meaning those "who would take her real estate" as successors under the law. This word occurs frequently in the revision, and so far as we have seen, it is invariably used as defined in the act of 1838. Those who are designated as successors to the reality are called heirs; those who are designated as successors to the personalty are called distributees. The question is not how the word may be used elsewhere, as in statutes of other States, or in other statutes of our own State, or in private writings which have come before the courts for construction, but how is it used in the revision? If throughout it is in every other place used to designate those who succeed to the reality, how can it be supposed it is used in this section in a different sense, and especially when it is used in the condensed restatement of a statute which distinctly defines it as meaning those who take the realty. Moreover, that is the correct use of the word. Not only accurately, but as the words are used in the revision, it may be said that the husband is the sole distributee of the surplus of his

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deceased wife's personalty, and that he is her heir when she leaves no kin as near as great grand parents or their descendants. That is the only case in which he is her heir.

This section appears as section 15, article 4, chapter 52 of the General Statutes. It is a copy, except that it does not provide that the indorsement shall show that the stock is for the "exclusive" use of the female, or "for her annual support." This change is manifestly of no importance in this case. By the Revised and also the General Statutes the husband is made the sole distributee of the wife's personalty after paying debts. This is reason enough why the provision of the act of 1838, that he should not be entitled as administrator, should have been omitted. Its equivalent would have been that he should not be entitled as distributee; but how can it be supposed necessary to declare who shall take, and then further declare who shall not take. It goes to the heir. We have tried to show that he is not the heir. If it was meant that on his wife's death he should, as distributee, take the bank stock, why was anything said about the succession? He would have taken it under the general statute of distribution, and it would have been a useless provision to say here what is declared there. The fact that special provision for the succession is made indicates that it is exceptional, and not according to the general law; so that if it were a matter of doubt as to the sense in which the word heir is used, this fact would have its value as indicating that the husband was not meant to take as distributee.

Our conclusion is that on the death of Mrs. Kent her mother, brother and sisters became the owners of the stock. They were consequently entitled to all dividends declared after Mrs. Kent's death. Even if her administrator could recover a dividend declared before her death, but not paid, it would be necessary, in order to show his title, to allege that it had been declared before her death. That is not alleged. Therefore, we think no right to recover was shown.

The judgment is affirmed.

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SUPERIOR COURT ABSTRACTS.

LOUISVILLE & NASHVILLE R. R. CO. v. HUNTER.

Filed March 6, 1889. Appeal from Marion Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. A party is not entitled to inconsistent instructions; therefore, the defendant, having asked and obtained a certain instruction, can not complain of the refusal of the court to give another instruction inconsistent with it.

2. Instructions—The appellant can not deny the correctness of an instruction given on its own motion.

3. Compensatory damages—An instruction ignoring mental suffering as an element of compensatory damages was properly refused.

H. W. Bruce, W. Lindsay and W. J. Lisle for appellant; Lewis Edelen for appellee.

GRAY, EX'OR v. HOLLIS, &c.

Filed March 6, 1889. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Bowden, affirming.

Chancellor's finding sustained—As the only question submitted was whether the plaintiff was entitled to recover for services alleged to have been rendered, and that was a legal issue, and the evidence conflicting, the judgment of the chancellor will not be disturbed.

N. G. Rogers for appellant; L. N. Dembitz for appellees.

FRAZER v. HUTCHISON, &c.

Filed March 6, 1889. Appeal from Wayne Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Trespass—Injunction—Where there have been repeated trespasses upon land, and there is a probability of their continuance, the owner may have an injunction.

2. Roads—Adverse possession—A grant of a way to the public can only be presumed from an adverse use continued for such a length of time as would bar the claim of the owner of the land, and this use must have been claimed and enjoyed as a right, not merely as a privilege, and this claim of right upon the part of those using the road must, in some way, be brought home to the owner of the land.

In this case, as it does not appear that the owners of the land ever had any notice of a claim of right to pass over the land in controversy, and the use of the land by the owners, the felling of trees, etc., from time to time without complaint, was inconsistent with a claim of right by the public, no presumption of a grant arises.

3. Limitation—Remainders—In determining whether a remainderman is barred by adverse possession the time must be computed from the termination of the life estate; and this rule applies as well in a contest between the public and an individual as in contests between individuals.

James S. Pirtle and J. Knox Frazer for appellant; R. C. Warren for appellees.

PRESTON v. CHILDERS.

Filed March 6, 1889. Appeal from Johnson Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Practice—As the instructions correctly presented the issues to the jury, and the evidence is conflicting, this court will not disturb the verdict.

Stewart & Stewart for appellant.

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BELKNAP v. CLARK.
AVERY & CO. v. SAME.
MEIKLE PLOW CO. v. SAME.
CORNWALL v. SAME.

Filed March 6, 1889. Appeals from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, affirming.

1. Taxation—Injunction—The statute (Act of May 17, 1886) makes it the duty of the assessor to assess all the property in his county subject to taxation, and if he fails to assess the property of any taxpayer it is made the duty of the county clerk, the sheriff, the board of supervisors, and the county court, under specified conditions applicable to each officer or tribunal, to assess such property. Therefore, to entitle a taxpayer to an injunction restraining the collection of a tax upon the ground that there has been no assessment of his property, it must appear by specific allegations that each officer or tribunal whose duty it is to assess the property has failed to perform this duty.

2. Same—Pleading—As the plaintiff, in his petition in this case, gives it as his opinion that there can be no assessment of property for State tax without the indebtedness of the taxpayer is deducted from the value of his property, and states that his indebtedness was not deducted from the value of his property, it is clear that the averment that there was no assessment by the assessor, or list made out by him or any one else, is but a legal conclusion, as the pleading is to be construed most strongly against the pleader.

3. Same—Assuming that the law permits the taxpayer, and makes it the duty of the assessor, to deduct his indebtedness from a part of his property, as was formerly the case (a question not decided), the fact that the assessor, in making the assessment, failed to deduct the indebtedness, would not authorize the chancellor to interfere by injunction, as the statute affords the taxpayer legal remedies for the correction of the assessment.

4. Same—The petition, in averring that there was no assessment made, nor tax list made out or reported by the assessor, states a case under which it was the duty of the clerk to copy and deliver to the sheriff the tax books of the previous year, under which the sheriff would be authorized to collect the tax, and in the absence of allegations to the contrary the court must, in construing the petition, assume that this was done.

R. W. Woolley and Hargis & Eastin for appellants; Helm & Bruce for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

Filed March 6, 1889. Appeal from Campbell Circuit Court. Opinion of the court by Judge Bowden, reversing.

Indictment against railroad for nuisance—Upon the trial of a railroad company under an indictment for committing a nuisance, the court instructed the jury to find defendant guilty if it "unlawfully operated its locomotives, trains and cars on and along Saratoga street, in the city of Newport, by habitually, in the night time and day time, running trains at a high rate of speed, and by habitually making up trains and keeping cars standing on said street, and by habitually blowing off steam and emitting sparks, soot and smoke from locomotives thereon, or any of the same, and so that the same was dangerous, uncomfortable and unhealthy to the citizens then and there being." Held—That this was error. The jury, by this instruction, was authorized to convict, if it believed that steam was habitually blown off, and that sparks, soot and smoke were habitually emitted, and that these were dangerous, uncomfortable and unhealthy. The State can not punish the company for the inevitable results of acts which it has authorized to be done. When the company has used all known means whereby the public inconvenience may be reduced, it has done all that can be required.

J. C. Wright and George Washington for appellant; W. W. Cleary for appellee.

MORRISON v. MORRISON.

Filed March 6, 1889. Appeal from Christian Circuit Court. Opinion of the court by Presiding Judge Ward, extending former opinion and reversing.

Divorce—As a diminution of the record has been supplied by agreement

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since the original hearing, and the certificate of the examiner to the depositions of witnesses now appears, supplying the defect referred to in the former opinion (ante, page —), that opinion is extended so as to reverse the judgment, with directions to grant appellant, the husband, a divorce.

W. F. Browder and Petrie & Downer for appellant; John Feland for appellee.

READ, &c. v. DEPOSIT BANK OF GLASGOW.

Filed March 13, 1889. Appeal from Barren Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Fraud—The evidence does not sustain the defense that the notes sued upon were obtained by fraud, and, therefore, the judgment for plaintiff must be affirmed.

J. A. Rousseau and P. W. Hardin for appellants; Porter & McQuown for appellee.

CONNOLLY, &c. v. COMMONWEALTH.

Filed March 13, 1889. Appeal from Pike Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

Bail—By an order of court the defendant's bail was fixed at $300. The clerk of the court, in vacation, took a bail bond for $500. Held—That the bond is void, and the sureties not liable for any amount.

Auxier, Ferrell & Connolly for appellants; S. G. Kinner for appellee.

ABBOTT v. COMMONWEALTH.
SAME v. SAME.

Filed March 13, 1889. Appeals from Calloway Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Lost records—Every court of record has the inherent power, independent of the statute, to supply, on proper proof, its own records which have been lost, destroyed or defaced. The proceedings in this case, however, were in substantial conformity with the statute.

2. A summons upon a forfeited bail bond is sufficient if it describe the bond with suffiient accuracy to enable the surety to ascertain the bond upon which there is a claim of liability. The grammatical inacuracy describing the bonds as executed by "them" instead of "him" did not vitiate the summons in this case.

G. A. C. Holt for appellant; S. H. Crossland for appellee.

McFARLAND v. BENTON, &c.

Filed March 13, 1889. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, granting rehearing and reversing; Judge Bowden dissenting.

1. Special judge—Bills of exceptions—A special judge has the same authority to sign a bill of exceptions after the term at which the trial is had as the regular judge has; therefore, the amendment of May 12, 1886, to section 334 of the Code applies as well to special judges as to regular judges.

2. Same—Statutes—That amendment applies to this case, although the extension to the next term of the time to file the bill was made April 23, 1886. The effect of the statute was simply to extend the existing right to the next succeeding term.

3. Statutes—A statute which merely affords the means of enforcing a right may be applied to actions pending at the time it became a law.

4. Clerks—Failure to issue execution—The object of the action was to recover of the defendant for the loss occasioned by his failure as clerk to issue an execution when ordered. The defendant's contention was that he had no right, without special directions, to omit the costs; and as the papers in the case were, through no fault of his, lost or mislaid, he had no means of ascertaining the costs, and could not comply with the order. Held—That, assuming the facts to be as defendant claims, his contention is correct.

5. Same—Pleading—Upon the trial there was evidence conducing to show that the papers were, at the time of the order, in the hands of plaintiffs' attorney, and were not returned until some time after; and it was, in gen-

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eral terms, so alleged in the original answer. During the trial defendant offered an amended answer, in which it was alleged more specifically that plaintiff's attorneys had withdrawn the papers from the clerk's office without defendant's knowledge or consent, and retained them for a long period of time, thus preventing the taxation of costs and issual of execution. Held —That the amendment presented a good defense, and should have been allowed.

6. Same—Burden of proof—It being admitted that the execution was ordered, the burden was on the clerk to show a good excuse for his failure to issue it.

Judge Bowden, dissenting, holds that the bill of exceptions should have been certified by bystanders at the next term after the trial, to which time was given, and that the special judge who presided at the trial had no power at the second term thereafter to certify the bill.

Geo. W. Williams & Son and W. N. & J. J. Sweeney for appellant; Little & Slack for appellees.

McNICHOLS v. HOPKINS.

Filed March 13, 1889. Appeal from Trigg Circuit Court. Opinion of the court by Judge Barbour, reversing.

Landlord and tenant—Mortgage—On the 22d of September, 1885, L being indebted to appellee, his landlord, for rent for the year 1885, and for advancements, executed to appellee a mortgage on a crop of tobacco, which was accepted as a settlement of the rent contract and the advancements, including money which appellee had paid as L.'s surety, and L. therein agreed to pay the amount January 1, 1886. Appellant instituted this suit June 22, 1886, asserting a mortgage lien on the tobacco which had been mortgaged to appellee. October 22, 1886, appellee filed his petition in the action, asserting a landlord's lien on the tobacco. Held—First. The contract by which appellee accepted a mortgage was upon sufficient consideration, and the sum therein named was due at the time fixed (January 1, 1886), no matter what the previous contract was.

Second—The appellee's lien as landlord to secure that sum, conceding to him such a lien, had expired before appellant instituted this suit; and the time having expired without the assertion of the lien, the only lien which appellee could have asserted was that secured by his mortgage, which he has seen fit to abandon.

R. A. Burnett for appellant; Fenton Sims for appellee.

COMMONWEALTH v. SHUCK.

Filed March 13, 1889. Appeal from Spencer Cicruit Court. Opinion of the court by Judge Barbour, affirming.

1. Local option—The act of April 14, 1886, to prohibit the sale of liquors in Spencer county, was not to take effect until ratified by the vote of the people of the county. The act did not create a board for comparing the polls, and certifying the result of the election. Held—That that duty fell upon the board provided by section 1, article 5, chapter 33, General Statutes.

2. Same—The polls were compared and the result certified by the county judge, county clerk and sheriff. At that election the county judge and county clerk were candidates for re election. Held—That they were disqualified to act as members of the board, and their certificate of the result of the vote was void. There was, therefore, no legal evidence that the vote had resulted against the sale of liquors.

J. S. Morris for appellant; G. G. Gilbert for appellee.

DUNN'S TRUSTEE v. McALPIN & CO.

Filed March 13, 1889. Appeal from Madison Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Appeals—Limitation—Within two years after judgment, the clerk of this court granted an appeal and made an indorsement on the record showing to whom he granted the appeal, but no process was issued, or statement indorsed on the record by the appellant, within the two years after judg-

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ment, within which it is provided an appeal may be taken. Held—That the plea of the statute of limitation is not good. Neither the issual of process nor the indorsement of the statement by the appellant is essential to the taking of an appeal.

2. Attachments—Where attachment is obtained upon ground that defendant has no property in this State subject to execution sufficient to pay plaintiff's demand, and that his demand will be endangered by delay in obtaining judgment, and it appears that another person is liable for the same debt as a co-obligor, who is presumably solvent, it devolves upon the plaintiff, in order to sustain the grounds for his attachment, to show that such person has no property, or that the property of both obligors is not sufficient to pay his demand, or such facts as indicate that delay will endanger.

J. M. Sullivan and J. H. Breck for appellant; John Bennett for appellees.

WALLER v. BOWLES, &c.

Filed March 13, 1889. Appeal from Pike Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Pleading—Assignment—Where, in an action upon an assigned note, the answer relies upon a breach of warranty as a counterclaim, asking part of the damages to go in discharge of the note, and asking judgment against the assignor, the original payee, for the residue, the assignees of the note are entitled to the benefit of the reply of the assignor, and when there is a verdict against the defendant on the issues thus formed, a judgment can not be rendered for him, notwithstanding the verdict, upon the ground that the assignees have not controverted the matters alleged in the answer.

2. Sale of jack—Counterclaim—In an action upon a note the answer alleged that the note was given for a jack, which was warranted to be a sure foal-getter, but which proved to be worthless for that purpose, which the pleader assumed constituted a total failure of consideration. Held—That whatever may be true as matter of fact, it can not be assumed as matter of law that a jack incapable in that respect is worthless for all other purposes. Therefore, as a strict defense the answer was not sufficient. While a cause of action on the warranty might have been sustained, and the damages used as a counterclaim, it was not so pleaded.

3. A set-off or counterclaim is not strictly a defense, and a party may decline to so plead without losing his right to redress.

Stewart & Stewart for appellant; Auxier, Ferrell, Connelly & McGinnis for appellees.

COMMONWEALTH v. CONLY.

COMMONWEALTH v. SPOFFORD.

Filed March 13, 1889. Appeals from Johnson Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Indictment—Injury to roads by hauling—It is not an offense at common law to haul saw logs over a public road, although "mud holes, ruts, ditches and other obstructions to public travel" are caused thereby.

2. Same—The offense created by the act of March 10, 1856, which applies only to certain counties, is the "failure to repair" a public road, which has been injured by hauling saw logs or other timber, and not the creation of a nuisance. The fine imposed, moreover, is to be recovered by a warrant before a justice of the peace.

S. G. Kinner for appellant; J. E. Stewart for appellees.

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KENTUCKY COURT OF APPEALS.

CASKEY v. WILLIAMS.

(Filed February 28, 1889—Not to be reported.)

Vendor and vendee—The plaintiff's petition fails to describe the land for which he seeks a title other than as "fifty acres of land on Pond waters, in Morgan county, Kentucky," and the title bond which he sues gives the same description. Held—That the description is not definite enough to authorize the chancellor to compel defendant to make a deed. And as the plaintiff did not allege that he paid any sum whatever for the land, no judgment could be rendered for the value of the land.

Salyer & O'Rear for appellant.

John W. Howard for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Bennett.

The appellant's petition fails to describe the land for which he seeks a title in accordance with the bond other than fifty acres of land on Pond waters, in Morgan county, Kentucky. The bond filed with the petition gives the same description as that mentioned in the petition. The description is not definite enough to authorize a chancellor to compel the appellant to make a deed. The appellant claims that, although the description may be too defective to authorize the chancellor to compel the appellee to make a deed, yet judgment should have been rendered for him for the value of the land. It is a sufficient answer to this contention that there is no allegation in the petition that there was any sum whatever paid by the appellant for the land.

The judgment sustaining the demurrer to the petition is affirmed.

RADFORD v. COMMONWEALTH.

(Filed February 28, 1889—Not to be reported.)

Continuance—The defendant moved for a continuance because of the absence of two witnesses. There had been three trials, and the case had been

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continued several times at defendant's instance. His affidavit discloses the fact that he must have known what the witnesses would testify from the time of the killing for which he was indicted At the previous term, when the case was continued at his instance, he failed to have the witnesses recognized, as he should have done if the witnesses were present, or to ask a warrant of arrest, as he should have done if they were absent. The continuance was refused, and defendant's affidavit was read as the evidence of the absent witnesses. Held—That the continuance was properly refused, as defendant did not show due diligence; and as he was not entitled to have the affidavit read at all, he can not complain that the State did not admit as true what the affidavit stated the absent witnesses would testify, even if he could have done so in any event.

John Feland and Fenton Sims for appellant.

P. W. Hardin for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Holt.

This appeal presents the single question whether a continuance should have been granted the appellant by the trial court. It was asked upon a proper affidavit because of the absence of two witnesses. It was shown that they were within the reach of the process of the court. Conceding that their testimony would have been material, which is, perhaps, questionable, the inquiry arises whether due diligence had been exercised to obtain them.

The killing occurred in Christian county in 1882. The appellant was indicted at the March term, 1883, of its circuit court. He continued the case several times, and then, at his instance, the venue was changed to Trigg county. There a trial was had, resulting in a hung jury. Upon a second trial, had in May, 1887, the appellant was convicted to the penitentiary for seventeen years. This court reversed the judgment, and, upon the return of the cause, he, at the first term of the court when it properly stood for trial, continued it. At the next, or August term, 1888, it was tried over his objection, and he was again convicted for twenty-one years. This is the judgment from which he now appeals. When he continued the case at the April term, 1888, and which was the term next prior to the one at which he was last tried, he failed to either have the two witnesses recognized to appear at the next term, which he should have done if they were present, or to ask a warrant of arrest against them if they were then absent, in order to enforce their presence at the next term. Instead of doing the one or the other, he, in May following, merely sued out a subpœna for them for the term at which he was tried. It was returned, executed as to one and "not found" as to the other. The affidavit discloses that what the appellant says he would have proven by them must have been known to him, and that they would testify to it from the very time of the killing. This State of case does not show due diligence in preparing for trial upon the part of the appellant. He was not, therefore, in a position to demand a continuance as a matter of right.

The Commonwealth consented that the absent witnesses would, if present, testify as stated by the appellant in his affidavit, and that this statement might be read as their evidence, and it was so read to the jury. The appellant demanded, however, that the State be required to admit as true what the affidavit stated they would testify, or else that he be granted a continu-

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ance; and as this was refused by the court, he now urges that the amendment of May 15, 1886, to section 189 of the Criminal Code, providing that the attorney for the Commonwealth, in order to prevent a continuance in such a case, need not admit the truth of the matter, but only that the witnesses, if present, would so testify, is unconstitutional, as being in violation of section 12 of the Bill of Rights, which guarantees to an accused compulsory process for his witnesses, and, therefore, void.

As, however, the appellant had not used due diligence, and had, therefore, no right to a continuance, he is not in an attitude to make this question. The trial court could properly have refused him a continuance without the consent of the attorney for the State that the statements of the affidavit as to what the absent witnesses, if present, would prove, might be read as their evidence. It was granting something to which he was not entitled. It was ex gratia, and he can not, therefore, complain that greater favor was not shown him.

The evidence strongly tends to show that the accused acted in self-defense. But he has been given every chance in the way of a fair trial. Many continuances have been granted, as well as a change of venue. There has been one mistrial, and two juries have found him guilty.

The judgment is affirmed.

LYNUM, &c. v. SMOOT.

(Filed February 28, 1889—Not to be reported.)

Rents and improvements—The land of a lunatic having been sold under execution, and purchased by the plaintiff in the execution, in this action to set aside the sale and adjust the accounts as to rents and improvements, the court set aside the sale, which is not complained of, and allowed the purchaser interest on his debt during the whole period of time, and allowed him for his improvements an amount nearly equal to the value of the rents for the four years he was in possession. Only such improvements were made as pertain to the ordinary management of a farm, such as making new fences, cutting bushes and sowing grass. Held—That $500 is ample compensation for the improvements, and this amount the purchaser (appellee) should be allowed, to be credited on the rent, applying so much of this sum in equal portions for each year during the four years, or until the sale was set aside, as will exhaust the amount allowed, and then credit the interest on the principal debt by the rent as it falls due, after deducting the improvements as directed.

D. L. Trumbo and W. H. Holt for appellants.

R. Gudgell & Son and W. P. D. Bush for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Pryor.

In this case the appellee obtained a judgment against the ancestor of the appellants that was afterwards replevied. Before an execution issued on the replevin bond the obligee became a lunatic, and, as the proof conduces to show, had been losing his mental faculties for several years prior to the judgment against him. The evidence, however, shows that there was a bona fide consideration for the debt, and that the ancestor of appellants had the capacity, at the time the debt was created, to fully understand what he was

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doing. After an inquest had been held and the lunacy established, the appellee, with a knowledge of what had transpired, proceeded to sell the land of the debtor at a ruinous sacrifice, and the object of that action was to set aside the sale and adjust the accounts as to the rents and improvements. The appellee had entered on the land under his purchase, and hence the necessity for such an account. There is no complaint made of the judgment setting aside the sale, and the sole question arises from the exceptions to the commissioner's report as to rents and improvements. The appellee has been allowed interest on his debt during the whole period of time, and has also been allowed for his improvements an amount nearly equal to the value of the rents.

The testimony as to the rents shows that they were estimated at a fair value up to the time the judgment setting aside the sale was rendered, regardless of the improvements, and after that time the estimate was proper. Neither the chancellor nor the commissioner was presented with an itemized account of the improvements made, and only such improvements were made as pertain to the ordinary management of a farm. Some new fencing was built, and old fencing removed, with some of the land sown in grass, and much less of it cultivated than was usual on such farms. That it improved in this way is evident, and that some compensation should be allowed the appellee for fencing the farm, cutting bushes, etc., and for grass sown, is apparent, and we think the sum of $500 is ample compensation. He purchased the land for $1,600, and entered upon it the 1st of January, 1880, and the sale was set aside in January, 1884, and for the improvements made during the four years, being such only as a prudent farmer would have made, he is allowed greatly more than two-thirds of the original purchase price for improvements, and the interest for the whole time on his money. Under such a ruling the possession for a few years longer, with no improvements but those ordinarily made on a farm, such as repairing fences, cutting bushes, etc., the appellee would have paid for the farm in that way. The rent has been swallowed-up, or nearly so, by this character of improvement, and the debt doubled by the interest allowed. The appellee should be allowed $500, to be credited on the rent, applying so much of this sum in equal portions for each year during the four years, or until the sale was set aside, as will exhaust the amount allowed, and then credit the interest arising on the principal debt by the entire rent as it falls due, after deducting the improvements as directed. The cost of the action to set aside the sale should be divided in equal amounts between the parties.

The judgment below is reversed and remanded for proceedings consistent with this opinion. The settlement or report of the commissioner is adopted in every particular save as to the particular errors pointed out. The report amended as directed will end the controversy.

Judge Holt not sitting.

PERSIFULL v. HIND, &c.

(Filed February 28, 1889.)

1. Homestead—P. and son were the owners of a tract of land for which they held a bond for title, and upon which P. with his family resided. P.

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being involved and about to die, he and his son assigned the title bond to H. as their agent, and authorized him to sell the land, pay their debts and account to the son and the wife of P. for any surplus of the proceeds. H. having contracted for a sale of the land, possession to be delivered in March, P., with a view to that contract, moved from the place in the preceding November, leaving his son and daughter in possession and retaining control of the place. He died in February, and a few days after his death his widow and children returned to the place and were in full possession when this action was brought by H. to sell the property and execute what he terms "the trust," the sale made by him not having been carried out, and having been abandoned before P.'s death. The widow of P. claims a homestead. Held—That P. intended to return to his home in the event of a failure to sell, and was prevented from doing so by his speedy death after it was ascertained that the sale which had been made would not be consummated. Therefore, his widow is entitled to a homestead in his interest in the place, subject to the purchase money.

2. Same—The fact that the land was held by the debtor under a title bond does not preclude the widow's right to a homestead. It was not necessary to the existence of this right that the husband should have had a deed to the land.

S. W. Tolin, J. L. Elliston and P. W. Hardin for appellant.

Riddell & Stephens and Thomas H. Hines for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Holt.

In 1880 one Roberts sold to James A. Persifull and his son, L. F. Persifull, a tract of land for $3,125, and executed to them a bond for a title. The grantees were to own it in proportion to what each might pay of the purchase money. The father paid about $1,600 and the son about $812. The former, with his family, lived upon the land from March, 1881, until some time in November, 1884. In the meantime the son, desiring to remove to another State, entered into a verbal arrangement with his brother, Mark Persifull, by which the latter was to take the former's place under the contract. In September, 1884, the father had not only become involved, but was in the last stage of consumption. He recognized he was about to die, and was desirous of settling up his affairs. He believed if he could sell the place at a fair value it would bring enough, not only to pay the unpaid purchase money, but that his interest in the surplus of the proceeds would pay his other debts, and leave something for the support of his family after his death. He, therefore, on September 24, 1884, assigned the Roberts title bond to the appellee, Samuel Hind, the two sons uniting in the assignment, and the father and his son, Mark, at the same time entered into an agreement with Hind, and executed to him a power of attorney by which he was authorized to sell the land, pay their debts, and account to Mark and the wife of James A. Persifull for any surplus arising from the sale in proportion to what the father and son had paid toward the price of the land. This writing recites that the title bond had been assigned to Hind for such purpose, and that it had been done owing to the father being involved, and the condition of his health. It is clear Hind accepted the charge or trust upon these terms and in this way. He testifies that the assignment of the title bond to him was not intended as an absolute transfer to him, and it is manifest, not only from his own evidence, but the other testimony in the record, that he merely became the agent of the Persifulls to make a sale of the land

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and pay their debts. The arrangement entered into was not, therefore, irrevocable, as is contended. In November, 1884, Hind contracted the farm to one Long, possession to be given on or before March 1, 1885, and when given $1,000 of the purchase money was to be paid. It was evidently the expectation of all parties that this trade would be carried out and that the purchaser would want possession some time between the date of the contract and the first of the following March. In view of this fact, and because of coming cold weather and bad roads, which would, perhaps, render it impossible for J. A. Persifull, who was then a dying man, to remove from the premises, he determined to do so at once; and did so about the middle of November, 1884. His object was to avoid any obstacle to the giving possession to the purchaser whenever he might be ready to make the first payment and desire possession of the property. This reason for the removal was fully understood by Hind. The father, with his family, save the son, Mark Persifull, moved some four miles from the home place to a rented house. The son-in-law of J. A. Persifull, one Mason, who had been residing with the father-in-law and Mason's family, as well as the son, Mark, remained there, however, as the tenant of J. A. Persifull, and accounted to him for rent for the place. J. A. Persifull also left some stock on the farm; all his farming implements, and some household plunder in the house. He died in February, 1885, or about three months after the removal, leaving the appellant, Permelia Persifull, as his widow, and also leaving three infant children. The sale to Long was not carried out, owing to his failure to make the first payment, and had been abandoned prior to Persifull's death. The widow and her children moved back to the home place a few days after his death, and were in full possession there and housekeeping when this action was brought by Hind to sell the property and execute what he terms "the trust." The issue having been properly made, the lower court refused the claim of the widow to a homestead for herself and children in the land, and of this she now complains. The liability of the land, first, for the unpaid purchase money is admitted by her; and she only claims a homestead, subject to it. The fact that the land was held under a title bond only does not preclude her right if she be otherwise entitled to it. It was not necessary to its existence that the husband should have had a deed to the land. (Griffin v. Proctor's Adm'r, 14 Bush, 571.) It is equally certain that if, at the time of his death, he had no such right in the property, then his widow and children have none, as the right is derivative. The question, therefore, arises, whether his removal from the premises under the circumstances stated is to be regarded in law as temporary or permanent so far as his right to a homestead therein is concerned. If he abandoned the premises with no intention of ever returning, then such an abandonment determined the homestead right. His removal was certainly a contingent one. He only left his home upon the idea that the sale to Long would be carried out, and this record fails to show that he did not intend to return, if it failed of complete execution.

It is evident, from all the circumstances, that the removal was temporary unless a sale should be effected, and that the deceased, in the event of a failure to sell, would have returned. His health, and the time of year prevented it, when it was ascertained that the intended sale to Long was a failure, and his speedy death cut short his opportunity to do so. He retained possession of the property until his death; and upon the entire record, we can not presume otherwise than that he intended to return to his home, save in the

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event of its sale. This being so he, at the time of his death, had not lost his right to a homestead in his interest in the place, the whole of it being, of course, subject to the unpaid purchase money; and upon his death this right survived to the widow and his infant children, who were in possession when this action was instituted.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

THE FIREMAN'S INSURANCE CO. OF NEWARK, NEW JERSEY v. SCHWING, SURVIVING PARTNER, &c.

(Filed March 2, 1889—Not to be reported.)

1. Insurance—Burden of proof—In this action upon a policy of fire insurance the defendant admitted the alleged extent of the loss, but claimed that the fire was caused by the falling of the building, and on that ground denied the plaintiff's right to recover. Held—That the burden of proof was on defendant, and it was entitled to the closing argument to the jury. (Royal Ins. Co. v. Schwing, ante, page 380.)

2. Same—Exceptions—The bill of exceptions recites that "the court ruled that the plaintiff had the right to open the evidence and testimony before the jury, to which the defendant by counsel excepted," and further recites that, after the evidence was through, "the court then ruled that the plaintiff had the right, by counsel, to conclude the argument, to which the defendant excepted." Held—That in order to enable defendant to take advantage of the error in the court's ruling as to the burden of proof, it was not necessary that the record should show that counsel asked leave to open the case, or to have the concluding argument to the jury, as all this must be necessarily implied from the action of the court and the exceptions made.

3. Waiver of error—The defendant, by asking an instruction to the effect that the burden of proof was on the plaintiff, did not waive the errors already committed by the court in its rulings as to the burden of proof, as the defendant was bound to acquiesce in the court's decision upon that point, as it had become the law of the case.

R. W. Woolley for appellant.

Abbott & Rutledge and Wm. Lindsay for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Pryor.

This court, in an opinion delivered at the last term involving the identical question presented in this case, held that under the pleadings the burden of proof was on the defendant, and the court below denying to the appellant the right to conclude the argument and assume the burden, for that reason remanded that case for another trial. (Royal Ins. Co. v. Schwing, ante, page 380.)

It is argued in the present case that the pleadings are different from the case heretofore decided, and that, in the absence of testimony, the verdict would have been for the defendant. We do not so regard the issue. The extent of the loss is admitted, and the sole question is as to how the fire originated, or, in other words, the defendant claims that the fire was caused by the fall of the building, and the burden was on it to establish that fact. It is further insisted that the appellant (insurance company) never offered to assume the burden, or to make the opening statement of the case to the jury.

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Such is not the record before us. The record reads: "The jury having been sworn according to law, * * * the court ruled that the plaintiff had the right to open the evidence and testimony before the jury, to which the defendant, by counsel, excepted. The plaintiff then introduced the following witnesses," etc. Whether this ruling was on the motion of the plaintiff or the defendant does not appear, but it is manifest that the trial judge had the question before him, and adjudged against the defendant, for the plain reason that the record so recites. It is urged, however, that the defendant should have offered to introduce his witnesses, or to open and conclude the case, and this should be made to appear of record before this court will take notice of the question raised. We do not well see how the question could have been more directly presented here than is found in the ruling of the court and the exceptions reserved. This court must necessarily assume that the point was made, else the court below could not have determined the question, and the exception made at the time by the defendant brought home to the court a knowledge of the fact that the defendant was not willing to surrender his right to open the case and conclude the argument. The court has no such discretion as authorizes the denial of this right, unless there is an absence of evidence to support the plea by which the burden of proof is assumed.

As conclusive of the fact that the question as to the right to open the case was made at the inception of the trial, when the evidence was through, the bill of exceptions recites: "The court then ruled that the plaintiff had the right, by counsel, to conclude the argument, to which the defendant excepted and the plaintiff's counsel did conclude the argument." Again, on the motion for a new trial the fifth ground was, that the court erred in awarding to plaintiff the opening of the case and the conclusion of the argument. So it is apparent that this question was made by counsel for the defendant at all times, during the progress of the trial, when it was proper to interpose his objections. It was not necessary that the record should show that counsel asked leave to introduce his testimony, or offered to open the case, because all this must necessarily be implied from the action of the court and the exceptions made. It is also contended that the appellant waived its right to insist upon the alleged errors in this court for the reason that its counsel asked an instruction to the effect that the burden was on the plaintiff, and they must believe, from a preponderance of the testimony, that the fall of the building was the result of the fire before they can find for the plaintiff. The court had decided that such was the law of the case, and the defendant, having reserved his exception, was not required to further insist that his client had assumed or was entitled to the burden. He was left no other ground upon which to base his defense, and was compelled to acquiesce in the court's decision, for, as to both litigants, it was the law of the case.

It is not left to the discretion of the court to say which of the parties, plaintiff or defendant, shall open and conclude the case. The Code is imperative, and confers upon the party holding the affirmative a right of which he can not be deprived against his consent. He may waive the right or present a sham plea, without evidence to support it, with a view of assuming the burden, or fail to introduce evidence conducing to support a plea filed in good faith. In such cases he is not entitled to the burden. Here the testimony was conflicting, with counsel asserting his right to be first heard in the presentation of his case, and last heard in the argument to the jury.

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The judgment is reversed and remanded for a new trial and for proceedings consistent with this opinion.

OAKLEY v. COMMONWEALTH.

(Filed March 2, 1889—Not to be reported.)

1. Criminal law—Self-defense—Upon the trial of appellant for murder, it appeared that the deceased was one of a party of friends; that there had been a difficulty between defendant and one of the friends, which had ended at the time of the killing of the deceased; that no words had passed between the defendant and the deceased when the shooting began, the only question being whether the fatal shot fired by defendant was the first shot fired, or whether the defendant was merely returning the fire of the deceased. Held —That under this testimony it was error to instruct the jury that if the accused brought on the conflict and continued the shooting, he could not rely on his plea of self-defense.

2. Same—It was error to instruct the jury that in order to acquit on the ground of self-defense, they must believe the defendant had no other safe or apparently safe means of escape. They should have been instructed that in order to acquit on that ground they must believe the defendant believed, and had reasonable ground to believe, that he had no other safe means of escape.

C. W. Goodpaster and Z. T. Young for appellant.

Wood & Day for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Pryor.

The bloody encounter that took place in the village of Stepstone on the 18th of July, 1885, in which three men were killed, has led to the conviction of the appellant, Perry Oakley, for the killing of Newton Osborn, and his punishment fixed at confinement in the State prison for the period of fifteen years. The evidence shows that the accused, Perry Oakley, was at the time the marshal of the village, and had, prior to the day of the encounter, arrested some of the parties who were engaged in the difficulty, resulting in the death of Newt. Osborn; that threats had been made by some of the party against Oakley by reason of his action as marshal, and while all such threats are denied, it is manifest that bad feeling existed between the parties. On the morning of the day of the killing, the deceased, Newt. Osborn, McGuire, the three Smiths and others, met in Stepstone under a previous arrangement, with a view of seining for fish in some small stream near by. They had a shotgun with them that was the only visible weapon, and, before leaving, started John Smith, one of their number, to the town of Mt. Sterling after a jug of whisky. He returned with the whisky; the fish had been caught and divided; the whisky drank, and Osborn, the two Smiths and others were going to McGuire's house that evening to eat the fish that had been assigned them. The bell rang at McGuire's house, who lived in the town, for supper, when the Smiths and Osborn and others started in response to the bell for their meals. The parties seem to have been noticing the movements of each other on that day, and without any apparent cause, unless the result of the previous trouble between the town marshal and some of

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McGuire's party. After starting to McGuire's house, and almost reaching it, John Smith left the party, composed of Newt. Osborn, McKaby, Henry Smith and himself, and went over to the store of Hickerson, where the town marshal, Oakley, was, and who was in possession of the store at the request of Hickerson, the latter being unwell, or perhaps had left the town on that day, and had just returned. Smith walked into the store where Oakley and his son were, with his hand on his pistol in his breast, and placed himself in front of Oakley. The latter asked Smith why he was following him up; if he was following him up to kill him? With that remark the trouble began, Smith seizing Oakley and throwing him back on the counter, when he, Smith, was shot and instantly killed, whether by Perry Oakley or his son does not distinctly appear. Perry Oakley then left the store and was fired at by McGuire with his shotgun, several shots having struck Oakley's face. This shooting McGuire denies, but that Oakley was shot is evident. McGuire states that Newt. Osborn and Henry Smith, hearing the shooting, left his house, and, being seen by Perry Oakley and his son, were both shot down without cause. Perry Oakley, the accused, says that when McGuire shot him he saw Newt. Osborn, the deceased, drop behind some bushes; that Osborn then fired at him and he returned the fire, when Henry Smith in turn fired and his, Oakley's, son fired at Smith, or perhaps both of them. The fire from Perry Oakley's gun took Osborn's life, and that from the son's gun took the life of Henry Smith. There are some four or five witnesses who were lookers-on at the time, and all concur in the statement that Osborn fired at Oakley before Oakley shot him, and while Hickerson and others are indicted for the killing also, alleging a conspiracy to do the act, there is no evidence of the slightest character showing any conspiracy or participation by Hickerson and those indicted with him in the killing, except the son of Oakley, and, from the evidence, it appears that he shot Henry Smith. There is contradictory and conflicting testimony as to the firing by Osborn, but witness after witness swears that he fired the first shot. Why John Smith left the company he was in and went to Hickerson's store does not appear. That they were under the influence of liquor, or some of them at least, on the fatal day, that inflamed their passions and led to the trouble, is, we think, apparent from the proof; but whether those killed were or not the aggressors is for the jury to determine and not this court.

The appellant is indicted for the killing of Newt. Osborn. He is being tried for that offense and none other, and, therefore, we see no reason for an instruction to the jury that if the accused brought on the conflict and continued the shooting, he can not rely on his plea of self-defense. The accused was either guilty of murder in shooting Newt. Osborn or he acted in self-defense. The rencounter with John Smith had ended, and Oakley had no right to shoot Osborn unless in self-defense or from apparent necessity. No words had passed between them, so far as the testimony on the part of Oakley shows. The accused either fired the first shot or it was fired by the deceased. If by the deceased, Oakley was acting in self-defense when he returned the fire; if by Oakley, he shot without cause. Instruction No. 6, therefore, should not have been given. The fifth instruction is also erroneous. It is not for the jury to believe that the accused had no other safe or apparently safe means of escape but to kill the deceased, but they must believe from the evidence that the defendant believed, and had reasonable grounds to believe, that he was in danger of great bodily harm, and had, at

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the time, no other safe or apparently safe means of protecting himself, but to slay his adversary, before they can acquit. This doctrine is so well understood as not to require the citation of authorities to support it, and it was evidently a mere oversight on the part of the attorney for the State in drafting the instructions given. The instruction B. asked by the accused, should have been given.

For these errors the judgment below is reversed and the cause remanded for a new trial consistent with this opinion.

TYLER & LUCKETT v. JEWELL, &c.

(Filed March 5, 1889—Not to be reported.)

1. Sales of infants' real estate—Where one owns, jointly with another, real estate, which can not be divided without materially impairing its value, he may bring an action, under section 490 of the Code, against the joint owner, although the latter be an infant, and have the property sold under a decree of court.

2. Same—The chancellor was authorized to order the sale in this case, although the title was in the plaintiff and "her children." While the plaintiff may hereafter have other children than the defendants, yet the decree of sale provides for re-investment in other real estate, the title to be taken, in all respects, like that to the property ordered sold, and the fund is under the control of the court, the sale bond having been taken payable to the master.

3. Same—Under section 489 of the Code, the real estate of an infant can only be sold for his debts, or a liability with which he is chargeable, or under a decree in an action brought by his statutory guardian to obtain means for his support and education or a re-investment of the proceeds.

4. Guardian ad litem—Where it is shown by an affidavit that all the persons named in section 52 of the Code are plaintiffs to the action it is the duty of the clerk to appoint a guardian ad litem for the infant defendant, and summons shall be served upon him. And where the petition shows the required facts and is verified, it is a sufficient affidavit to authorize the clerk to appoint a guardian ad litem.

5. Amendment of return on summons—The officer's return upon the summons, in stating that the summons was served upon the guardian ad litem for the infant defendants under fourteen years of age, omitting the name of one of the infants. After the filing of exceptions to the sale, but before action upon them, the officer was permitted to amend his return by supplying the omitted name. Held—That this was proper.

6. Guardian ad litem—This court, by permitting the guardian ad litem to answer for all of the infant defendants, those over as well as those under fourteen years of age, ratified the previous appointment of the guardian ad litem as to those over fourteen years of age.

W. Carrico for appellants.

W. N & J. J. Sweeney for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

J. W. Jewell and his wife brought this action against their children, some of whom are over and some under fourteen years of age, seeking the sale of a lot of ground in the city of Owensboro, which belonged jointly to the wife and children. The petition avers that the owners are in possession: that

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they are deriving no income from the property, and it can not be divided without materially impairing its value; that it is unimproved, and the owners destitute of means to improve it; that the father is a farmer and the children living on a farm; that a sale of the lot will redound to their interest, and it is asked for the purpose of re-investment. It was sold under a judgment for this purpose, the appellants becoming the purchasers, at considerably less than its appraised value, and upon the sale being reported to court they excetped to its confirmation, and their exceptions having been overruled they have appealed, and now urge that the proceedings are too defective to pass a valid title.

The first point presented is, that the plaintiffs, J. W. Jewell and wife, had no right to bring the action. This is true, if it be founded upon section 489 of the Civil Code, as the appellants contend. Under it the real estate of an infant can only be sold for his debt, or a liability with which he is chargeable, or under a decree in an action brought by his statutory guardian to obtain means for his support and education or a reinvestment of the proceeds. Section 490, however, provides: "A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant:

"1st. If the share of each owner be worth less than $100.

"2d. If the estate be in possession, and the property can not be divided without materially impairing its value or the value of the plaintiff's interest therein."

It is manifest this action was brought under this section. The property was jointly held. The petition does not aver that the share of each owner was worth less than $100, although the subsequent proceedings show this to be true; but it does set forth the state of case named in the second subsection, and the mother being a joint owner, had a right to institute the action.

It matters not that the title was in the mother and "her children." It is true she may have other children, but the decree of sale provides that it is for re-investment in other real estate, the title to be taken, in all respects, like that to the property ordered sold; and the court selected its agent to report suitable property for this purpose, and the fund is under the control of the court, the sale bond having been taken payable to the master. Upon the filing of the petition the affidavit of Mrs. Jewel was also filed, stating the ages of the children, and that they had no statutory guardian; therefore a guardian ad litem was appointed for them, and a summons was then issued and duly served upon those over fourteen years of age, and, in fact, served upon the guardian ad litem for all those under that age; but the officer, in making his return, failed to so state as to one of them. The guardian ad litem subsequently anwered for all of them.

Section 52 of the Civil Code requires a summons against an infant under fourteen years of age to be served on his father; if no father, then upon his guardian; if there be none, then upon the mother; or, if he have no mother, then upon the person in charge of him. The amendment of January 16, 1888, to this section provides that where it is shown by an affidavit of a plaintiff that all the persons above named are plaintiffs to the action, the clerk shall appoint a guardian ad litem for the infant, and the summons shall be served upon him.

In this instance an affidavit disclosed that there was no statutory guar-

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dian. The petition, which was verified, and should, therefore, be held for the purpose to take the place of an affidavit, showed that the father and mother were plaintiffs, and, by fair inference from its averments, that they were in charge of their children.

The service upon the guardian ad litem for the children under fourteen years of age was, therefore, proper.

After the filing of the exceptions to the sale, but before action upon them, the officer who had served the process was permitted to amend his return, and state that he had also served it upon the guardian ad litem for the infant whose name had been omitted in the return.

It is urged that this was not an amendment of a return, but the indorsement of an original return, and that the court, therefore, had no power to authorize it. We think otherwise. It was held by this court at an early day that it was proper to allow an officer, even at a subsequent term, to amend his return, and that the amendment would relate back and be as effective as if it had been correctly returned at the outset. (Malone, Chiles & Co. v. Samuel, 3 A. K. M., 350.) The officer may do so by leave of court, although out of office. (Newton v. Prather, 1 Duvall, 100.) It is apparent that the absence of such a power would often deprive a court of the means of doing justice, and there is no good reason why the right to show what was really done should not exist.

Moreover, in this case the summons executed upon the guardian ad litem for one of the infants embraced them all by name, and he answered for all of them, and this he did not do until the summons had been properly served upon those over fourteen years of age, and the action of the court in allowing such answer to be filed should be treated as a ratification of the previous appointment of the guardian ad litem as to those over fourteen years of age. The averments of the petition are supported by testimony, and the deed to the wife and children is filed as a part of the record.

After the bringing of the suit the father became the statutory guardian of the children; and conceding that it was necessary, inasmuch as it was not pleaded, although the record shows the share of each to be less than $100, yet he came into court and executed bond as required by the statute. In addition to this a lien exists upon the property sold for the payment of the purchase money, and it appears to us not only that the interest of the infants is amply and properly protected, but that the appellants will acquire a valid title to the land as against them when protected by a proper deed.

Judgment affirmed.

GREER v. OLDHAM, &c.

(Filed March 7, 1889—Not to be reported.)

1. Joinder of actions—Execution liens—In an action to enforce a vendor's lien on land, it having been determined that no lien existed, the plaintiff filed an amended petition, asserting a lien upon the land under two executions which he had caused to be levied on the land pending the action. The defendant filed an answer to this pleading, making an issue as to the existence of a lien, and also claiming a homestead. Held—That while the plaintiff had no right to proceed in this way, but should have enforced his execution lien by suing out a venditioni exponas, yet by failing to have the court act upon a demurrer which he filed with his answer, he waived it, and lost the right to question the mode adopted by the plaintiff to enforce his lien.

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2. Judicial sales—Payment—A sale of the land made under a judgment of the court having been set aside, the defendant can not complain that the judgment appealed from fails to allow him a credit which appears upon the bond executed by the purchaser at that sale, as the title to his land has been restored to him, and it does not appear that he made the payment. This is a matter between the parties to the bond.

3. Homestead—A vendee in part payment of the purchase money executed his note to a creditor of the vendor. Held—That while the holder of that note is not entitled to a lien, yet as it was executed for a part of the purchase money, the vendee can not claim a homestead as against it.

Price & Compton for appellant.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Holt.

March 7, 1873, the Bullingtons sold 198 acres of land to the appellant, B. C. Greer, and then executed to him a deed therefor, retaining a lien for $1,004 of unpaid purchase money (evidenced by his note then given to them), but which he refused to accept, because one Meredith Wilson held a mortgage lien upon the land. In April thereafter the interested parties arranged the matter by the Bullingtons surrendering the note for $1,004, and in lieu thereof the appellant executed two notes, one of which for $500 was, by the request of Meredith Wilson, executed to his son, J. R. Wilson, in satisfaction of the mortgage lien; and it was thereupon released, and the deed accepted by the appellant, Greer. The note so executed having been assigned to the female appellee, she and her husband brought this action upon it on November 8, 1876, seeking a judgment both in personam and the enforcement of an alleged lien upon the land for its payment. December 11, 1876, a personal judgment was rendered against the appellant, upon which an execution issued and was levied upon the land on January 29, 1877, but nothing further appears to have been done under it. Subsequently a judgment in rem was rendered, under which the land was sold, and purchased by one Beard; but this sale was set aside upon exceptions to the report filed by another creditor of the appellant, who had made himself a party to the action.

The sale bond executed by Beard shows a credit for a certain sum, and it is urged that the judgment now complained of should be reversed, because it allows no credit for this payment. The appellant was not a party to the sale bond, however, and it does not appear that he made the payment or had anything to do with it. Inasmuch as the sale was set aside, it is a matter between the parties to the bond, and he can not complain that no credit is now allowed him on this account, as his property did not pass from him by the sale, nor did he make the payment.

A second sale of a greater portion of the land was had by a commissioner, and the appellees became the purchasers at a price equal to their debt. This sale, however, appears to have been altogether disregarded in the further progress of the case, owing doubtless to the fact that the appellant appealed to this court from the judgment giving the appellees a lien upon the land, and on February 18, 1880, it was reversed, the grounds being, first, that the judgment also embraced a judgment in personam, although one had been previously rendered; second, because the giving of the note by Greer to the creditor of his vendor was pro tanto a payment upon the land, and a discharge of the lien to that extent.

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This ruling was based upon the case of McClure, &c. v. Harris, 12 B. M., 261, and thereby this question in this case became res judicata, the opinion holding that the appellant, Greer, so far as the Bullingtons were concerned, paid the purchase money and thereby extinguished the lien to the extent of the note by its execution to Wilson. The vendor was no longer liable to his creditor, and in the absence of fraud, mistake or some equitable ground for relief, no lien existed.

A second execution was levied upon the land on June 24, 1883, and then returned by order of the appellees. It appears to have been dated May 25, 1873. This is manifestly a mistake. The action had not then been brought, and it is a fair presumption from the return that it issued on May 25, 1883. In June, 1883, the appellees, without objection, filed an amended petition setting up the levy of their two executions, and asserting a lien upon the land thereunder. The references in it to the executions are somewhat confused as to dates, owing probably to the mistake already alluded to in the test of one of the executions. They were, however, a part of the record.

It is now urged that the appellees had no right to proceed thus, but should have sued out a ven. ex., and by means of it enforced their execution lien if one existed. Undoubtedly this would have been the proper course. No sufficient reason was presented in the amended petition for not adopting it.

The appellant, while he filed a demurrer as a part of his answer, nevertheless waived it by a failure to have action upon it; and by filing his answer, which made the issue whether any lien existed, and also claimed a homestead as against the debt, he lost his opportunity to properly question the right of the appellees to reach the property in the mode adopted.

The claim to a homestead was properly rejected. Although no purchase money lien upon the land existed, yet the note sued on is as to the appellant a part of the consideration by which he obtained it. While the change of payee operated as to the vendor as a payment, and, therefore, extinguished any purchase money lien, yet the fact nevertheless remains that, so far as the vendee is concerned, he never paid this much of the purchase money, and it is a part of the consideration he promised to pay for the property, and by means of which he in part obtained it. He is entitled to no homestead as against the purchase money, and as to him the note sued upon should be regarded as in effect, as indeed it is in fact, a part of it.

Judgment affirmed.

COMMONWEALTH v. BOWMAN.

(Filed March 7, 1889—Not to be reported.)

Jurisdiction—The boundary line between the States of Kentucky and Tennessee being in dispute, a compact was entered into between the two States prior to the year 1820, by which it was provided that a certain strip of land in the State of Tennessee was the property of and subject to the disposition of the State of Kentucky, the compact giving to Kentucky the right to make all laws necessary and proper for disposing of said land. It was also provided that any grants made by Kentucky for this land should be received in evidence in the courts of Tennessee, with the further proviso that the land referred should not be subject to taxation by the State of Tennessee for five years, except in so far as it might be appropriated by individuals. Under this compact the State of Kentucky issued a patent for a part of the land in

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the year 1836. The State, by this action, now seeks to cancel that patent and reinvest itself with title upon the ground that the patent was obtained by fraud. Held—That the courts of Tennessee, and not the courts of this State, have jurisdiction.

S. F. J. Trabue and E. F. Trabue for appellant.

S. B. Dishman and N. A. Richardson for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Pryor.

Prior to the year 1820 the States of Kentucky and Tennessee, with a view of fixing definitely the boundary line between the two States, appointed commissioners for that purpose, John J. Crittenden and Robert Trimble acting for Kentucky and Felix Grundy and William L. Brown for the State of Tennessee. The commissioners having agreed on the boundary line, prepared articles of agreement to that effect that were ratified by the legislatures of the two States. It was provided in one of the stipulations of the compact that a certain strip of land lying between Walker's line and the line of latitude 36 degrees and 30 minutes north was the property of and subject to the disposition of the State of Kentucky, and although within the State of Tennessee, giving to Kentucky the right to make all laws necessary and proper for disposing of said land. (General Statutes, article 5, chapter 8.)

It was also provided that any grant or grants Kentucky might make for this land should "be received in evidence in all the courts of law and equity in the State of Tennessee, and be available to the party deriving title under the same," with the further proviso "that the land referred to in this article shall not be subject to taxation by the State of Tennessee for five years, except so far as the same may in the meantime be appropriated by individuals." The sovereignty of the State of Tennessee has extended over this territory from the date of the compact until the present time, with the right only on the part of Kentucky to dispose of it by grant or otherwise. Under this compact the State of Kentucky, in the year 1836, issued a patent to one Cornelius Bowman that embraces 7,100 acres of land lying between Walker's line and the line of 50 degrees 30 minutes north. The State of Kentucky is now claiming that the patent was for only 1,400 acres of this land, the patentee, Bowman, representing, at the time he obtained the patent, that other patents had been issued, or surveys made, covering the most of the land within his patent boundary, leaving only 1,400 acres of vacant land. That his representations were false and fraudulent, and so known to be by him, he knowing, when he obtained the patent, that only 200 acres of the survey had been previously patented. The State, therefore, seeks to cancel the patent and re-invest itself with title. Cornelius Bowman is dead, and one of his children, Washington Bowman, is made a defendant to the action. This patent had been issued nearly half a century before this present action was instituted, and the whole of the land in controversy having been actually patented, and the jurisdiction over it by this State entirely exhausted forty-eight years ago, and that jurisdiction or power over it confined alone to the right to dispose of this land, we perceive no reason for disturbing the title of those in possession, or the existence of any jurisdiction in this court to oust those from the land within the State of Tennessee, the courts of the

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latter having the jurisdiction of both the person and the thing sought to be recovered. A cancellation of the patent is, in effect, a recovery against those in possession, when it seems to us plain, from the compact between the States, that when this land was granted all the power of this State over it ceased, and, if any remedy exists, it must emanate from the courts of Tennessee. Besides, it appears, from the answer filed in this case, that much of this land has been sold and not in the possession of or claimed by the heirs of the patentee, and, if the courts of Kentucky had the jurisdiction to determine the rights of these parties after the lapse of half a century, we would be reluctant to disturb those who entered under or derived title through this patentee.

The dismissal of the action for want of jurisdiction was proper, and is, therefore, affirmed.

DAVID LEWIS v. COMMONWEALTH.

(Filed March 7, 1889—Not to be reported.)

Criminal law—Conspiracy—Although the indictment against appellant and others for murder charges a conspiracy, yet as it was not proved with reasonable certainty as to one of the defendants that he was a party to the conspiracy, if any existed, he was a competent witness for appellant, who was tried separately.

John T. Hazelrigg for appellant.

P. W. Hardin for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Bennett.

The appellant and Amos and Alvin Lewis were jointly indicted and charged with the crime of having conspired to murder, and pursuant to such conspiracy, of having murdered Joseph Lewis. The appellant was tried separately, which resulted in his being convicted of the crime charged, and his punishment was fixed at confinement in the penitentiary for life. On his trial he offered to introduce Alvin Lewis, one of the persons indicted with him, as a witness for him. The Commonwealth's attorney objected to his introduction as witness, which objection was sustained. The record shows his evidence was material for the appellant; indeed, if true and believed, it would acquit the appellant. This person was rejected as a witness, because the court was of the opinion that a conspiracy was proven.

A careful investigation of the record convinces us that it was not proven, with reasonable certainty, that this boy, about sixteen years old, was in the conspiracy to kill Joseph Lewis. We make no comment in reference to the appellant and Amos Lewis in this regard; nor do we deem it prudent, in view of the fact that the appellant is to have another trial, and Alvin is yet to be tried, to give the reasons in detail why we have come to the conclusion that the proof fails to establish, with reasonable certainty, that Alvin was in said conspiracy.

For the foregoing error the judgment is reversed and the cause remanded, with directions to grant the appellant a new trial.

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BARLOW, &c. v. McCLINTOCK.

(Filed March 7, 1889—Not to be reported.)

1. Judicial sales—Prior to the sale of city property under decree, notice of the sale was given through two of the county papers having an extensive circulation, and notices were posted throughout the city, but none were sent to the country. A large number of persons were present at the sale, and the property was offered in parcels, and in every way most advantageous to the owner, and finally was sold as a whole, because, when offered in that way, it brought more money. Many witnesses state that the property sold for its full value. It was appraised at $15,000 and sold for $10,831. Held—That there can be no valid objections to the manner of advertising or the manner of the sale; and there was no such sacrifice of the property as requires the chancellor to scrutinize the proceedings with a view of relieving the owner on account of any mere irregularity.

2. Same—The fact that one of the appraisers became interested in the purchase is not ground for setting aside the sale, as he states that he had no idea of making the purchase when he went on the ground, or at the time of the appraisement, and there is no reason for discrediting his statement.

A. Duvall and John Bennett for appellants.

C. F. & A. R. Burnam and C. H. Breck for appellee.

Appeal from Madison Court of Common Pleas.

Opinion of the court by Judge Pryor.

The case is brought to this court on exceptions to a report of sale made by the commissioner. The property sold is a dwelling house and mill, with certain lots and outbuildings annexed. The property was appraised at $15,000 and sold for $10,831. It is located in the city of Richmond, and is regarded as valuable property. It was advertised extensively by handbills and in the newspapers of that city, but at the instance of the appellant, the owner, the day fixed for the sale was postponed, and one of the complaints now is, that it was not properly advertised. The publication or notice of the sale was made through two of the county papers having an extensive circulation, and the advertisements were posted throughout the city, but not sent to the county. A large number of persons assembled on the day of sale, and the property was offered in parcels, and in every way most advantageous to the owner, and finally was sold as a whole, because, when offered in that way, it brought more money. The sale had been delayed in the first place at the instance of the owner, who had also advertised the property by sending postals to the country. There can be no valid objection to the manner of advertising or the manner of the sale, and from the evidence before us we are inclined to adjudge that the property brought its full value, or as much as it would ordinarily sell for when exposed for sale to the highest bidder. That the cost of erecting the buildings was double the amount for which the property sold is doubtless true, but, when offered for sale, buildings that have been standing for years scarcely ever bring more than one-half of the original cost of construction. Many witnesses place the full value of the property at the price for which it was sold, and while the property may be worth more, the evidence does not authorize a reversal of the case that a resale may be had.

It is objected that one of the appraisers became interested in the purchase. He swears that he had no idea of making the purchase when he went on the

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ground, or at the time of the appraisement, and there is no reason for discrediting his statement. He certainly appraised the property, from the testimony before us, at as high a price as it should have been appraised, and as this was done when he had no interest in the bidding, or reason to believe that he would become a bidder, we see no reason for making such an exception available. After examining the testimony, we find a fair sale was made of the property, and, from the proof, a fair value paid for it, and certainly no such sacrifice as would require the chancellor to scrutinize the proceedings with a view of relieving the owner from the effect that any mere irregularity might have had on the sale of the property.

Judgment affirmed.

AMOS LEWIS v. COMMONWEALTH.

(Filed March 7, 1889—Not to be reported.)

The declarations of one of several conspirators after the object of the conspiracy has been accomplished, and the conspirators have disbanded, can not be used as evidence against the others.

W. W. McGuire and John T. Hazelrigg for appellant.

P. W. Hardin for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Bennett.

The indictment charges the appellant and David Lewis and Alvin Lewis with the crime of having murdered Joseph Lewis pursuant to a conspiracy entered into by them for that purpose.

The appellant had a separate trial, which resulted in convicting him of the crime charged, and fixing his punishment at confinement in the penitentiary for life. On the appellant's trial the Commonwealth was permitted to prove, over the objections of appellant, that, after the examining trial of the appellant and David and Alvin Lewis, and while they were in the wagon which was to convey them to jail, David Lewis called Albert Peyton to the wagon and whispered in Peyton's ear, saying to him "to tell John and Frank Lewis to work head work and get Jesse Cogswell out of the country." Jesse Cogswell was the most important witness against appellant and David Lewis. An effort by either one of the defendants to get Cogswell out of the way might be regarded by the jury as a strong circumstance against him. Therefore, if the evidence was incompetent as against the appellant the case must be reversed.

The trial court, doubtless, held that the evidence was competent upon the ground that a conspiracy was charged, and, in the opinion of the judge, proven with reasonable certainty. If it be true that a conspiracy was proven, the conspiracy was entered into for the purpose of killing Joseph Lewis, which had been, some time since, accomplished. It is a well-settled rule that the declarations of one conspirator, after the object of the conspiracy has been accomplished, and the conspirators have disbanded, can not be used as evidence against the others. Also, if it be said that evidence was made competent by reason of the fact that the appellant was present and might have heard it, the answer is: First, it is reasonably certain that he did not hear it; second, if he did hear it it was not a charge against him, nor did it tend to establish his guilt, for it expressed the desire of David

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Lewis alone. As the case is to be sent back for a new trial, we refrain from writing any more in reference to the evidence.

For the foregoing error the case is reversed, with directions to grant the appellant a new trial.

LEATHERMAN v. TIMES CO., &c.

(Filed February 28, 1889.)

Suing wrong party—Limitation—When a plaintiff brings his action against the wrong party, and after the statute of limitations has fully run, amends his petition and brings in new parties as defendants, the new parties thus brought in may rely upon the statute of limitations as a defense.

"The Times Co." was sued as a corporation for an alleged libel, and answered without disclosing whether or not it was an incorporated institution. After more than a year the defendant filed an amended answer, setting up the fact that it was not incorporated, and thereupon the plaintiff filed an amended petition, alleging that the allegation of the original petition that the defendant was a corporation was a mistake, and that the "Times" was a private concern, owned and published by certain individuals as partners, who were made defendants, and, upon being summoned, filed an answer pleading the one year's statute of limitations. The original summons was served on one of these defendants as the business manager of the supposed corporation. Held—That the action is barred.

J. M. Chatterson and Baker, Kinney & Kinney for appellant.

F. Hagan for appellees.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

The appellant, in November, 1884, commenced action against the Times Co. as an incorporated institution for the purpose of printing and publishing a newspaper called the Louisville Times, etc., and Dr. Keller. The appellant sought to recover damages for an alleged libel published in said paper upon him. The appellant dismissed the action as to Dr. Keller. An answer was filed in the name of the Times Co. without disclosing whether or not it was an incorporated institution or merely a private concern, alleging the truth of the libelous matter charged. The pleadings having been made up for more than a year, the Times Co. filed an amended answer, disclosing the fact that it was not incorporated. Thereupon the appellant filed an amended petition, setting up the fact that his allegation that the Times Co. was a corporation was a mistake, and that the times was a private concern, owned and published by the appellees, Haldeman & Logan, as partners. These two partners were summoned to answer this amended petition. They answered, among other things, that more than one year having elapsed since the publication complained of, the action against them was barred by the statute of limitation of one year. The lower court deeming the reply to this plea insufficient, sustained a demurrer to it, and the appellant declining to plead further, his action was dismissed. The sole question is, was the demurrer properly sustained? The appellant, in support of his contention that the demurrer was improperly sustained, relies upon the case of Heckmakn's

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Adm'r v. L. & N. R. R. Co., 9 Ky. Law Rep., 297 (opinion by Chief Justice Lewis). In that case the administrator, by mistake, sued the Louisville, Cincinnati & Lexington Railway Co. for an injury to his intestate, resulting in his death. An answer was filed, apparently in the name of said company. It was discovered afterwards that the L. & N. R. R. Co. operated the road, and did the injury complained of instead of the Louisville, Cincinnati & Lexington Railroad Co., and that the L. & N. R. R. Co. had, in fact, filed the answer. Upon the discovery of the mistake the true state of case, by amendment, was set up, and judgment was asked against the L. & N. R. R. Co. To the action, as amended, the L. & N. R. R. Co. interposed the plea of the statute of limitations. It was held that where a person against whom a cause of action exists is sued by the wrong name, and a summons is served upon him, though in his wrong name, and he appears and files an answer, though in the name by which he was sued, he is thereby effectually brought before the court. Thus, if a person, having a cause of action against A, sues him in the name of B, and A is served with summons in the name of B, and answers in that name, he thereby adopts the alias, and effectually brings himself before the court.

Here the attempt was made to bring the Times Co. before the court as a corporation, and to recover judgment against it as a corporation, but no such corporation was in existence; therefore, the Times Co., representing individuals as partners, and not a corporation, such individuals were not brought before the court by filing the action against the Times Co. and issuing summons thereon in that name alone. Had the appellee been made defendants to the original action in connection with the Times Co. as an alleged corporation, and had been summoned and answered, or had appeared and answered without having been summoned, in such case the mistake in suing the Times Co. as a corporation would not have availed the appellees on their plea of the statute of limitations. But the appellees, as the owners of the Times, were not made defendants until more than a year after the cause of action had accrued; therefore, this case is wholly unlike the Heckman case, supra. But the case falls within the principle that where a plaintiff commences his action against the wrong party (here no such party was in existence), and, after the statute of limitations has fully run, amends his petition by bringing in new parties as defendants, the parties so brought in may successfully rely upon the statute of limitations as a defense. Also, as intimated, the bringing of the action against the Times Co. by that name did not have the effect of bringing the individual members of the company before the court, nor of suspending the statute of limitations as to them; for the statute of limitations is not suspended by merely filing the petition in the proper court, but a summons must be issued against the defendants before the statute is suspended. The fact that the original summons was served by the sheriff upon the appellant, Logan, as the business manager of the supposed corporation, defendant, did not have the effect to bring him before the court as a defendant.

The judgment is affirmed.

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DOTY v. LOUISVILLE BANKING CO.

(Filed March 9, 1889—Not to be reported.)

Husband and wife—Fraudulent conveyances—A conveyance of land by husband to wife pursuant to an agreement by the husband to invest the proceeds of the wife's land in other land for her benefit, or to give to her other land in lieu of land she had united with him in conveying, was not fraudulent as to the husband's creditors, although the conveyance was not executed for several years after the agreement was made.

Wm. Lindsay and W. McKee Duncan for appellant.

Barnett, Noble & Barnett for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

This is a controversy between the wife of I. M. Doty and the Louisville Banking Company, the latter seeking to cancel a conveyance made to Mrs. Doty by her husband on the ground that it was executed in fraud of the rights of creditors. The appellee held a note as a collateral to secure the payment of a debt that was owing it, and upon this collateral the husband, I. M. Doty, was liable as one of the sureties.

Suit was instituted on the note and a judgment obtained, upon which an execution issued that was returned by the proper officer no property found, and Doty having conveyed his land to his wife, this action was to subject it to the payment of the debt.

At the time of the marriage of Doty, his wife, or shortly after, was the owner of two or more tracts of land in the county of Barren, and of personal property, all of the value of near $15,000. The husband was desirous of selling this land and investing it in land in Garrard county. The wife opposed the investment for some time, but finally yielded on the agreement that the proceeds of her property should be invested for her in land in Garrard county. The land was sold in the year 1870 and no investment made, but the title to the land in Garrard, purchased by the husband, was taken in his own name. This purchase only amounted to thirty or forty acres; the balance of the land, forming the tract sought to be subjected, the husband inherited from his father. It appears that the wife, after the removal from Barren county to Garrard, went with her husband to the town of Lancaster to see their attorney and have him to prepare the conveyance. They found the attorney absent, and on their return home her husband was taken sick and was confined to his house for near fourteen months, and the matter was in this way neglected and no deed made until the year 1885. The wife's claim was continually asserted against the husband until the deed was made. There is no creditor of the wife or husband complaining because of credit given the husband for necessaries furnished himself and family, or the consent of the wife, by executing liens upon the land, in such a way as would indicate a purpose to yield her claim in favor of creditors.

The debt for which her husband was bound was evidenced by a note upon which he was only the surety, and that had been placed with the appellant, a banking house in the city of Louisville, as collateral security for another debt in which the husband had no interest, and from which neither himself nor wife had ever derived any benefit. In the case of Mead v. Stairs, decided

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at the last term (ante, page 702), the husband had invested his own means in the mill property, or there was no proof that the money of the wife ever found its way in the investment. The wife had united in a mortgage to creditors on the identical property, the proceeds of which she claimed as against creditors living in the same town, and who had the right to believe, from her own conduct and silence, that the property belonged to the husband. Here the debt was not created by the husband for himself or his wife. The husband was not primarily liable on the paper. No creditor has been misled by the conduct of the wife, or given credit, so far as this record shows, to the financial standing of the husband by reason of any knowledge as to the manner in which he held the title to this realty. The liability of the husband is fixed by reason of the bond alone. He was under no moral obligation to pay the debt. The equity of the wife existed by reason of the agreement with the husband, and his appropriation of her means in the purchase of the land that is embraced in the conveyance, and having been invested with the legal title to that which her own estate purchased, we perceive no reason for disturbing it. It was a reasonable and proper settlement on the wife, and her husband, in making the deed, did that which, in law and morals, he should have done years before. This view of the question is sustained by the cases of Miller v. Edwards, 7 Bush, 394, and Campbell v. Campbell, 79 Ky., 395. (3 Ky. Law Rep., 15.) Nor was the transaction held fraudulent by the chancellor below, and the question really presented here is, did the agreement between the husband and wife embrace the entire tract of one hundred acres or only a part of it? The court below held that it only embraced that much of the land inherited by her husband from his father, and the balance of the tract was subjected because not within the terms of the agreement. While the wife on cross examination stated that it was the land inherited by her husband from his father, as far as it would go, she did not mean that the agreement was limited to that much of the tract. The entire statement of the wife shows that both husband and wife understood that it included the land owned by him. In fact she states that the husband agreed, if she would consent to sell her land, he would give to her his land in Garrard as far as it goes. With the conviction that the wife's claim is founded upon an agreement that was both just and equitable, and being now invested with the legal title, we think the chancellor erred in depriving her of any part of the land.

The judgment is reversed, with directions to dismiss the petition.

CONGER, &c. v. BERGMAN.

(Filed March 9, 1889—Not to be reported.)

Taxation—A tax can not be imposed on the lands lying on each side of a public road to pay the entire cost of grading and macadamizing the road. (Graham v. Conger, 9 Ky. Law Rep., 133.)

Lane & Burnett for appellants.

Robert J. Elliott and J. S. Pirtle for appellee.

Appeal from Louisville Law and Equity Court.

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Opinion of the court by Chief Justice Lewis.

Under an act approved April 21, 1882, a contract was let to appellant to grade and macadamize the Fountain Ferry road from the limits of the city of Louisville to the Ohio river, to be paid for by an assessment of tax on lands lying within 800 feet of and on each side of the road.

Having completed the work which was received, and all other requirements of the act having been complied with, appellant brought this action to enforce his alleged lien on the land of appellee within the prescribed boundary for payment of his quota of tax assessed under the act.

The case of Graham v. Conger, 9 Ky. Law Rep., 133, involved the same questions. The action was to enforce a lien in favor of appellant for the same work on the same road, as is the case here, and if the decision rendered in that case is to be adhered to in this, appellant is without a cause of action against appellee. For there it was held that a tax for a public purpose could not be imposed in such manner and upon the property, as provided in the act; and that the system of street improvements, when applied to highways in the country, was a plain departure from that character of equality constituting the basis of taxation according to the Constitution.

For the same reasons therein given, it must be held no lien exists upon the land of appellee to pay for the work done under the act by appellant, if the facts exist, as shown by the record.

Judgment affirmed.

HYLAND v. SHORT ROUTE RAILWAY TRANSFER CO.

(Filed March 9, 1889—Not to be reported.)

1. Construction of railroad along street—A railroad may, under legislative authority, be construed along a street, provided it be so done as not to interfere with the reasonable use of the street in the usual modes, and a mere inconvenience or decline in the value of his property from the use of a street for such a purpose will not entitle an abutting lot owner to relief. It is only when such a use becomes destructive of the primary purpose, and the abutting lot owner is deprived of its use for such purpose, that he will be heard.

2. Injunction—Relief by injunction should not be afforded in such a case, unless the evidence clearly shows the existence of the right and its invasion, and that such a remedy is necessary to adequate relief.

While the plaintiff in this case may be entitled to legal redress, the record does not show such an injury as will authorize an injunction.

R. C. Davis and Matt O'Doherty for appellant.

Bullitt & Harris for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

The appellant, James Hyland, is the owner and resides upon a lot thirty feet in width, extending from Rowan street to Portland avenue, in the city of Louisville. His house fronts upon the last-named street.

The appellee, under sanction from both the legislature of the State and the general council of the city, being about to construct a double track for

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its railroad, from near one corner of the lot upon Rowan street diagonally across the street, and in such direction that the track would be in front of the lot, but gradually receding from it, the appellant brought this action to prevent it, upon the ground, first, that it would be an illegal diversion of the use to which the street had been dedicated; and second, because it would deprive him, as an abutting lot owner, of the reasonable use of the street. A temporary injunction against its construction was sought, but refused by the chancellor, because it would not per se unreasonably obstruct the appellant in the use of the street; and whether it would in effect do so when constructed, and be specially injurious to him, was conjectural; and if it should so result, his remedy by compensation in damages was entirely adequate to protect him.

After the road had been built across the street, he filed an amended petition so stating, and also averring that he was thereby deprived of the reasonable use of it. The prayer is that the appellee be enjoined from maintaining and operating the tracks, three in number. It was denied below, and the appellant has appealed.

The street is sixty feet wide, twelve feet of it being in use for the sidewalks on each side. There is no complaint of obstruction in its use, save from cars upon the tracts. The appellant testifies, in substance, that the tracks do not per se injure the street for use. The rails have been sunk to the level of the pavement, and the tracks so constructed that they do not in themselves interfere with the travel. In fact the testimony tends to show that the street at this point is in better condition now than it was prior to the building of the railroad, and but a very small portion, a mere corner of the sidewalk in front of appellant's lot is taken.

The appellee is not a trespasser. It entered upon the street by legislative sanction, and with the approval of the city. So far as the general public is concerned, it unquestionably has the right to maintain and operate its road.

It is now too well settled in this State to need the citation of authority, that where private property has been acquired for a certain public use, it may be applied to any new mode of user in line with the primary purpose, and that a railroad may, therefore, be constructed along a street, provided it be so done as not to interfere with the reasonable use of it in the usual modes. The abutting lot owner has a right to the use of the street. It does not matter whether he owns the fee in the street subject to the public use or not, since he, as an adjacent owner, has a peculiar private right in it, which attaches to his lot, and which the law will protect. He is entitled to the reasonable use of it in all the ordinary ways. It is an easement attaching to his lot; an incident of his title; but while all this is true, yet he can not complain to a court of a mere inconvenience or decline in the value of his property, arising from the use of the street by the public in the way of improved modes of travel. It is only when the use becomes destructive of the primary purpose, and he is deprived of its reasonable use for such purpose, that he will be heard. The construction of a railroad over a street is not per se an illegal invasion of his right. (Cosby, &c. v. O. & R. R. Co., 10 Bush, 288.) Whether he can complain depends not upon the existence of the railroad, but the manner of its construction and operation. If he be thereby deprived of the reasonable use of the street, he may apply to the courts for relief; but if he be merely inconvenienced or suffer some remote consequential injury, it is damnum absque injuria.

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The Kentucky cases supporting these views will be found collated in Fulton, &c. v. Short Route R. Transfer Co., &c., 9 Ky. Law Rep., 291.

The testimony in this case is conflicting as to whether the appellant is deprived of his right to the reasonable use of the street by the running of trains of cars over it. The track next to his lot is used less than the other two, and the evidence tends to show that all of them are rarely, if ever, in use at the same time; and when even one of them is not, the street admits of travel.

Undoubtedly the operation of the road is an inconvenience and annoyance to the appellant. It may even be such an injury as entitles him to legal redress; but if so, it does not sufficiently appear in this record to authorize a court to afford it by the summary means of injunction, and especially when that from which the injury results has been authorized by the sovereign legislative power, and the injured party has a complete remedy by way of damages for any direct injury.

Relief by injunction should not be afforded in such a case unless the evidence clearly shows the existence of the right and its invasion, and that such a remedy is necessary to adequate relief. As said in L. & O. R. R. Co. v. Applegate, &c., 8 Dana, 289, not "unless strong reasons for doing it be conclusively manifested."

Such a state of case is not presented and the judgment is, therefore, affirmed.

CITY OF FRANKFORT v GAINES & CO.

(Filed December 18, 1888.)

1. Municipal taxation—Taxation of whisky of unknown owners—While whisky in the possession of distillers belonging to nonresidents of the State, or other persons whose names are unknown to the assessing officer, may, for purposes of State taxation, be properly assessed against the distillers having the possession, it can not be so assessed for city taxation where no authority is given the city by its charter to cause property to be listed by, or taxes to be collected from, any other person than the owner. And as no such authority is conferred upon the city of Frankfort by its charter, appellees, distillers, are not responsible to the city for taxes on whisky which was no longer owned by them when it was assessed as their property, although still in their bonded warehouses.

2. Same—A license tax paid by appellees to the city on their business as wholesale liquor merchants was not a discharge of taxes on whisky in their bonded warehouses, owned by them, as their business as wholesale liquor merchants was entirely distinct from that of manufacturing whisky.

George C. Drane, John L. Scott and W. C. Herndon for appellant.

A. Duvall, D. W. Lindsey and Wm. Lindsay for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Lewis.

W. A. Gaines & Co. instituted this action to enjoin the board of councilmen of the city of Frankfort from taxing, for municipal purposes, any part of 27,000 barrels of whisky assessed as the property of that firm for the year 1884, at the value of $216,000, or of 26,889 barrels assessed in the same way for the year 1885 at $215,000, and also the marshal and collector of the city from

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selling their property levied on to pay such taxes. And judgment having been rendered perpetuating the injunction as prayed for in the petition, the defendants have brought this appeal.

It appears that W. A. Gaines & Co., previous to and during the years named, owned and operated, within the corporate limits of Frankfort, a very large distillery, connected with and contiguous to which, as required by law of Congress, are bonded warehouses for storing the whisky manufactured until the taxes due the United States government are paid. The evidence in this case shows, however, that of the 27,000 barrels in the warehouses January 10, 1884, all except 4,502 barrels had been sold, and of the 26,889 barrels there January 10, 1885, all but 6,852 barrels had been sold. But though it appears from the evidence the purchasers of the whisky are nonresidents of Frankfort, it is not shown by the assessor's book, nor does any one for the firm undertake to state who the owners of any part of the whisky sold were at either date mentioned, and it is probable, as the warehouse receipts evidencing ownership are assignable, the fact can not be readily ascertained.

By an act passed in 1882 the city council of Frankfort was authorized to cause all stores, groceries and business houses within said city to be classified, and to tax each wholesale store not exceeding $250, provided that goods in such stores so taxed according to their class shall not be valued and included in the assessment of property for taxation in said city. It appears that W. A. Gaines & Co. own and occupy a storehouse in a ward in the city different from the one in which are the distillery and warehouse buildings, where, as shown by the license issued to them, they carry on the business of wholesale liquor merchants. And because a license tax of $250 was paid by them on that business, each of the years named, it is contended the board of councilmen is precluded from collecting an ad valorem tax on the whisky manufactured at the distillery and stored in the adjacent bonded warehouses.

It is to us clear that, in fact, as well as in contemplation of the statute, the business of wholesale liquor merchants, as carried on by the firm of W. A. Gaines & Co., is entirely distinct from that of manufacturing whisky. The evidence is there is never at one time more than one hundred barrels of whisky in the storehouse, and it does not follow that any part of even that comparatively small quantity was manufactured at the distillery in Frankfort, nor would it be either practicable or lawful to remove any of it from the warehouses to the storehouse before payment of the internal revenue tax, which may be delayed three years, though any or all of it may be sold without such removal. It would, therefore, be unreasonable and unjust to treat the payment of a license tax of $250 on the business of wholesale liquor merchants as a full discharge of taxes due under the city charter on nearly one quarter of a million dollars in value of whisky annually manufactured at the distillery and shipped from the bonded warehouses to purchasers without even being in the storehouse.

Whether the whisky in question, or any part of it, is subject to the taxation attempted to be imposed by the board of councilmen depends upon the meaning of section 13 of the city charter, passed March 16, 1869, as follows: "That the board of councilmen shall have power to assess annually, levy and collect a tax not exceeding two dollars and fifty cents on the one hundred dollars' worth of property, exclusive of the school tax and tax authorized to pay principal and interest of the bonds of the city issued for school pur-

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poses, on all real estate within the limits of said city, and all bank stocks, bridge stocks, manufacturing stocks, or any other kind of stocks, money, notes, or bonds of cities, towns, corporations or States, choses in action, and all personal estate of every kind, not exempt by law from execution, belonging to citizens of the city of Frankfort, and any capital or other property belonging to any other corporation or citizen of any other place employed in said city."

Counsel differ in argument about the meaning to be given to the word employed. It being contended for appellants that it was intended to be used and understood, in its application to personal property of nonresidents, as a substitute for and in the sense of "having an actual situs."' On the other hand, it is argued it was intended to apply to capital or personal property of such persons that may be used or employed to accomplish some purpose as contradistinguished to being stored or deposited. But it seems to us not necessary in this case to determine in what sense the word was used and intended by the legislature to be understood. For the whisky that was unsold, and still the property of W. A. Gaines & Co , on the tenth day of January of the years 1884 and 1885, was clearly liable to the tax imposed, and we are unable to perceive upon what ground the lower court perpetuated the injunction as to it. The situs of it was in the city of Frankfort: the owners of it, or at least one member of the firm, were residents, and it was as much liable to city taxation as any other personal property within the corporate limits.

But W. A. Gains & Co. are not responsible for taxes upon that portion which the evidence shows had been sold, and was no longer owned by the firm, when it was assessed as their property, although still in their bonded warehouses. It is true this court, in the case of Commonwealth v. Gaines & Co., 80 Ky., 489 (4 Ky. Law Rep., 379), held that whisky in the possession of distillers belonging to nonresidents of the State or other persons, whose names were unknown to the assessing officer, was properly assessed against the distillers having the possession. But it was so held because it was expressly provided by section 4, article 4, and section 11, article 5, chapter 92, General Statutes, that the person owning or possessing estates taxable for State revenue should list it with the assessor and remain bound for the tax, notwithstanding he may have sold or parted with it.

There is no authority given by the city charter to the board of councilmen to authorize property to be listed by, or taxes to be collected from, any other person than the owner, much less to levy upon the property of another to pay taxes due from such owner. And as all the power in reference to taxation for municipal purposes, which the board of councilmen possesses, is to be found in the city charter and not elsewhere, it seems to us the right to assess the whisky in question, or that portion already sold, against W. A. Gaines & Co., and to enforce the collection of taxes thereon from them, does not exist.

In our opinion, therefore, the lower court properly enjoined the collection from appellees of so much of the taxes as were assessed against them on the whisky they did not own, but erred as to that which they had not sold. And the judgment is reversed for further proceedings consistent with this opinion.

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MONTGOMERY v. WHITE, &c.

(Filed February 26, 1889—Not to be reported.)

1. Pleading—Heirship—In an action to recover the real estate of a decedent, the plaintiffs allege that one of them is her only brother and the others the children of an only sister, and that they are entitled to the decedent's estate as her "only heirs." Held—That the petition does not show any right in the plaintiffs to recover. It was incumbent on them to allege, and prove, if denied, that there were no other relations of the intestate entitled to the estate by descent in preference to themselves, the father and mother of the intestate, if living, being entitled to the estate in preference to the plaintiffs. And as there was no proof relative to this matter, this court will not send the case back with leave to amend, judgment having been rendered for defendant.

2. Same—The averment that the plaintiffs are "the only heirs" of the intestate is not an allegation of fact, but merely the conclusion of the pleader, and not admitted by a failure to deny.

Cochran & Son for appellants.

Wadsworth & Bro. and E. W. Hines for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Bennett.

On the 23d day of January, 1878, S. B. Poyntz conveyed by deed to Mrs. Elizabeth Connell, wife of the appellee, Thomas Connell, the absolute title to the house and lot in controversy. Mrs. Connell died intestate in 1885 without, as is admitted, any living issue, and without ever having had any children by the appellee, Thomas Connell, who was her second husband. The appellants, John Montgomery as the only brother, and William Dwyer, etc., as the children of the only sister of Mrs. Connell, claim the house and lot in controversy as her "only heirs."

The allegations of the appellants that John Montgomery was the only brother and William Dwyer, etc., were the children of the only sister of Mrs. Connell, who died without any living issue, and without having had any children by the appellee, Thomas Connell, do not of themselves entitle the appellants to take the estate. For chapter 31, General Statutes, Descent and Distribution, provides, in substance, that, in the absence of children of the intestate and their descendants, the father and mother of the intestate, if both are living, are each entitled to one moiety of the estate, and if the mother be dead, the father is entitled to the whole of the estate, in preference to the brothers and sisters of the intestate. Therefore, to entitle appellants to take any of said estate by descent from the intestate, Mrs. Connell, the father must have been dead at the time of her death; to entitle them to the whole of said estate the mother of the intestate must also have been dead at the time of her death. The appellants failed to allege that the father and mother, or either of them, were dead; unless that fact affirmatively appears, it must be alleged, as well as proved, if denied, the appellants are not entitled to take the estate by descent. Therefore, it was incumbent on the appellants to allege and prove, if denied, that John Montgomery was the only brother and William Dwyer, etc., were the children of the intestate's only sister; and that there were no other relations of the intestate who were entitled to the estate by descent in preference to themselves.

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In the case of Berkley, &c. v. Stewart, &c., 5 Ky. Law Rep., 609, it was alleged that the plaintiffs were the uncles and nieces of the intestate and "her next of kind," and were, therefore, entitled to the land conveyed to her in her husband's lifetime. This court held that it was necessary in order to entitle the plaintiffs to recover, to not only allege and prove, if denied, their relationship to the intestate, but to negative by allegation and prove, if denied, that there were no other relations of the intestate that were entitled to take the estate by descent in preference to themselves. It was also held in that case that the expression "next of kin" was not an allegation of fact, but the conclusion of the pleader, which was not sufficient to admit the proof of heirship; nor to establish the fact of heirship by the failure of the defendant to deny the allegation. Also the averment that the appellants are "the only heirs" of the intestate is not an allegation of fact, but is merely the conclusion of the pleader. (Larue, &c. v. Hays, &c., 7 Bush. 50; Greenleaf on Evidence, section 354.)

The appellants not only failed to allege that there were no nearer relations entitled to take the estate than themselves, but failed to take any proof relative to that matter; nor is there any proof relative to it in the record; so there exists no reason why we should send the case back with leave to amend.

Also the proof, as appears from the record, tends strongly to establish the fact that the deed, by mistake of the draftsman, fails to express the intention of the intestate and appellee, which was, that the property should be conveyed to the intestate with the right of survivorship in the appellee, if he should outlive her.

The judgment is affirmed.

VANMETER v. VANMETER'S ASS'EE.

(Filed March 30, 1889.)

1. Judicial sales—Setting aside sale—Where the statute regulating the manner of conducting judicial sales has been disregarded in making a sale, and the debtor has been prejudiced thereby, it is the duty of the court, upon exceptions filed to the commissioner's report, to set aside the sale, although made in strict conformity to the judgment, as the court, notwithstanding the judgment, has complete control over the mere manner of conducting the sale until the report of sale has been confirmed.

2. Same—It was error to sell a large body of land as a whole without first offering it in parcels, and this irregularity, connected with the inadequacy of price, was sufficient to entitle the debtor to have the sale set aside upon exceptions to the report, although the commissioner followed the judgment of the court in making the sale. And the fact that the sale was conducted under the supervision of counsel on each side is not sufficient to estop the debtor.

3. Rights of purchaser as to costs—Where the purchaser resists an effort to set aside the sale, and is unsuccessful, he should pay the costs incurred upon the trial of the exceptions as any other litigant. If he does not resist the effort to set aside the sale, he should be allowed his ordinary costs incurred as a bidder.

The court in this case properly refused to allow the purchaser an attorney's fee as part of his costs incurred upon the trial of the exceptions. Egard v. Chearnly, 1 Bush, 12, overruled.)

Wm. Lindsay, C. J. Bronston and W. B. Kinkead for appellant.

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Breckinridge & Shelby for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

The appeal is prosecuted in this case from the original judgment, and from the order overruling the exceptions to the commissioner's report, and confirming it. The reversal of the original judgment can in no wise benefit the appellant unless the order of confirmation is also reversed, and it is, therefore, only necessary to consider that branch of the case. The assignment evidently contemplated that some of the proceeds of the estate assigned, or a part of the estate itself, would, in all probability, be restored by the assignee to the assignor, but whether so or not the petition filed asked for a sale of the land, or so much as might be necessary to pay the debts of the appellant. The appellant and his wife both answer and consent to a sale of so much of the land as would pay the debts. At the time the sale was ordered under the judgment the amount of indebtedness had not been ascertained, and the court below, proceeding on the idea that all the land would have to be sold to pay debts, directed a sale of the entire tract without directing a sale in parcels, or any division, as required by section 694 of the Code. It is evident that the land could have been divided, and there was no evidence upon which to hold the conclusion that a division was impracticable; therefore, the commissioner should have been directed to offer the land first in parcels, and then as a whole, with a view of making it bring its full value. The chancellor below was satisfied, from the evidence heard on the exceptions, that the land did not bring its value, and, in fact, a bid was offered on the motion to set aside the sale securing an advanced bid of $4,000. The land sold was valuable, and the quantity of acres embraced in the entire tract was beyond the reach of purchasers who had but small means to invest, and this, perhaps, accounts for the land not bringing its full value.

The question presented is, can the debtor or the assignee for creditors disturb the purchaser when there is no such inadequacy in the price as would authorize the chancellor to reject the bid? There is no such inadequacy in this case, and if the report of sale had been confirmed without objection, the rights of the purchaser could not be affected by a reversal of the judgment. It is plain that if the court had directed the commissioner to make the sale, first dividing the land into parcels, and the latter had failed to follow the judgment, that the sale, upon exceptions filed, would have been set aside; and when the attention of the court, where there has been such a sale in plain disregard of the statute for the protection of the debtor, is called to the action of the commissioner, although in obedience to the judgment, ought not the sale to be set aside, and the error corrected by the court rendering the judgment?

The terms and the manner of the sale being regulated by statute, the court should correct the error before confirmation, if objections are interposed and an injury results to the debtor. It is not an erroneous judgment merely over which the court has no control, but an error as to the manner of sale that the court has control over until after confirmation. This view is not in conflict with the rule laid down in Stump v. Martin, 9 Bush, 285, where it is held that a mere inadequacy of price is not sufficient to set aside a sale, or the offer of an increased price when made in resisting the confirmation. There may be such an irregularity in the proceedings connected with the inad-

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equacy of price as will require the chancellor to interpose, and while he can not at his mere will set aside a sale, although he may believe that his decision is wrong on the merits, yet where the manner of sale is irregular, although authorized by the chancellor, it being a matter over which he has complete control, notwithstanding the judgment, if the rights of the debtor are prejudiced by it, he should see that justice is done him. The Code requiring a division of the land, where it can be made so as to prevent the sacrifice complained of in this case, not being followed by the commissioner or by the court, is such an irregularity connected with the inadequacy of price as will require the sale to be disregarded. The sale in such a case is not void, but being within the control of the chancellor, his power over it is unquestioned, as much so as in a case where the sheriff had offered the entire tract to satisfy an ordinary execution, on motion the court would quash the sale.

An attempt by the debtor to show on exceptions that no judgment should have been rendered against him on the merits, is no ground for invalidating the sale. Such an exception is altogether different from that which is in the nature of a ministerial act, or affects the mere manner of conducting the sale, although directed by the chancellor. The purchaser has notice of the irregularity when the exceptions are filed, and, therefore, can not complain. While it is apparent that these proceedings were conducted under the supervision of counsel on each side, we do not feel authorized to say that it works an estoppel on the debtor. The judgment is, therefore, reversed and cause remanded, with directions to set aside the sale, and order a resale, requiring a division of the tract so as it may be advertised and offered first in parcels and then as a whole, and for proceedings consistent with this opinion.

On the cross appeal of the purchaser it is insisted that the court below erred in refusing to allow him an attorney's fee as part of the costs on the trial of the exceptions below, and the case of Egard v. Chearnley, 1 Bush, 12, is relied on to support such an allowance.

That case is a much stronger case for the purchaser than the one before us, but, on an examination the statutes, we find no authority conferring such power on the chancellor, and the practice has been for years on this bench, to treat the purchaser as one of the parties litigant where he resists, as he has the right to do, the setting aside the sale. The motion is made by the owner of the land to set aside the sale upon sufficient grounds when shown to exist. The purchaser resists the motion, and the contest is then between him and the owner as to the right of the latter to have the bid rejected. If causes exist why the sale should be set aside the purchaser should be treated as if the vendor, in an existing contract, seeks a recission as against the vendee for equitable reasons. The party unsuccessful should pay the costs. It will not do, under our rules of procedure in equity in regard to decretal sales, to invite the purchaser to resist any effort to set the sale aside upon the idea that he will incur no cost or expense in the litigation. He should be treated fairly and allowed his ordinary costs, incurred as a bidder, where there is no contest made, but where he asks the confirmation, or opposes the motion to set aside the sale, there is no reason why he should not be required, like any other litigant, to pay the costs if unsuccessful. The exceptions are filed to the report of sale. He knows the grounds relied on and makes the contest at his peril. As this was a case to settle an assignment for the benefit of creditors, and the assignee favored the confirmation

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of the sale, the costs in this court should be apportioned equally between the purchaser and the appellant. The rule in Egard v. Chearnley is overruled.

BLEDSOE v. COMMONWEALTH.

(Filed March 12, 1889—Not to be reported.)

Reformation of verdict—Upon the trial of appellant under an indictment for murder, the jury having been instructed as to the law of both murder and manslaughter, returned the following verdict: "We, the jury, find the defendant guilty, and fix his punishment in the penitentiary for ninety-nine years." Thereupon the court reformed the verdict so as to make it read: "We, the jury, find the defendant guilty, and fix his confinement in the penitentiary for life." To this the jury agreed in open court as their verdict. Held—That the action of the court was not improper.

M. O. Allen for appellant.

P. W. Hardin for appellee.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted and tried in the Cumberland Circuit Court for the crime of murder. The jury, after having been instructed as to the law of murder and voluntary manslaughter, returned into court the following verdict: "We, the jury, find the defendant guilty, and fix his punishment in the penitentiary for ninety-nine years." Thereupon the court reformed said verdict so as to make it read: "We, the jury, find the defendant guilty, and fix his punishment at confinement in the penitentiary for life."

The jury were told if they found the appellant guilty of murder they should fix his punishment at death or confinement in the State penitentiary for life, and if they found him guilty of manslaughter that the maximum punishment was confinement in the State penitentiary for the term of twenty-one years.

It is manifest that the jury understood these instructions, and that they found the appellant guilty of the crime of murder and attempted to fix his punishment at confinement in the State penitentiary for life, and that, in fixing his punishment in the penitentiary for ninety-nine years, it was, according to all human probabilities, equivalent to a life sentence. Therefore, the verdict, as reformed by the court, expressed, in unambiguous terms, what was manifestly the verdict of the jury, and they agreed in open court, and in the presence of the appellant and his attorney, that said verdict, as written out by the court, was their verdict. It has been expressly decided by this court that such action on the part of the court was not improper. The evidence is not copied in the record; therefore, we can not consider any of the other errors assigned.

The judgment is afirmed.

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MITCHELL v. COMMONWEALTH.

Filed March 12, 1889.)

1. Indictment—As a general rule an indictment for an offense which is the creature of the statute, is sufficient if it describes the offense in the language of the statute. If, however, the statute merely imposes a penalty for a common-law offense, referring to the offense by its popular name, the pleader must define the offense by stating the common-law element necessary to its commission.

2. Same—Breaking into dwelling house—The offense of feloniously breaking into a dwelling house, or any part thereof, and taking away "anything of value," described in section 4 of article 5, chapter 29, General Statutes, is a creature of the statute, and an indictment following the language of the statute is sufficient. It is not necessary, therefore, to charge, as in case of larceny, that the taking was with felonious intention of depriving the owner permanently of his property and converting it to the use of the taker without the owner's consent.

3. Same—In determining whether the place which has been entered constitutes a part of the dwelling house, both the situation and the use should be considered.

In this case a cellar is held to have been a part of the dwelling house, although there was no internal communication between it and the dwelling.

Butler Hawkins for appellant.

P. W. Hardin for appellee.

Appeal from Campbell Criminal Court.

Opinion of the court by Judge Holt.

The indictment against the appellant, William Mitchell, charges him with feloniously breaking and entering the dwelling house of Julius Schultz by forcibly opening a cellar door and feloniously taking therefrom certain articles of property (naming them) of value belonging to Schultz.

Section 4, article 5, chapter 29 of the General Statutes, provides: "If any person shall feloniously take out of or from any church, chapel or meeting house, schoolhouse, courthouse, or other public building, any goods or chattels, or other things of value belonging thereto, or shall rob any person in his dwelling house, or place, or in any booth or tent in a fair or market, he, his wife, children or servants, or other person then being within, or shall feloniously break any dwelling house, or any part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously take away anything of value, although the owner or other person may not be there, he shall be confined in the penitentiary not less than two nor more than ten years."

The accused, upon conviction, made a motion in arrest of judgment, which, under our practice, can only be sustained when the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court. The ground urged in support of it is, that the indictment does not charge, as is necessary in case of larceny, that the taking was with the felonious intention of depriving the owner permanently of his property and converting it to the use of the taker without the owner's consent.

It does, however, aver that the accused feloniously broke and entered the dwelling house, giving the manner of it; that he feloniously took the propery therein named, and that it was of value. It conforms to the wording of the statute, and the offense, as stated in the statute, is complete within

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itself. It is the creature of the statute, and where this is so it is, as a general rule, sufficient to describe the offense in the language of the statute. (1 Wharton's Criminal Law, section 364.)

The case of Ward v. The Commonwealth, 14 Bush, 233, and upon which the appellant relies, is distinguishable from this one. It was an indictment under the same section of the statute as this one, but under that clause of it which provides: "If any person shall rob any person in his dwelling house or place," etc.

It is never sufficient to charge an offense merely by way of legal conclusion. If a statute refers to a common-law offense by its popular name, as, for instance, "robbery," and proceeds to impose a penalty for its commission, it is not sufficient to charge the accused with its commission in the statutory terms alone. (1 Wharton's Criminal Law, section 372.) In such a case the pleader must define the offense by stating the common-law elements necessary to its commission.

The evidence shows that the property was taken out of a cellar under the dwelling house, there being no internal communication between them. It was necessary to go out of the house into the yard to enter the cellar. The door to it opens out into the open air. It had no fastenings, but could not be opened without the use of force.

It is, therefore, now urged that the cellar was no part of the dwelling house, and that the accused, if guilty, is only so of a trespass and petit larceny.

There is a diversity of decision as to what does and what does not, in law, constitute a part of the dwelling house. Some cases include all within the curtilage, and this, according to Blackstone, appears to have been the common law rule, while others are made to turn upon the use.

It has been said that burglary may be committed by breaking into a dairy or laundry standing near enough to the dwelling house to be used as appurtenant to it, or into such outbuildings as are necessary to it as a dwelling. (State v. Langford, 1 Devereux, 253.) Also by breaking into a smokehouse opening into the yard of the dwelling house and used for its ordinary purposes; and cases are to be found holding that if an outhouse be so near the dwelling proper that it is used with it as appurtenant to it, although not within the same inclosure even, yet burglary may be committed in it. (State v. Twitty, 1 Haywood (N. C.), 102.) It need have no internal communication with the dwelling proper to give it this character. In Rex v. Lithgo, 1 Russell & Ryan, 357, the breaking was into a warehouse. There was no internal communication between it and the dwelling of the owner; but they were contiguous, inclosed in the same yard, and under the same roof, and it was held to be burglary.

Mr. East says: "It is clear that any outhouse within the curtilage, or same common fence as the mansion itself, must be considered as parcel of the mansion. * * * If the outhouses be adjoining to the dwelling house and occupied as parcel thereof, though there be no common inclosure or curtilage, they may still be considered as parts of the mansion." (2 East, 493.)

It is difficult to lay down any general rule upon the subject, owing to the nice distinctions to be found in some of the cases. It seems to us, however, that both the use and the situation should be considered. Can the place which has been entered, considering both its situation and use, be fairly considered as appurtenant to and a parcel of the dwelling house, or, as the

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older writers say, "a parcel of the messuage?" If so, then burglary may be committed by breaking into it.

The dwellinghouse of a man has peculiar sanctity at common law. It is his castle. The law intends its protection because it is the family abode. The object is to secure its peace and quiet, and, therefore, the burglar has always been liable to severe punishment. The law throws around it its protecting mantle because it is the place of family repose. It is, therefore, proper not only to secure the quiet and peace of the house in which they sleep, but also any and all outbuildings which are properly appurtenant thereto and which, as one whole, contribute directly to the comfort and convenience of the place as a habitation. If this reasoning be correct, then any which are not so situated or are not so used should not be regarded as a part of the dwelling, although they may, in fact, be within the curtilage. If there for other distinct purposes, as for instance, a storehouse for the vending of goods, or a shop for blacksmithing, and the dwelling is equally convenient and comfortable without them, and they are not, in fact, a part of it, as by being under the same roof so that the breaking into them will disturb the peace and quiet of the household, then they should not be regarded as a part of it in considering the crime of burglary, or the offense named in the statute. (Armour v. The State, 3 Humphreys, 379.)

If, however, an outhouse, having no internal communication with the dwelling proper, may be considered as so appurtenant to it that burglary may be committed therein, surely it would seem it should be so held as to a cellar under the dwelling, although there may be no means of internal communication between them. It is under the same roof. It is a part of the house in which the occupant and his family sleep. It is essentially part and parcel of the habitation.

It is manifest, however, that the statute above cited includes it. It says: "Or shall feloniously break any dwellinghouse or any part thereof, or any outhouse belonging to or used with any dwelling house." The language is quite sweeping, and it is clear it was the legislative intention in enacting it to embrace not only every part of the dwelling, but every outhouse properly a parcel of and appurtenant to it. It at once strikes the ordinary observer that it was not intended the cellar of a dwellinghouse should be excluded from its operation, and to so hold would not only be in the face of the language used, but unreasonable.

The accused was convicted upon altogether circumstantial evidence. It was for the jury to weigh it, however, and to determine from those circumstances his innocence or guilt.

Judgment affirmed.

GOWDY v. SANDERS.

(Filed March 12, 1889.)

1. Service of process—Executions—The word "process," as used in section 667 of the Code, which provides to whom "every process" in an action shall be directed, includes an execution.

2. Same—An execution must be directed to the sheriff of the county, and executed by him if he be not a party to the proceedings, or interested; if he be a party, or interested, it must be directed to the coroner and executed by him if he be not interested.

An execution was directed to the "coroner or jailer" of the county and executed by the jailer. Held—That the proceedings under the execution

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were void. The jailer had no authority to execute the writ unless both sheriff and coroner were interested, which does not appear. Upon the contrary, the presumption arises from the manner in which the writ was directed, that the coroner was not interested.

Charles Patterson for appellant.

J. T. Collins, J. W. Wood and J. Garnett for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Bennett.

The appellee's, E. T. Sanders, curtesy in a house and lot belonging to his deceased wife, was levied on and sold by virtue of an execution in favor of the appellant against the appellee. The appellant, having purchased the said interest, received a deed for the same. Thereafter he made a motion before the circuit court for a writ of possession. The appellee resisted the motion upon the grounds: First, that he was entitled to a homestead in said property; second, that the levy and sale were void. If the last-named ground is well taken, there is no need of inquiring into the first. The execution was directed to the "coroner or jailer of Taylor county."

By subsection 1 of section 667 of the Civil Code of Practice, "every process in an action or proceeding shall be directed to the sheriff of the county; or, if he be a party, or be interested, to the coroner; or, if he be interested, to the jailer; or, if all these officers be interested, to any constable." By subsection 26, section 732, "process" is defined to be a "writ or summons issued in the course of judicial proceedings." Subsection 27 defines the word "writ" to be "an order or precept in writing, issued by a court, clerk or judicial officer.

So the word "process," as used in section 667, means, among other things, a writ of execution, which must be directed to the sheriff of the county, and executed by him if he be not a party to the proceedings, or interested; if he be a party or interested, it must be directed to the coroner, and executed by him, if he be not interested; if he be interested, it must be directed to the jailer, and executed by him if he be not interested; if he be interested it must be directed to a constable. If the sheriff is not disqualified, neither the coroner, jailer nor constable can execute a writ of execution; nor can the jailer execute it unless the coroner is disqualified, nor can the constable execute it unless all three are disqualified.

The reason why the coroner, jailer and constable are denied the right to execute a writ of execution, if the sheriff is not disqualified by reason of being a party or interested, is: The duty involving experience and judgment, and the handling of large amounts of money, belongs directly to the office of sheriff, and the sheriff is required to give bond in an amount sufficient to indemnify against loss by reason of any default of his. By reason of the fact that the general duties of the jailer are inconsistent with the duties of sheriff and coroner, the coroner is regarded, as to executing processes, the next officer in rank, and he is required to give bond with a view to the fact that he will be required to execute writs of execution if the sheriff is disqualified. The jailer, in reference to such duty, is third in rank, and he executes bond with a view to that fact. In a word, it is the policy of the law that the sheriff, unless disqualified, shall, by himself or deputies, execute all the duties pertaining to his office, and that no one else

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shall execute them unless he is disqualified, in which case the duty devolves upon the coroner exclusively, unless he is disqualified, in which case the duty devolves upon the jailer.

That the foregoing is the true meaning of subsection 1 is made manifest by subsection 2, which provides that "the summons or an order for a provisional remedy in an action or proceeding" (neither of which entitles the officer to handle money), "may, at the request of the party in whose behalf it is issued, be directed to any of the officers named in subsection 1," provided he is not interested, etc.

The issue was made that neither the sheriff nor coroner was a party or interested. The execution shows that it was directed to the coroner or jailer, from which fact the presumption arises that the coroner was not interested, and that the execution ought to have been directed to him and executed by him; instead, however, it was executed by the jailer, which, in the absence of proof that both the sheriff and coroner were interested, he had no authority to do.

The judgment of the lower court is affirmed.

ROBINSON v. COMMONWEALTH.

(Filed March 12, 1889—Not to be reported.)

1. Contradiction of witness—In order to contradict a witness a foundation must be laid by calling his attention to the time, place and matter about which he is about to be contradicted.

2. Instructions as to self defense—Upon the trial of appellant for murder it was error to instruct the jury that he could not rely upon the ground of self-defense if he commenced or brought on the difficulty in which the deceased was killed, as there was no evidence showing that he commenced or brought on the difficulty. Besides, such an instruction is objectionable because the jury is left in doubt about the meaning in law of commencing or bringing on the difficulty.

Wood & Day for appellant.

P. W. Hardin for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellant having been indicted for the murder of Wm. Pearsall was convicted of manslaughter and sentenced to the penitentiary for twenty-one years.

It appears the wife of appellant had been employed by W. C. Glover to cook for his family, and with her husband occupied the kitchen, where the killing took place, as a sleeping place, he being occasionally employed to do work for Glover, and the deceased also lived in a cabin on the same farm. No one except appellant testified on the trial as to the precise manner in which the homicide was committed. But it seems the deceased had been sent by Glover to get a trowel from a neighbor, and the latter having just eaten his breakfast and seen the deceased return, started to the kitchen to get the trowel from him, and as he approached the door heard a pistol or gun shot fired, the deceased fell near the door inside the kitchen with trowel in his hand. Another witness testified he left the kitchen just as the de-

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ceased entered, appellant lying on the bed at the time. Those two witnesses state they heard talking in the kitchen just before the firing, one of them testifying it was loud talking, but neither understood what was said. Another witness testifies that appellant, while lying on the side of the bed a short time before the deceased returned with the trowel, gave to the witness a drink of whisky and showed to him a pistol and said he was going to kill the deceased when he came to breakfast. On the other hand, a witness, Davis, testified that on the day before the killing, he heard the deceased say he was going to kill appellant on sight, which the witness communicated to the latter the night before. According to the statement of appellant he had, for some time before the killing, been in bad health. That on the morning he shot the deceased the family had eaten their breakfast and gone out of the kitchen, when the deceased came in the door with something in his hand which looked like a knife. Appellant asked him if he had said he was going to kill him, to which deceased, in a loud voice and with an oath, replied he had, and came around the table toward appellant when he shot him with a pistol. Appellant, in his testimony, denied he had a bottle of whisky that morning, or that he had said he was going to kill the deceased when he came to his breakfast.

It appears that at the conclusion of evidence on behalf of the accused, the Commonwealth introduced a witness who stated he met the witness, Davis, on the day after the shooting, who, upon inquiry, said he never heard the deceased make any threats against appellant, and, notwithstanding objection, that testimony was permitted to go to the jury.

There is no rule of evidence better settled or more necessary than that requiring a foundation to be laid in order to contradict a witness by calling his attention to the time, place and matter about which he is about to be contradicted.

The threats proved by Davis constituted an important element of appellant's defense, and if his attenton had been first called to the time, place and person he might have explained the seeming inconsistency of his testimony, which, as this record stands, was probably disregarded altogether.

By instruction 4, the jury were told, in substance, the accused could not rely upon the ground of self-defense or apparent necessity if he commenced or brought on the difficulty in which the deceased was killed.

The right of self-defense is both inalienable and invaluable, and a jury should never be instructed to ignore or disregard it unless the evidence clearly warrants it. Such an instruction as the one under consideration is often misleading and prejudicial, because the jury is left in doubt about the meaning in law of commencing or bringing on a difficulty. A word spoken, not so calculated or intended, may sometimes be the commencement of a difficulty, or the person speaking may thereby, in one sense, bring on a difficulty.

There is no evidence in this case, except that of the accused, showing what was said or done in the kitchen previous to the shooting, and what he said, according to his testimony, did not, in legal contemplation, amount to commencing or bringing on the difficulty.

For the errors indicated the judgment is reversed and cause remanded for a new trial.

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WILMOT, &c. v. BORDER.

(Filed March 14, 1889—Not to be reported.)

Ejectment—Judicial sales—In this action by appellee to recover land which he purchased at judicial sale, the record of the proceedings being destroyed, and the evidence being conflicting as to the land purchased by plaintiff, the judgment of the lower court in his favor is affirmed.

Isaac A. Stewart for appellants.

W. O. Bradley for appellee.

Appeal from Rockcastle Circuit Court.

Opinion of the court by Judge Bennett.

The appellee brought a separate action in the Rockcastle Circuit Court against each of the appellants to recover the possession of a distinct parcel of land that each held without right. The answers raised equitable issues common to both cases. They were thereupon transferred to equity and consolidated.

It is claimed by the appellants that one of the tracts of land was composed of two small tracts that W. E. Wilmot purchased from ——— Parsons; that after said purchase W. E. Wilmot mortgaged said tract of land to S. Noland; that he, by his petition in equity, enforced his mortgage lien on said land and purchased it, together with another tract that belonged to M. G. Wilmot, which he (M. G. Wilmot) had also mortgaged to secure said debt; that S. Noland gave W. E. Wilmot time in which to pay off said judgment debt and redeem his and M. G. Wilmot's land; that after making some payments on the judgment he (W. E. Wilmot) and Noland sold the tract of land that belonged to W. E. Wilmot to the appellee for money enough to pay off the balance of the judgment, interest and costs, which sum the appellee paid to Noland, whereby M. G. Wilmot's land was released. The appellee contends that he purchased not only the land that belonged to W. E. Wilmot, but the tract that belonged to M. G. Wilmot. The record, exhibits and proceedings of the old suit were burnt; therefore, their contents have to be established by oral proof.

W. E. Wilmot's recollection is, that he alone executed to Noland the note and mortgage, the mortgage being upon his own land alone. But he states that Noland presented to him a paper to sign, which he did sign, but did not understand it, and M. G. Wilmot's name was to the paper as his surety; and M. G. Wilmot's land was sold and Noland purchased it, together with his own land. On the other hand, it is established by the weight of evidence that the note and mortgage were signed by W. E. and M. G. Wilmot, and the lands of W. E. and M. G. Wilmot were included in the mortgage, and that both tracts of land were sold and purchased by Noland to satisfy said mortgage debt; and the appellee purchased both tracts, and was entitled to the possession of the same, and, the lower court having so adjudged, its judgment is affirmed.

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HEAD v. CLARK.

(Filed March 14, 1889.)

1. Judicial sales—Discretion of commissioner—Where a commissioner making a sale under decree of court discovers, after the hammer has fallen, and the purchaser has been announced, that he has made a mistake, he may announce the fact and proceed with the sale, the parties and the crowd still being present.

Appellant and appellee were both bidding the same amount at a decretal sale, but the commissioner hearing only appellant's bid, let the hammer fall and announced that appellant was the purchaser. Discovering at once his mistake, he proceeded with the sale, the interested parties and the crowd being still present, and, appellee increasing his bid, the property was knocked off to him. Held—That this was proper.

2. Same—In so far as the commissioner is not restricted by the terms or the general law, he has a reasonable discretion as to the time and manner of conducting the sale.

Montgomery Merritt for appellant.

Yeaman & Lockett for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

This is a contest between two bidders at a decretal sale of land, each claiming to have been the purchaser. The bidding at the outset was spirited, several engaging in it, but it finally narrowed to these two contestants. The appellee, J. W. Clark, bid by signs made by holding up his hand, and which the commissioner making the sale understood and recognized. The appellant, W. G. Head, was outspoken in making his bids. There was quite a crowd present, and some confusion existed. A bid of $5,325 was offered, the master and some of the bystanders understanding it as the bid of Clark, and it was so cried. He testifies, however, that he did not make it. Head then bid $5,350, and so did Clark. The master understood Head's bid only. Some of the persons present testify that Head made this bid, and others appear to have understood it as Clark's bid. It is evident both made it, and that when it was being cried each understood it as his bid. Some of the bystanders thought Head's bid was being cried, while others believed it was the bid of Clark. The hammer fell, and the master announced that the property was sold to the appellant, Head, at $5,350. He asked him to give the initials of his name, and directed his clerk to write his name down as the purchaser, and he did so. The appellee, Clark, then and there claimed that he had made the bid, and that he was the purchaser. The master at once, and while both parties and the crowd were yet present, but over Head's protest, again offered the property, crying it at $5,350, when Clark bid $5,375, and it was knocked off to him. Head tendered and delivered to the commissioner satisfactory bonds for the $5,350, for which he claimed to have bought the property, and Clark gave like bonds for the $5,375 bid by him. The master reported the facts to the court for its direction and judgment. Both parties to this appeal made themselves parties to the action by proper pleading, each claiming the property.

The lower court held that the action of the commissioner in reoffering the property was, under the circumstances, proper; accepted the bonds of Clark

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as the purchaser, and Head has appealed. He now claims that when the master knocked off the property to him the contract of purchase was closed, subject, of course, to rejection or ratification by the court upon the master's report; that the master's duties were then at an end, and that no matter what mistake had been made, or what misunderstanding had existed, he, from that moment, had no power over the matter, and no duty to perform, save to report his action to the court.

It is a general rule as to sales by auction that a bid is a mere offer of purchase, and may be withdrawn until accepted, but when the hammer falls, or the bid is otherwise accepted, it becomes a binding contract. The minds of the parties then meet, and the auctioneer can not, of his own will, rescind the sale. (Grotenkemper v. Achtermeyer & Co., 11 Bush, 222.) In the case of judicial sales the court itself has no mere arbitrary power over them, but must regard the rights of all the parties, including the purchaser, and exercise a legal discretion as to rejecting or confirming them; and still less has its commissioner, who is a ministerial officer, the power to control them at will.

If it be conceded, however, that in the case of an ordinary sale by auction, the power of the auctioneer is at an end the moment the hammer falls, and that the contract of purchase is then closed, no matter what mistakes he may have committed, or what misunderstanding may have existed upon his part as to the bidding, yet we are unwilling to say that this is true as to a decretal sale attended by circumstances similar to those now under consideration. In an ordinary sale by auction, the auctioneer is the agent of the seller only, until the sale is made, when, for certain purposes, he becomes the agent of both parties.

A commissioner, acting under a decree has, however, duties to perform as to the complainant, the vendor, the purchaser and the court, and in the performance of those duties he must exercise his best judgment. He is necessarily invested with a reasonable discretion in many respects as to the manner of its exercise, taking care, however, to obey the decree so far as it has given him specific directions. In acting under it he should adopt all proper means to fulfill its directions, and in doing so he is, unless restricted by its terms or the general law, to exercise a sound discretion. He may, for good reason, decline to sell at the time advertised. If there be but one person present, or by reason of sham bidding a sacrifice of the property is reasonably certain to occur, he may refuse to proceed.

It was said by the Supreme Court of the United States, in Blossom v. Railroad Co., 3 Wall, 209, that he might "be justified in postponing the sale to a future day to prevent the sacrifice of the property. Every such officer has a right to exercise a reasonable discretion to adjourn such a sale, and all that can be required of him is that he should have proper qualifications, use due diligence in ascertaining the circumstances, and act in good faith, and with an honest intention to perform his duty."

Undoubtedly a sheriff, in selling under execution, may exercise his discretion in the respects to which we have alluded, and we see no reason why a commissioner, in selling property under decree, should not have the same right. The fact that his action is not final until approved by the court does not present a sufficient reason for a distinction.

It would certainly have been proper in this instance, owing to the circumstances attending the sale, for the court, had Head been reported to it as the

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purchaser to have set the sale aside. (Rorer on Judicial Sales, section 421.) Why then, under the circumstances, should its master, when aware of the mistake and misunderstanding upon his part and with the knowledge that in point of fact when he announced the sale as made, there really had been no highest bid offered, and hence no sale in fact made as directed by the decree, be compelled to report to court, instead of proceeding to properly make it? All the parties were still present. The appellant, Head, had an opportunity still to bid for the property. The commissioner had merely announced that he was the preferred bidder, because he thought he was the highest bidder, when in fact he was not, and discovering his mistake immediately, and when the interested parties were yet present, he had such a discretion in the matter as authorized him to declare the mistake and proceed with the sale. The decree directed him to sell to the highest and best bidder. At least this was his duty, and he had not done it, and, finding at the time that he had not done so, he had a right to comply with the decree in view of the fact that those interested were still present and could not fairly suffer any injustice, but would otherwise, perhaps, obtain an unjust advantage through mistake.

A commissioner ordinarily is left to select the time in the day when he will sell. He may, in the absence of regulation in the decree, adjourn the sale to another hour in order to obtain a fair price, or determine which piece of property shall be first sold, or, owing to sham bidding or lack of bidders, refuse altogether to sell at the time fixed by his notice. He may, when not restrained by the decree or the general law, adopt such measures as are reasonably calculated to promote the fairness of the sale, and it has even been held by many courts that he may adjourn an advertised sale to a different time or place in order to obtain a fair price for the property. (Rorer on Judicial Sales, section 119.) In our opinion the master had, in view of the existing circumstances, a right to disregard what had occurred by mistake and proceed with the sale; and that the judgment of the lower court, confirming his action, was proper.

Judgment affirmed.

CHESAPEAKE & OHIO R. R. CO. v. COMMONWEALTH.

(Filed March 14, 1889.)

1. Former acquittal—Two indictments were found at the same time against appellant for nuisance by obstructing a public road with its cars. The time at which the offense was charged to have been committed was the same in both indictments. Appellant having been acquitted under one indictment, pleaded former acquittal upon the trial of the other. Held—That as the State has the right in such a case to show that the defendant had committed the offense charged at any time within a year prior to the indictment, a conviction or an acquittal under one indictment does not ipso facto bar another indictment found at the same time for the same character of offense. The first trial is a bar to the further prosecution for only such offenses as were then proved or attempted to be proved; and whether the same acts were proved or attempted to be proved upon the first trial is a question of fact. Therefore, as the defendant in this case offered testimony tending to show that upon the first trial the Commonwealth in the examination of its witnesses embraced the entire year, the issue thus presented should have been submitted to the jury, as this testimony, if true, showed the attempt to prove the obstruction at the time named by the witnesses in this case.

2. Indictment—The charge in one of the indictments that the obstruction

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was "habitual" was surplusage, and did not change the character of the offense.

Breckinridge & Shelby for appellant.

C. J. Bronston for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Holt.

Two indictments were found at the same time against the appellant, The Chesapeake & Ohio R. R. Co., for nuisance by obstructing a turnpike road with its cars. Each charged that the offense was committed at the same time, and they are couched substantially in the same language, save the one now under consideration avers that the obstruction was "habitual." A continuing nuisance was not charged however; and it is proper only for the purpose of abatement. Punishment only was sought; and the charge, therefore, of habitual commission was surplusage, since although each act of obstruction constituted an offense, yet a conviction could be had under the one indictment for but one offense, although frequent ones were charged. The same character of offense was, therefore, charged in each indictment.

One of the cases was tried, resulting in an acquittal. Subsequently, and at the same term of court this one was also tried, the plea being a former acquittal as well as "not guilty," and the verdict, a fine of $750 against the appellant.

It offered in evidence the record of the former case, and also introduced several witnesses to show the identity of the offenses charged. At the close of the evidence the lower court refused either to instruct the jury to find for the appellant or as to the issue presented by the plea of former acquittal.

It is now contended that the record alone of the former case afforded evidence which, as a matter of law, conclusively sustained this plea, and that it was the duty of the court to draw this necessary legal conclusion, and instruct the jury to find for the accused. This argument is based upon the general rule that if the first indictment were such that the accused might have been convicted under it upon proof of the facts by which the second is sought to be sustained, then the jeopardy which attached upon the trial of the first one is a bar to a trial upon the second one. (1 Wharton's Crim. Law, section 565; Cooley's Con. Limitations, 328.)

It is true the indictments were found upon the same day; they were for the same character of offense; they covered the same period of time, because the statutory limitation under our law to such a prosecution is one year; but the time named in them as being that when the offense was committed was not material, and each obstruction was a distinct offense. The State was not confined to any particular time, but had the right to show that the appellant had so offended at any time within a year previous to the finding of the indictment. This being so a conviction or an acquittal would not ipso facto bar another indictment found at the same time and charging the same character of offense. Whether the same act was proven or attempted to be proven upon the trial of the other one would be a question of fact, and the first trial would only be a bar to a further prosecution for such offenses as were then proven or attempted to be proven. This would of course have to be shown by extrinsic evidence. The general rule, therefore, above cited, does not control such a case.

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If A be tried for the murder of B and acquitted because of a failure to prove some material fact, as the death of B, then it does apply, and a second trial can not be had upon the ground that the Commonwealth has now secured the testimony. In such a case there is but one offense. It is unlike this one. In this character of case the State could, upon the trial of one indictment, select one particular act or offense and proceed for it; and under the other indictment, although found at the same time, it would prove a different one. It does not follow, therefore, that an acquittal under one indictment is necessarily an acquittal not of one only, but of every act within the year, the proof of which would have sustained the first indictment. If this were the rule then, although the accused might have committed the offense a hundred times within the year, yet an acquittal upon an indictment, under which it could only be convicted for a single commission, would be a complete protection as to all, although in point of fact but the one unlawful act had been investigated. The statement of a proposition leading to such a result is its own refutation.

The fundamental law protects one from being twice put in jeopardy. Indeed the rule is imbedded in the very elements of the common law, not only as to criminal, but even as to civil cases: nemo debet bis vexari, pro una et eadem causa; but yet it recognizes not only the difficulty, but the necessity of punishing offenders; and, therefore, in its wisdom does not confine the Commonwealth in proving offenses to the time named in the indictment; but it may prove or attempt to prove the commission of the offense at any time not beyond the period fixed by limitation. In a case like this one it can not, upon the trial of the second indictment, prove any act which it even attempted to prove upon the other trial. In the attempt embraced the entire year in a short of drag net way, then it may properly be said that the accused has been tried for all the offenes attempted to be proven. He has, in such a case, been in jeopardy as to all the unlawful acts of the year of the character of that named in the indictment, and it does not matter that the State may have then failed to show his guilt. If it could, upon the trial of one indictment, inquire as to whether at this time or that, or whether during a certain time the accused had not committed the offense, and then, because it failed to elicit his guilt, retry him upon another indictment and go over the same ground, he would be subjected to continuous trials. Such a rule would be unjust to the citizen and violative of not only the letter but the spirit of the law.

Whether the accused has been once in jeopardy, whether the State has, upon the trial of another indictment, proved or tried to prove the same offense is, however, in a case like this one, where there is testimony tending to show a question of fact, to be submitted to a jury under proper instruction. It rests upon the defendant to show, however, that he has been acquitted of the identical offense, but this is done when it is made to appear that the same conduct was previously inquired or attempted to be inquired into by the State.

In this instance the appellant offered testimony tending to show that upon the trial of the first indictment the Commonwealth, in the examination of its witnesses, embraced the entire year and endeavored to prove that at some time during that period the appellant had committed the act constituting the offense. This, if true, necessarily involved the attempt to prove the obstruction of the road at the time named by the witnesses in this case, and the issue thus presented should have been submitted to the jury.

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Judgment reversed and cause remanded, with directions to grant the appellant a new trial and for further proceedings consistent with this opinion.

PEAK, &c. v. WIGGINTON, &c.

(Filed March 14, 1889—Not to be reported.)

Construction of deed—The land in controversy was devised by W. to M., his daughter. M. was, at the death of her father, the wife of C., but had children by a former marriage. Those children claimed that the land in controversy should have been devised to them jointly with their mother, under a contract made by W. with their father, but, W. having failed to do so, they claimed that they were entitled to some recompense for what their father had done and paid for the testator, and, as a recompense, C, their stepfather, executed to each of them his note for a certain amount, and all they were bound to do when arriving at full age, in order to entitle them to payment of the notes, was to release their claim and causes of action. When they respectively arrived at full age, however, C. required each of them to execute a deed of release as a condition of paying the notes. Each of those deeds conveys to C. all title to the land devised by W. to M., and also releases and discharges the said land and estate of W. from all debts and causes of action whatsoever. M., the mother of the grantors, did not die until after the execution of the last deed. Held—That these deeds were intended merely to release the claims which the grantors had, as heirs at law of their father, against the estate of W., and against those who acquired possession of it under the will, and were not intended as conveyances of title in the land. Therefore, the grantors are entitled to the land jointly with their half-brothers and sisters, as the heirs of their mother, subject to the life estate of C.

Thos. J. McElrath for appellants.

Masterson & Gaunt for appellees.

Appeal from Carroll Circuit Court.

Opinion of the court by Chief Justice Lewis.

The land in controversy was devised by William Heath, who died in 1851, to his daughter, Mariah B., who first married Levi Lee, by whom she had three children, appellants, and was the wife of C. S. Wigginton, appellee, at the death of her father, and at her death, and by him also had three children. It appears from the evidence that, in 1850, or in 1851, a parol agreement was made between Levi Lee and William Heath, by which the former agreed to pay $500 to R. D. Heath, the son, and $300 each to Lucy Lee and Susan Stafford, the two daughters of the latter, and to support and care for him and his wife while they lived, in consideration of the tract of land and such personalty as was on the farm; that, in pursuance of the agreement, the whole amount, except $100 going to Susan Stafford, was paid by Levi Lee to the three persons, and he removed to the land, and continued, until his death in 1856, to care for and support William Heath and his wife. But no deed or other written evidence of the agreement was ever executed. It further appears that just before the death of Levi Lee, William Heath promised, in response to his request for a deed, that his (Heath's) will should be a deed, and after the death of Levi Lee he did cause a will prepared, giving the land to Mariah B. Lee and her children. But after she married C. S. Wigginton

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he wrote for William Heath another will, the one that was probated, by which the land and all the testator's personal estate except $100 to Lucy Stafford was devised to Mariah B. Wigginton alone. After the death of William Heath, however, the uncle and aunts of the three infant children of Levi Lee insisted that some recompense be made to them for what their father had paid and done for and at the request of the testator, and to accomplish that object and as appears also compromise all disputes about the will and the disposition of his estate, the following scheme was resorted to: By a deed made in 1861 C. S. Wigginton and Mariah B. Wigginton conveyed to R. D. Heath an undivided fourth part of the land, and on the same day he reconveyed the same to them, whereby C. S. Wigginton became invested with title to one-eighth of the land. Not long afterwards they conveyed to J. W. Lee, husband of Lucy Lee, another undivided fourth, which he immediately reconveyed to them, C. S. Wigginton thus acquiring altogether the absolute title to one-fourth of the land. At the respective dates of the two sets of deeds a written contract was made, one of them being between C. S. and Mariah B. Wigginton and R. D. Heath, and the other between them and J. W. Lee. But the two contracts were almost identical in language and the same in purpose.

It further appears that C. S. Wigginton, at the time the deeds and contracts were respectively made, executed notes to the then infant children, bearing interest from date, and payable as they respectively arrived at the age of twenty-one, aggregating $666.66⅔, the other third of the $1,000 paid at the request of William Heath by Levi Lee being, as the evidence shows, claimed by C. S. Wigginton as the dower interest of Mariah B.

In the two contracts it was, in substance, stipulated that the deeds and notes had been executed in compromise and discharge of all controversies and claims between the parties growing out of the settlement and division of the estate of William Heath under his will and under the statute of descent and distribution, or otherwise, including the infant children of Levi Lee; that the whole estate of the testator was to pass according to the will; that C. S. Wigginton was to pay said notes in compromise of all claims of the children of Levi Lee, or of his estate against the estate of the testator, and in case they did not, upon arriving at full age, receive the amount of the notes in compromise and release of all claims or causes of action against the parties to the contract, as well as the estate of William Heath, the provision made for them and the notes should be of no effect.

It appears that when the children of Levi Lee, respectively, arrived at full age, C. S. Wigginton required each of them to execute a deed of release as a condition of paying the notes, and upon the construction and meaning of those deeds depends the decision of this action. As they are all alike, or substantially so, we need refer to only the one executed by Lucy J. Peak and her husband in 1869, the other two having been executed in 1870 and 1873. After a recital in the deed that the notes were executed under the written contracts mentioned, is the following: "Now, in consideration of the payment by said Wigginton of the full amount of said notes, the parties of the first part have bargained, sold, conveyed and released * * * unto said C. S. Wigginton all right, title, claim or interest whatever, either in law or equity, held by the said parties of the first part in and to the tract of land * * * owned by William Heath, and devised by his last will to his daughter, Mariah B.; and also, by these presents, release, acquit and dis-

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charge the said land and estate of William Heath, and also said C. S. and Mariah B. Wigginton, from all debts, dues, demands, and causes of action whatsoever."

Mariah B. Wigginton did not die until 1882, nine years subsequent to the date of the last of the three deeds of release; and the question involved in this action, brought by C. S. Wigginton in 1885 to quiet his title, is, whether the children of Levi Lee, in common with the three by the second husband, were, upon the death of their mother, entitled each to one-eighth of the land. If they were not it was because they conveyed their several interests by their respective deeds of release to C. S. Wigginton, in which case he has in addition to an estate for life as tenant by curtesy, an absolute title to five-eighths of the land. It seems to us that, regarding the language used in these deeds in connection with the subject matter, and the situation and purpose of the parties, there is no room for doubt about the construction. The consideration and inducement for the execution of the notes was the compromise and release of claims or causes of action which the children of Levi Lee had against the estate of William Heath, devised to Mariah B. Wigginton, on account of the $1,000 paid, and for supporting and taking care of him and his wife. And all, according to the meaning of the contracts and purpose of the parties to them, they were bound to do when arriving at full age, in order to entitle them to payment of the notes by C. S. Wigginton, was to release their claim and causes of action. But neither when the notes were given, nor when the deeds of release were made, did they have any title to or interest in the land, being mere expectant heirs of their mother, who was no party to the deeds.

To construe the deeds as intended to merely release the claims they had as heirs at law of Levi Lee against the estate of the testator, and against those who acquired possession of it under the will, would be consistent with the purpose and with the language used. But to construe them as conveyances of title in the land involves an attempt by the children of Levi Lee to do what they had no legal right to do, and received no consideration whatever for doing, either of which considerations would be a sufficient reason for rejecting such construction.

We think the children of Levi Lee never parted with, but were, upon the death of their mother, entitled each to one eighth of the land, subject to the life estate of C. S. Wigginton; and the judgment of the lower court is, therefore, reversed for further proceedings consistent with this opinion.

FICHTNER v. FICHTNER'S ASS'EE.

(Filed March 14, 1889.)

Lunatic married woman—Sale of inchoate right of dower—Under the statute providing for the sale and conveyance of the inchoate right of dower of married women who are confirmed lunatics, the bond required to be executed by the husband secures to the wife the present value of her inchoate right of dower, which "becomes complete" within the meaning of the statute when the sale is made under the judgment and perfected by a conveyance depriving her of all right in the land. And in estimating the value of the wife's inchoate right the amount of a mortgage on the land in which she has united with the husband should be deducted from the value of the land.

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A. Lincoln Dembitz for appellant.

Brown, Humphrey & Davie and Marshall & Lochre for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

John Fichtner, the husband of the appellant, Catherine Fichtner, being involved in debt, made an assignment of all his estate for the benefit of creditors, and, by the terms of the deed made, valuable real estate passed to the assignee. Fichtner and his assignee, Lochre, having sold several parcels of the land under executory contracts, filed this petition in the Louisville Chancery Court asking a sale and conveyance of the inchoate right of dower of the appellant in this land so as to make a perfect title. In the petition it is alleged that the wife (Catherine) is a confirmed lunatic, and has been so adjudged by the Jefferson Circuit Court, and this proceeding is had under an act of the legislature approved March 14, 1878, providing for the sale and conveyance of the inchoate right of dower of married women who are confirmed lunatics. (General Statutes, page 835.) The act provides in express terms that whenever a married woman is a confirmed lunatic, the circuit or chancery court of the county where the land is situated may, on the petiiton of the husband, adjudge the sale and conveyance of the inchoate right of dower.

The wife was made a defendant, with the proceedings all regular, and the land sold in the manner provided by the act, and conceding the power of the legislature, which we think is unquestioned, to pass laws regulating the sale of such property belonging to those who are under the parental care of both the legislature and the chancellor, it is only necessary to determine the single question presented in this case, that arises from a construction given the last clause of section 3 of the act by the court below. That clause provides: "Before any judgment shall be rendered in pursuance of the provisions hereof, the husband shall, before said court, execute, with sufficient surety, a covenant to the Commonwealth for the benefit of his wife, that she shall be paid the value of her inchoate right of dower in said land, should such right thereafter become complete, and to perform all orders of the court in the premises. Such covenant and surety shall be approved by the court." The case was referred to the commissioner, with directions to ascertain the present value of the wife's inchoate right of dower in the land sold by the husband and his assignee, and the commissioner reported back its value at $986. It is insisted by counsel for the wife that the bond to be given by the husband, required by the statute, secures, or should secure, to the wife the value of her dower in the estate conveyed, in the event she survives her husband; in other words, she is to be paid the value of her dower now inchoate when the same thereafter becomes complete. If she survives the husband, she takes as widow the value of her dower in money instead of the land itself, and dying before the husband, she takes nothing.

While there is some reason for urging such a construction, on account of the awkward manner in which the claim in question is framed, we are satisfied, in looking to the object to be accomplished in connection with the power conferred on the chancellor, such is not a correct interpretation of the legislative intent. The chancellor is empowered to sell and convey the in-

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choate right of dower, and when sold, in order to pass this right, the committee, if the lunatic has one, if not, the commissioner, as the act provides, shall unite with the husband, as the wife would if sui juris, in conveying her inchoate right in the land. The committee, or commissioner, represents the wife passing her potential right, and the husband passing the fee. The object is to enable the chancellor to have executed to the vendee such a conveyance as the husband and wife could make if the wife was of sound mind. The act further provides that the deed executed by the husband and the committee, or commissioner, shall pass the inchoate right of dower. It is manifest, therefore, that the purchaser acquires, by such a conveyance, all the right that he would or could have acquired if the wife had been sui juris.

The question then arises, is the wife entitled to the present value of her inchoate right, or must she wait until the happening of her surviving the husband before she can assert any claim by reason of the sale by the chancellor? The stipulation of the bond following the statute is that she shall be paid the value of her incohate right of dower in the land, and not the value of her dower in the event she survives her husband. She shall be paid that value should such right thereafter be complete. It might be argued that the sum fixed as the value is not to be paid until the wife becomes discovert by the death of the husband, but such a construction would in effect deprive the wife of any present interest in the proceeds of a sale that estops her from asserting her right to dower at the death of her husband, and is as unreasonable as allowing her, as against the husband and his sureties on her bond, the full value of her dower at her husband's death, when its stipulation is that she shall be paid the value of her inchoate right. When did her right become complete? The response is, when the sale was made under the judgment and perfected by a conveyance depriving her of all right in the land. Before a judgment is rendered the bond is signed, payable to the committee, securing to the wife the value of what she parts with. This value you agree to pay the wife, should such right thereafter be complete. So whether the purchaser complies with his bid or not, the wife is made secure by the execution of a bond when her right is sold and conveyed. It then becomes complete, and she or her committee at once entitled to the money. The wife, whether the husband is solvent or insolvent, may insist upon having set apart to her the value of this potential right. It has been often approved by this court, and in many cases held to be a fair equivalent as against creditors for property passed to the wife by the husband in consideration of her relinquishment. If the wife had been of sound mind when this proceeding was had, she would have been equitably entitled as against creditors to the value of this potential right in the attempt for their benefit to perfect the title of the purchaser. It has a fixed or ascertainable value, and the chancellor, under this statute, is authorized to do that which the wife, if sane, could have done, first securing to the lunatic the value of that right the purchaser obtains under the sale and conveyance. The money is the property of the wife: may be used and disposed of for her benefit through or by some one authorized to act for her, and in such case the chancellor will see that her rights are protected. (Lancaster v. Lancaster, Trustee, 78 Ky., 199.)

There was an incumbrance on the realty sold, by way of mortgage, for $5,000, and to this extent the wife, when sane, had relinquished her dower. This was deducted, and we think properly, from the value of the land when determining the value of the potential right of dower, and the mere fact

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that the relinquishment was to the one creditor or grantee can make no difference. That mortgage debt has to be satisfied out of an insolvent estate, and to that extent the dower is gone, and the amount should be subtracted from the value of the entire land. The mortgage is only a lien, but still its foreclosure carries with it all the right of the wife to the extent that the land may be sold to satisfy it, and, therefore, the wife is only entitled to compensation out of the land left.

We construe the judgment below as vesting in the wife the absolute right to the monied value fixed on her potential right and must, therefore, affirm the judgment.

BURGESS v. COMMONWEALTH.

(Filed March 14, 1889—Not to be reported.)

Homicide—Instructions—On the trial of cases of homicide it is generally, if not always, prejudicial to the accused for the court to recite in an instruction the facts established by the testimony, and then say to the jury if such facts exist they must find the accused guilty of a certain degree of the offense.

In this case the court invaded the province of the jury in summing up the facts and telling them if these facts existed they should find defendant guilty of murder. The jury should have been allowed to say whether the killing was in sudden heat and passion.

Guffy & Graves for appellant.

P. W. Hardin for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Pryor.

We have not been favored by a brief from counsel for the appellant, although his client was convicted of murder in the court below, and the punishment fixed at confinement in the State prison for life. Fred Burgess was convicted of the murder of his brother-in-law, George Harris.

The offense was committed on Christmas morning, in the year 1878, at the home of the deceased and under the following circumstances:

It seems that Harris had been twice married, and also his wife, both having children of their first marriage. One of the children of Mrs. Harris by her first husband lived with her father, and the day prior to the killing the mother (wife of Harris), who had saved, from the proceeds of her labor over the wash tub, the means to purchase a small piece of cloth, out of which she desired a dress made for her child, sent the cloth to her mother to be made up.

The husband, George Harris, conceived the idea that she had sent more goods than was necessary, and for that reason became angry and threatened to burn up the clothing of the wife. He was a trifling, drunken, disagreeable husband that often exercised his limbs by chastising and kicking his wife, and from this conduct on his part originated a hostile feeling on the part of her brothers towards him On Christmas morning the trouble between the husband and wife culminated in the husband choking and kicking her from the house, telling her that she was a whore, and had learned

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such practices from her mother. The wife found her way to the home of her father and approached the door of the house crying, and repeated to her brother the cause of her trouble, and what had been done and said by the husband. The houses, from the proof, were only a short distance apart (the exact distance does not appear), and her brother, as soon as his sister had given him the details of the trouble, seized his pistol or obtained one, and he and his brother went to the house of Harris, entered it and there the difficulty occurred, resulting in the shooting of Harris and the crippling of his son by his first wife. Whether he shot the son purposely does not appear. Both were running from the house in the same direction when several shots were fired. The defendant testifies that he was assaulted in the house by both the son and father. By the one with a hatchet and by the other with a pistol before he made any demonstration of a hostile character. Whether this was so or not was a question alone for the jury to determine, and from the verdict it rendered they seem to have disregarded his testimony. It is manifest, from the testimony that the accused was wild with excitement, yet by no means in such a condition as not to be responsible in law for his conduct. We have only to pass on the instructions given by the court below, and if prejudicial to the substantial rights of the accused, this judgment and conviction must be reversed. The instructions in regard to murder and manslaughter were properly given, but, in our opinion, instruction No. 4 took from the jury the right of determining whether the killing was in sudden heat and passion, and left the jury with no other alternative but to acquit the accused or find him guilty of murder.

The jury was told that "if they believed the prisoner armed himself with deadly weapons, and sought deceased with the purpose of having a rencounter with him, and if, in execution of the purpose, he found deceased and began an altercation with him, and prosecuted same to the death of deceased, he should not be acquitted on the ground of self-defense, nor will the affray thus arising, or the heat of blood thus produced, reduce the degree of the prisoner's guilt as in instruction No. 2." This (No. 2) was the manslaughter instruction, and if the facts existed as detailed in the instruction, the jury was told that the crime could not be reduced to that offense. The facts were, in susbtance, as given by the court, and still the appellant may have seized his pistol, making for the home of the deceased, and under circumstances that not only indicated, but evidenced, sudden heat and passion, with no time for his better judgment to prevail, and if in this condition he took the life of the deceased, it should have been left to the jury to say whether or not he was guilty of manslaughter or of murder. The court below invaded the province of the jury in summing up the facts, and instructing them that if such facts existed the accused was guilty of murder. There was no evidence in this case showing any self-defense but the testimony of the brothers charged with the murder, and with their testimony out of the case, the jury should have been permitted to say whether or not the killing was in sudden heat and passion. In fact the decided weight of the testimony shows a killing in sudden heat and passion, and it may be said that on the trial of all cases of homicide, it is generally, if not always, prejudicial to the accused for the court to recite the facts established by the testimony in an instruction, and then proceed to say to the jury that if such facts exist they must find the accused guilty of a certain degree of the offense. If there is any testimony tending to lessen the degree, the jury should be left free to determine the one or the other, and as the instruction

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in this case was erroneous in this regard, the judgment below is reversed and the cause remanded, with directions to award a new trial and for proceedings consistent with this opinion.

PARKER, &c. v. PARKER, &c.

(Filed March 14, 1889—Not to be reported.)

Advancements—Trusts—A decedent left children by each of two marriages. His children by his first wife claim that certain sums of money received by them from their father should not be charged to them as advancements, because the money was received by their father from their mother under an agreement by him to hold it in trust for them. Held—That if it be conceded that a trust of this kind can be established by a parol agreement the agreement must be clearly and definitely established, which is not done in this case.

F. M. Baker for appellants.

J. W. Henson for appellees.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Bennett.

W. J. Parker died intestate. He was twice married; by his first wife he had four children, by his second wife, who survived him, he had children. He received $4,000 by his first wife, which, after her death, he let his children by her have in equal portions. They claimed that W. J. Parker agreed with his wife, their mother, that he would waive his right to this money and hold it in trust for her and her children by him, which agreement he kept, and, pursuant thereto, he paid said children, after the death of their mother, their respecitve shares of said money; therefore, the same should not be charged to them as an advancement. This agreement, if made at all, was made just after the civil war. W. J. Parker died recently. The appellants seek to establish the agreement by the proof of one witness, who states that, just after the war, Mrs. Parker returned home with $1,000 in gold, which her father had given her; that she and her husband, W. J. Parker, verbally agreed that the latter should take the money and keep it for these children, and he received it by virtue of that agreement. It was also proven by other witnesses that W. J. Parker on several occasions, between the time mentioned and 1876, said that he had received $4,000 by his first wife which he was holding, according to his promise to her, for their children, and eventually, that he had paid it over to them as their estate, derived from their mother.

On the other hand it is in proof, that is, under the circumstances, entirley trustworthy, that W. J. Parker took receipts from three of said children, by which they acknowledged that the respective sums received by them were advancements out of his estate. The fourth child, John, received from his father $1,000 worth of land, and it may be presumed that he received said land in the same way that his brothers and sister received said money.

If it be conceded that a trust of this kind can be established by a parol agreement, the agreement must be clearly and definitely established. The proof of the trust consists in the recollection of what one witness heard W. J. Parker and wife say in reference to the trust over twenty five years ago,

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and the recollection of other witnesses as to what they heard W. J. Parker say in reference to said trust many years ago.

This evidence is not strong enough to overcome the presumption that W. J. Parker received said money, by virtue of the marital relation, in his own right, strengthened, as the presumption is, by the well established fact that he took receipts from his children showing that the money was received as advancements out of his estate. Therefore, the chancellor did not err in charging said children with said sums as advancements. The question as to whether or not W. J. Parker held said sum in trust for his first wife is the only question urged here by the appellants.

The judgment is affirmed.

NICHOLS v. NICHOLS.

(Filed March 14, 1889—Not to be reported.)

Divorce—Abandonment—In this action by the husband for a divorce upon the ground of abandonment, a writing executed by the parties several months after the abandonment, in which it was stated that the plaintiff and defendant having separated, certain arrangements in reference to their children and property rights were entered into, did not justify the inference that the separation was by mutual consent, the evidence showing the abandonment, and that it was without plaintiff's fault.

Thos. H. Hardin for appellant.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Bennett.

The appellant alleged in his petition that he and the appellee were husband and wife; that they were married in Mercer county, Kentucky, in 1871; that they both had lived in said county ever since their marriage; that the appellee had abandoned him without his fault, and lived separately and apart from him for one year and more; that he and appellee had resided in Mercer county for more than one year before the bringing of his action; that the cause of divorce had occurred within five years before he brought his action. All of these allegations were fully proven, and there was no countervailing evidence whatever, yet the chancellor dismissed the appellant's petition. We are at a loss to know upon what ground the petition was dismissed, unless it was upon the ground that a writing was filed, executed in March, 1887, several months after the abandonment, in which it was stated that the appellant and appellee having separated, certain arrangements in reference to their children and property rights and alimony were entered into, from which the chancellor might have drawn the inference that the separation was by mutual consent. In view of the facts stated in the record such inference would be wholly unjustified; for it conclusively appears that the appellee abandoned the appellant, and that such abandonment was without any fault of his whatever, and that she had lived separate and apart from him without his fault ever since.

The judgment dismissing the appellants' petition must be reversed and the cause remanded, with directions to grant the appellant a divorce in accordance with the prayer of the petition.

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KEATON, &c. v. PENNINGTON, &c.

(Filed March 14, 1889—Not to be reported.)

Partition—Appellant seeks by this action to recover a parcel of a tract of land owned by the common ancestor of all the parties, which she says was allotted to her in the division of the ancestor's land by parol made prior to his death. After the ancestor's death, and eleven years before this action was brought, the land was divided by a proceeding in the county court, in which appellant's name appears as a party plaintiff, but she says she had no notice of that proceeding, and that her name was used without her authority. Held—That if appellant was no party to the division, and has not acquiesced in it, she is entitled to a redivision, but she can not insist that there shall be allotted to her any particular parcel of this land, and is not entitled to a redivision in this case, because she has not asked for it. And if she had, it does not appear that there was anything unfair in the division already made.

E. F. Dulin and J. B. Botts for appellants.

J. B. Hannah for appellees.

Appeal from Elliott Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted on the common law side of the docket, and was good as an action of ejectment. For some reason a demurrer was sustained to the petition, and an amended petition filed that transferred the case to the equity docket. In the amended petition the appellant is seeking to recover a parcel of a tract of land owned by the common ancestor of all the parties, that she says was allotted to her in a division of the ancestor's land by parol made prior to his death. The father of the appellant and appellee had several children, and, as the proof shows, made conveyances to his two sons of their interest in his land, and no doubt intended the parcel of land in controversy for the appellant, Mrs. Keaton. He died before consummating this purpose, and left the balance of his land undivided, or if divided, had made no deeds to his other children.

After his death, a petition was filed in the county court of Elliott, asking a division of the land between his children. The name of the appellant appears as a party plaintiff to that petition, and the testimony shows that her husband was present when the division was made. She says that she knew nothing of the proceeding, and her name used without her authority, and the division of the land made complete by the commissioners without any notice whatever to her. There is no averment that this division was unfair, or any attempt made to set it aside, but the appellant is insisting on the allotment to her of that parcel of the land intended for her by her father, and is bringing an ejectment for its recovery.

Many years have elapsed since her father's death, and since the division was had in the Elliott County Court. That division was made in the year 1868, eleven years before this petition was filed, and it is a singular fact, if true, that the attention of the appellant was never called to it until about the time this action was instituted. If she was no party to the division, and has not acquiesced in it, she is entitled to a redivision, but she is in no condition to insist that there shall be allotted to her any particular parcel of this land, and is not entitled to a redivision in this case, because she has

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not asked for it, and if she had, we see nothing unfair in the division already made.

Judgment affirmed.

REYNOLDS v. McFARLAND & CO.

(Filed March 14, 1889—Not to be reported.)

Construction of deed—J. conveyed land to M., his son, the deed providing that M. was not to sell to any person except T. and W. The deed also provided that it was not to take effect until after the death of the grantor and wife. Thereafter M. conveyed the land to W., the deed providing that it was subject to the provisions of the deed from J. to M. In this action to enforce a mortgage executed by W., Held—That without inquiring as to the validity of the clauses restricting M.'s right to convey, he had the right to convey to either T. or W., and the court properly adjudged the land subject to the mortgage, but erred in adjudging to the wife of J. only a dower interest. She is entitled, by the terms of the deed, to a life estate.

James Goble and R. H. Weddington for appellant.

Walter S. Harkins for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Chief Justice Lewis.

In May, 1878, John H. Reynolds and Cynthia Reynolds, in consideration of love and affection, and $100 to be paid to Anna Sowards, conveyed a tract of land to their son, C. M. Reynolds, "his heirs and assigns," the habendum being in the following language: "To have and to hold the same, with all the appurtenances, unto the party of the second part, his heirs and assigns, forever; and the party of the first part hereby covenants with said party of the second part that they will warrant the title to the property hereby conveyed to said party of the second part and his heirs forever; that is to say, M. C. Reynolds is not to sell and convey said land to any person except Thomas Reynolds and William Reynolds; and if said M. C. Reynolds shall sell or convey, then this deed is to be void; and if the said M. C. Reynolds should get in debt or any liability that will sell said land, this deed shall be null and void, and the land shall then go to the heirs of his body, and if he has no children, to go to his brothers and sisters; and should said M. C. Reynolds die before his wife, she is to live on said land her lifetime, unless she should marry, then, in that event, the land shall go to his heirs at the time of said marriage. This deed is not to take effect until after the death of myself and the death of my wife, Cynthia Reynolds, and at her death then this deed is to be in effect."

In November, 1880, M. C. Reynolds and wife conveyed, or attempted to convey, the same land to William Reynolds mentioned in the deed just quoted from, the granting clause containing the following: "That said party of the first part, in consideration of a swap in land—that is, M. C. Reynolds has given his land where he now lives, the same deeded to him by John H. Reynolds, for the land deeded to William Reynolds, and with they same provisions of the deed from John H. to M. C. Reynolds—do hereby sell and convey to the party of the second part, his heirs and assigns," etc. The habendum is as follows: "To have and to hold * * * unto the party of the

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second part, his heirs forever; and the party of the first part covenant to warrant the title to the party of the second part and his heirs that is with the same provision of deed from John H. Reynolds to M. C. Reynolds." Subsequently William Reynolds executed a mortgage to appellees on the same land to secure certain debts, and the consolidated actions in which the judgment appealed from was rendered were instituted to enforce the mortgage lien to pay the debts.

In the answer of William Reynolds he disclaims any title to the land, because M. C. Reynolds was without the power to convey it. And Cynthia Reynolds filed her answer claiming a life estate in it.

Without inquiring whether the clauses of the deed restricting the right of M. C Renyolds to alienate the title by deed, we think, by the terms of the deed of John T. and Cynthia Reynolds, he had the power to sell and convey to either Thomas or William Reynolds, and his deed to the latter was not void but effectual to pass the title. Consequently the lower court properly adjudged the land subject to the mortgage debts of appellees, but erred in adjudging Cynthia Reynolds had only a dower interest.

In our opinion, according to the plain language of the deed, a life estate in the whole tract was reserved and belonged to her, and all the estate William Reynolds could mortgage, or be made subject to his debts, was his interest in remainder after the termination of such life estate.

For that error the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

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SUPERIOR COURT ABSTRACTS.

ROSENBERGER v. ROSENBERGER.

Filed March 20, 1889. Appeal from Louisville Chancery Court. Opinion of the court by Presiding Judge Ward, affirming on original and reversing on cross appeal.

Divorce—In this action by the husband (appellant) for a divorce upon the ground of abandonment by the wife for more than one year, the wife filed an answer and cross petition, asking a divorce and maintenance for herself and children on the ground of confirmed habits of drunkenness on the part of the husband, continued for more than a year, accompanied with a wasting of his estate and without suitable provision for the maintenance of his wife and children; and of habitually behaving for six months in such cruel and inhuman manner as to indicate a settled aversion to her, and to destroy permanently her peace and happiness. Held—That under the evidence the wife was entitled to a divorce and reasonable provision for the support of herself and children left with her. The judgment refusing the husband a divorce is affirmed.

John W. McGhee for appellant; John Roberts for appellee.

CARPENTER, &c. v. WARNOCK, ADM'R.

Filed March 20, 1889. Appeal from Carter Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

1. Sheriff—County levy—For the years 1879, 1880 and 1881 the salary of a county judge was fixed and allowed by the county court of claims In the year when each allowance was to be paid, it was listed by the county clerk on the list of claims payable out of the levy for that year, and this list was furnished to the sheriff. The levies imposed for 1879 were not sufficient to pay the claims allowed and to be paid out of it, and in this way there was a deficit carried forward from year to year until the year 1882, when the levy imposed was sufficient to discharge the claims allowed against it, and the deficit which had been brought forward from the other years. The claims were listed with the sheriff but once, but at the end of the year settlements were made ascertaining the amount in his hands and the per cent. it would pay on the claim for the years before, and then a general order was made directing the sheriff, out of the levy imposed for that year, to pay the per cent. yet due on unpaid claims, as well as the claims payable out of the levy for that year. In this action by the administrator of the county judge against the sureties on the sheriff's bond for the year 1882 to recover the deficit due his intestate for past years, Held—That the plaintiff is entitled to recover. The placing of a county claim on a list made out and delivered by the clerk to the sheriff is not indispensable to the right to recover. The statute (General Statutes, chapter 27, article 2, section 7) was simply intended to provide a mode by which the sheriff may receive official information that a claim has been allowed, and to furnish him with evidence which will protect him in making the payment.

2. Same—The sheriff's settlements and the orders of the county court relative to the payment of county claims were competent evidence against the sheriff and his sureties.

E. B. Wilhoit for appellant; E. F. Dulin and R. C. Davis for appellee.

BEMISS v. WOOD.

Filed March 20, 1889. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Ward, affirming.

Questions of fact—In this action upon an assigned note, in which the de

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fendant pleaded an entire failure of consideration, and also that before notice of the assignment he had paid the note, and that the original payee was largely indebted to him, the evidence sustains the judgment in favor of plaintiff.

John A. Fulton for appellant; C. T. Atkinson for appellee.

COURIER-JOURNAL CO. v. WEAVER.

Filed March 20, 1889. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Libel and slander—In an action for libel or slander, it is necessary for the plaintiff to allege that the words were published maliciously, but an answer merely denying such an averment, or denying that the words were "false or slanderous" does not raise an issue.

2. Same—Burden of proof—If the defendant admits the publication and presents a defense to the action—as the plea of justification, or that the occasion made the words privileged, or that the words were spoken in jest, and were so understood by the hearers—the burden is on him to establish his defense, and he is entitled to the closing argument to the jury.

3. Same—The denial of the amount of damages claimed does not place the burden on the plaintiff.

Evidence—The defendant having introduced the warrant of arrest against the plaintiff can not complain that the indorsement upon it showing the plaintiff's discharge was also read to the jury.

Frank Hagan for appellant; Matt O'Doherty and J. M. Chatterson for appellee.

GALBREATH'S ADM'R v. GALBREATH.

Filed March 20, 1889. Appeal from Mason Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Arbitration and award—Mistakes of arbitrators in matters of judgment, whether upon questions of law or fact, which do not prove partiality or corruption can not be corrected.

2. Same—That one of the arbitrators employed the plaintiff after the submission of the controversy to arbitrators; that he, upon two occasions, rode to town in a buggy with the plaintiff; that before the trial he went to the office of the plaintiff's attorney and remained there some time and heard some of the papers in the case read; and that during the trial he spoke of one of the plaintiff's witnesses as "one of our witnesses," are not sufficient facts to show undue partiality. And, besides, they all occurred before the award was made, and the objection should have then been made.

3. Same—The hearing of evidence in the absence of the parties, and without giving them an opportunity of being heard upon it, is a sufficient ground for setting aside an award. And the evidence thus heard in this case is none the less prejudicial, because it came from one of the arbitrators.

4. Same—The calling by the arbitrators of plaintiff's counsel before them, after the case was submitted, and in the absence of defendant and his counsel, and consulting with him and taking his opinion in regard to a matter pertaining to the controversy under consideration, is sufficient ground for setting aside the award. In such a case it devolves upon the party seeking to maintain the award to show clearly that no injury to the opposing party could or did flow from the advice given.

Cochran & Son and J. G. Hickman for appellant; Thomas R. Phister, G. W. Adair and Wm. Lindsay for appellee.

ALEXANDER, &c. v. ASHER.

Filed March 20, 1889. Appeal from Clark Circuit Court. Opinion of the court by Judge Barbour, reversing.

Measure of damages—The petition avers that the plaintiffs were the owners of a raft of logs which they were floating down the Kentucky river to the Frankfort market, when they were stopped by a boom which the defendant had unlawfully erected across the river, and detained by the defendant,

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who refused to open the boom until late in the day. That when the boom was opened they were compelled to go on with their raft or tie it up and leave it there, thereby losing the rapidly-flowing tide; that the day was then so far spent they could not reach their landing before nightfall, and that in consequence of the darkness their raft struck an object, lodged in the river, and was broken up and sixty-four of their logs lost. That if they had not been detained they would have passed this obstruction when they would have seen and avoided it. The prayer of the petition is for $300 damages. Held—That the petition states a cause of action, and entitles the plaintiff to recover such damages as were the natural result of the defendant's wrongful act. But as the loss of the logs was not the ordinary and natural result of the detention of the raft, the plaintiffs can not recover therefor. The question as to what the recovery may be for will arise on the evidence and the instructions. It is not alleged that the lost logs were worth $300, so as to justify the interpretation that plaintiffs claimed damages for their value only.

I. N. Cardwell for appellants; W. M. Beckner for appellee.

HILL, FLETCHR & CO.'S ASS'EE v. FLETCHER, &c.

Filed March 20, 1889. Appeal from Louisville Chancery Court. Opinion of the court by Judge Bowden, reversing.

Partnership—Trusts—F. having money belonging to his wife, which she had placed in his hands, delivered $800 of the trust fund to the clerk of a firm of which he was a member, and directed the clerk to credit the amount to his personal account, stating at the time that he would need the money in a few days and would draw it out. The clerk made the entry as directed, and deposited the money in bank to the credit of the firm. The clerk knew the money belonged to F.'s wife, but it does not appear that the other members of the firm knew that fact. The deposit was made December 3, and December 17 the firm check was drawn in favor of R for $800, and was paid the same day. It does not appear that there was any intention on the part of F. or his partners that the money should be used by the firm. Held—That the firm was not liable for the money after it was withdrawn by F. This fund did not come into the possession of the firm in any sense other than that in which it would have gone into the possession of a bank in which it might have been deposited by F.

Dodd & Grubbs for appellants; Brown, Humphrey & Davie for appellees.

NELSON v. BLACK.

Filed March 20, 1889. Appeal from Ohio Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Vendor and vendee—A vendee in possession and undisturbed, though holding under a deed with general warranty, may, if the title is defective and the vendor insolvent, resist the collection of the purchase money, and demand a perfect title or a rescission.

2. Pleading—A petition to enforce a lien on land for the unpaid purchase money alleges that the plaintiff sold and conveyed the land to defendant "for the consideration of $1,200, $600 of which has been paid, and two notes, one due 1st of January, 1888, for $300, and one for like amount due the 1st day of January, 1889." Held—That the petition is defective. (Huffaker v. National Bank, 12 Bush, 289.)

J. P. Sanderfer for appellant; John McHenry for appellee.

AUGUSTUS, &c. v. WURSTER.

Filed March 20, 1889. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Bowden, affirming.

1. Married women—Decree to trade as feme sole—The better way in suing a married woman who has by decree the powers of an unmarried woman, is to allege that she has been so enfranchised, but when the petition does not

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show her coverture, and the answer does not plead it as a defense so that it may be replied to, evidence of the fact given on the trial may be answered by the record conferring the powers of a feme sole.

2. Same—A married woman thus empowered is amenable to the same rules as if she had never been married. Therefore, she is liable for the price of work which she has procured to be done upon property owned by her.

Hainey & Hammond for appellants; Frank Hagan for appellee.

MAYSVILLE & BIG SANDY RAILROAD v. WARNOCK.

Filed March 27, 1889. Appeal from Greenup Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Trespass—In this action against a railroad company to recover damages for a trespass upon plaintiff's land committed by entering upon his land and taking dirt to make a fill, the presumption is that the entry and taking by the contractors employed to construct defendant's road was by the license and consent of defendant, and, therefore, the defendant is liable.

2. Punitive damages—Where there is a tortious invasion of one's rights by another, he is entitled to punitive damages, and the assessment made by the jury will be upheld unless the court is satisfied from the evidence that the finding is excessive. Therefore, an instruction in this case authorizing the jury to find punitive damages was proper.

3. Measure of damages—The measure of compensatory damages in this case is the difference in value of the plaintiff's land before and after the removal of the dirt and the temporary injury, if any, inflicted on the land while removing. It was, therefore, error to instruct the jury that they should find for plaintiff such sum as the dirt removed was then and there worth to defendant.

4. Evidence—Evidence as to what it would cost to fill up the pit, and as to what the dirt was worth when put into a fill on the railroad, was irrelevant and incompetent.

Wadsworth, Whitaker & Bennett for appellant; E. F. Dulin for appellee.

GARVEY, FELLMAN & CO. v. CROUCH.

Filed March 27, 1889. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Pleading—Practice—After a reply was filed in the clerk's office in vacation an order was made traversing of record the averments of the answer not traversed in the reply. Held—That this was a recognition of the reply as a part of the record, and, therefore, it will be so regarded.

2. Set-off—One member of a firm can not set-off against a debt due by him a debt due to the firm, and the fact that he may be the only solvent member of the firm is immaterial.

3. Counterclaim—As this action was instituted to recover an alleged balance due to plaintiffs growing out of the consignment and sale of defendant's tobacco, any matter that related to and arose out of that transaction is a proper subject of counterclaim in this action, no matter whether it be a liquidated amount, such as the failure to account for a sum for which tobacco was sold, or whether unliquidated, as for damages arising from misappropriation or negligence in caring for the tobacco.

Montgomery, Lindsey & Botts for appellants; J. W. Green and E. E. Settle for appellee.

CARROLL'S ADM'R v. CARROLL.

Filed March 27, 1889. Appeal from Harrison Circuit Court. Opinion of the court by Judge Barbour, reversing.

Executions—Devise of proceeds of land—A testator devised land to his widow for life, and directed his executor, at her death, to sell the land and pay to L. a certain part of the proceeds. C., by purchase, acquired the interest of L. Held—That C.'s interest, like that of L., was in the proceeds and not in the land, and was not subject to levy and sale under execution;

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yet, if he allowed it to be sold and afterward confirmed the sale by a conveyance of the land to the purchaser under the execution, such conveyance was sufficient to pass what interest he had in the proceeds. But the evidence does not sustain the charge that the land, in the proceeds of which C. had an interest, was included in the boundary conveyed by him.

J. Irvin Blanton for appellant; A. Perrin for appellee.

COMMONWEALTH, FOR USE, &c. v. ALLEN, &c.

Filed March 27, 1889. Appeal from Hancock Circuit Court. Opinion of the court by Judge Barbour, affirming.

Appeals—There can be no reversal for an error in giving or refusing instructions unless all the instructions are included in the bill of exceptions or identified by order of court.

W. S. Roberts and R. E. Duncan for appellants; Thomas H. Hines for appellees.

COMMONWEALTH v. HARPER, &c.

Filed March 27, 1889. Appeal from Grayson Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Liquor selling—Indictment—The indictment charges that within the year preceding March 3, 1888, the defendants sold spirituous liquors without a license. Held—That there was no law prescribing a penalty for such sales during the period named.

2. Same—Distillers—Query: Where several partners are operating a distillery, can each partner sell, at his residence, spirits of the firm's manufacture?

Chapeze Wathen, Commonwealth's Attorney, for appellant; J. M. McClure, Jr., and Will R. Haynes for appellees.

WATTS v. PHILLIPS & CO.

Filed March 27, 1889. Appeal from Whitley Court of Common Pleas. Opinion of the court by Judge Bowden, affirming.

1. Practice—In this ordinary action the law and facts were decided by the court. There was no separate statement of conclusions of fact, and no motion for a new trial. Held—That the pleadings only can be considered.

2. Police courts—The judgments of police courts created by municipal charters have been so often treated as valid that the objection that the title of the charter makes no reference to the court can not be entertained.

R. S. Crawford for appellant; A. Duvall for appellees.

THE NEWPORT NEWS & MISSISSIPPI VALLEY CO. v. GHOLSON.

Filed March 27, 1889. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Bowden, affirming.

1. Instruction as to damages—In this action to recover for personal injuries resulting from defendant's negligence, the court instructed the jury that if plaintiff sustained injury to his person they should find "a fair compensation for the mental and physical pain and suffering, if any, he sustained." Held—That the right to recover for mental suffering was recognized only in case there was also physical injury, and, therefore, the instruction was proper.

2. Personal injuries—Evidence—The evidence was that the plaintiff was driving a milk wagon; that his horse was frightened and ran away; that the wagon, while he was in it, was overturned. and that he was held by it where he was thrown until he was extricated. Held—That from the facts given the jury were authorized to conclude he received some injury.

Quigley & Quigley and Holmes Cummins for appellant; W. G. Bullitt for appellee.

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KENTUCKY COURT OF APPEALS.

CITY OF COVINGTON, &c. v. BISHOP, &c.

(Filed March 16, 1889—Not to be reported.)

In this action against appellant to compel it to repair a certain street a judgment was rendered directing the repair, and a rule was subsequently issued against appellant to show cause why it had not complied with the judgment. The appellant, in its response to the rule, stated that it had repaired the street to the extent it was formerly improved, and to an extent sufficient for safe and convenient travel. Held—That the evidence does not sustain the statements of the response.

Hallam & Myers and Fisk & Fisk for appellees.

Appeal form Kenton Circuit Court.

Opinion of the court by Judge Bennett.

There has been no brief filed for the appellants.

The appellees, in 1859, filed their petition against the appellant to compel it to repair Front street, in said city, between Garrard and Shelby streets. The appellees allege that they owned property abutting the south side of said street, and the appellant owned the property abutting the north side of the same for a public landing or wharf; that said street was fifty feet wide, and had been dedicated to the city as a public street, and the city had received it as one of its streets, and had macadamized and otherwise improved it as such; but since then the high water from the Ohio river had cut said street in and otherwise damaged it so as to render it unfit for a public street. The lower court having sustained a demurrer to the petition, this court reversed the ruling of the lower court upon the ground that the city having taken said street in charge and improved it as a public street, its duty to keep it in repair was mandatory, and a mandamus would lie to compel it to put the same in repair. So the case was sent back in 1863 for further proceedings in conformity with the opinion. Thereupon the lower court entered judgment directing the appellant to put said street in proper repair, etc. Since then the common council of the city have been ruled from time to time (as many as seventeen times in all) to repair said street in a proper manner.

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The council would occasionally respond, but the chancellor rejected each and every response as not in compliance with the judgment.

At the September term, 1887, the council filed another response, in which it was said that said street, exclusive of the sidewalks, which were eleven feet wide, was never improved by the city to a greater width than fifteen feet north of the curb line; that the street was then improved between the south curb line and the top of the slope on the north side of the street, a width of from seventeen to twenty-four feet, and only at one point is its width as narrow as seventeen feet, the width of the remaining portion varying from twenty to twenty-four feet; that the high water in the last few years from the Ohio river had greatly washed and damaged said street; that the city was put to great expense in repairing the same to the extent above indicated, which was sufficient for safe and convenient travel, etc. The chancellor rejected this response because it appeared that the judgment directing the repair of said street had not been complied with.

According to the weight of evidence the appellant did not repair the street to the extent in width that it was formerly improved; nor was it repaired in a substantial manner; nor was it repaired in a manner to render it reasonably safe, commodious and convenient for public travel; that it could have been repaired in accordance with the judgment of the chancellor at not an unreasonable outlay. It seems to us that the judgment of the lower court rejecting the response is clearly correct, and the appellee's counsel realizing that fact, declined to file any brief.

The judgment rejecting the response is affirmed.

SCOTT, &c. v. WILSON, &c.

(Filed March 16, 1889—Not to be reported.)

1. Ferries—In this controversy as to the ownership of a ferry landing on the Ohio river, and the ferry franchise, the appellee, who is in possession and owns the tract of land, in front of which is the landing, and who has a ferry license from the county court, must, under the evidence, be regarded as the rightful owner of the ferry privilege, and entitled to the exclusive use of the ferry landing.

2. Same—It being illegal for appellant to ferry across the Ohio river from the Kentucky shore without a license from the county court, his use of the ferry landing, however long continued, did not ripen into a perfect title.

John L. Scott for appellants.

Cochran & Son for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Chief Justice Lewis.

The judgment appealed from was rendered in two actions consolidated and tried together; one instituted in 1875 by Herbert Wilson against Thomas B. and J. C. Scott, to which Herbert L. Wilson also became a party; the other was brought by Herbert L. Wilson against Thomas B. and J. C. Scott, and Herbert Wilson. The issues involved were as to the ownership of a ferry landing in front of thirty-two acres of land situated on the Ohio river, in

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Lewis county, opposite the town of Manchester, State of Ohio, and the ferry franchise, both of which were decided by the lower court in favor of Herbert L. Wilson, though only Thomas B. and J. C. Scott have appealed. There was also an issue between Herbert Wilson and the Scotts not decided, which will be hereafter incidentally referred to.

In order to understand the questions involved it is necessary to refer, in some detail, to the various transactions and persons connected with the disputed ferry landing and franchise. It appears that many years ago one George Wilson became the owner of a tract of 400 acres of land situated in what is called Wilson's bottom, on the Ohio river, that had been patented to his father, in front of which was a ferry landing that for many years previous to 1827 had been used by him under orders of the county court granting the ferry privilege. November 24 of that year he entered into a written contract with appellant, J. C. Scott, then residing in the State of Ohio, as follows: * * * "That the said Geo. Wilson this day agrees with the said John C. Scott, his heirs or assigns, to disannul the ferry now kept by the said Wilson opposite or immediately below the town of Manchester, on the Kentucky Side, forever, and also agrees to let said Scott have free privilege of a road so far as his land extends above where the said Wilson now lives, and to land without molestation from him, the said Wilson, or his heirs, in consideration for which the said John C. Scott agrees on his part to pay the said Wilson, or his heirs, five dollars' worth of salt in hand, and $5 annually for five years, payable in salt at the market price when delivered, and the said Scott further agrees to ferry the said Wilson and his children across the Ohio river, when called on, gratis."

In 1828 an order was made by the county court, on motion of the heirs of George Wilson, discontinuing the ferry previously established in his name. And there is upon the back of the written contract a receipt by his executors, dated in 1832, for $20 paid by John C. Scott in full of what he agreed to pay, and opposite the signature the following: "The claim of ferry in force."

After the death of George Wilson it seems Herbert Wilson, his son, acquired title to the greater part of the 400 acres and resided there. But in 1837 Barton Wilson was in possession, claiming a tract of thirty-two acres adjoining, but on the river above the land occupied by Herbert Wilson, and also 100 acres on the river adjoining and above the thirty-two acres. How Barton Wilson acquired title to the two tracts does not clearly appear, though his title never was disputed. But in November of that year, on his motion, and having, as recited in the order, shown to the satisfaction of the court he had the fee simple title to the land, the privilege of a ferry across the Ohio river, from the "landing or place called Wilson's old ferry," was granted him.

The evidence shows that he continued in possession of the two tracts of land, 100 and thirty-two acres, owning and operating the ferry, until about 1851, when he sold the land to one J. B. Thompson, who likewise operated the ferry, under license of the county court, until his death. And afterwards licenses were granted to persons who, as recited in the orders, had obtained a lease from the widow of Thompson. Some time after the death of Thompson, about 1868, at a judicial sale, Ellis Tucker purchased the two tracts, and also operated the ferry, under license of the county court, until about 1875, when litigation began between him and Herbert Wilson, who, having obtained, about 1861, a patent for supposed vacant land between the river bank and low water in front of the thirty-two acre tract, endeavored to de-

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prive Tucker of the ferry privilege. And with the design of accomplishing that object procured John C. Scott to set up claim to the ferry pirvilege, based on the contract of 1827 between him and George Wilson. And in furtherance of that design he obtained a ferry license from the county court. But Thomas B. Scott, to whom his father, John C., had given one-half his claim, having built a ferry boat and commenced operating the ferry under an alleged agreement with Herbert Wilson, the latter instituted an action to enjoin and restrain him, which is one of the two actions in which the judgment appealed from was rendered.

In the meantime appellee, Herbert L. Wilson, a son of Herbert Wilson, purchased the two tracts of land from Tucker and also his ferry privilege, and afterwards judgment was rendered in favor of Tucker in the action between him and Herbert Wilson. And thereupon Herbert L. Wilson brought the other of the two consolidated actions against the Scotts and his father, Herbert Wilson, though the latter seems not to have taken any further part in the litigation after his son got title to the two tracts of land. Thus the issue is between Herbert L. Wilson, who has title to the ferry landing, ferry license granted by the Lewis County Court, and also a license from the town of Manchester and J. C. and Thomas B. Scott.

It appears that John C. Scott operated a ferry up to 1837, but it does not satisfactorily appear where his landing on the Kentucky shore was. He states he owned a tract of forty acres adjoining, but above the 100 acres, for which he held the bond of one Davis for title. But it seems that one James Little became the owner of it, and, as J. C. Scott states, continued, after 1837, to operate a ferry under a lease from him, and we think Little's landing place on the Kentucky shore, if he had any definite one, was in front of his own land, the forty acres once owned by his father in-law Davis. For it appears that in 1846 he made a motion in the county court for the establishment of a ferry from his lands on the Kentucky Shore, that was, however, denied by the court, which makes it evident he did not claim the right to land opposite the thirty-two acre tract then owned by Barton Wilson. It clearly appears that the landing used by George Wilson up to 1827 was on the thirty-two acre tract, for no other part of the original survey seems to have been fit for the purpose. And the natural inference from the language used in the contract of 1827 is, that John C. Scott was then using a different landing. But it is not material whether he was or not, for that contract did not operate to invest him with a ferry privilege any where, the only effect it had, or seemed to have been intended to have, being discontinuance of the ferry of George Wilson. And even if the contract had been so designed, it alone would not have invested Scott with a ferry privilege. For, under the statutes as they then were, the privilege of ferrying across the Ohio river depended upon an order of the county court granting it.

No license to ferry across the river seems ever to have been granted to John C. Scott, or to have been even applied for by him; nor could an order granting the privilege to him have been legally made after 1837; for, if he ever did before, he was not, after that time, the owner of land on the Kentucky shore, much less could his lease to Settle have had the effect to invest the latter with the privilege or continued it for himself. It seems to us that the contract of 1827, even if recorded before 1875, did not have the effect to either invest John C. Scott with a ferry privilege, or prevent the exercise of it by Barton Wilson and those claiming under him. And however long continued may have been the use by John C. Scott of a ferry landing, whether in front

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of the thirty-four acres or elsewhere, it did not, nor could, ripen into a right or privilege: for without a license from the Lewis County Court it was illegal for him to ferry across the Ohio river from the Kentucky shore.

It thus results that the only claim either John C. or T. B. Scott can have to the exclusive or any use of the landing in controversy rests upon the alleged verbal contract with Herbert Wilson, who, in the action between him and Tucker, has been adjudged to have no right. As the record stands appellee, Herbert L. Wilson, who claims under Tucker, is in possession, and owns the thirty-two acres, and also has a ferry license from the county court, must be regarded the rightful owner of the ferry privilege, and entitled to the exclusive use of the ferry landing.

Judgment affirmed.

APPERSON'S EX'TX v. EXCHANGE BANK OF KENTUCKY, &c.

(Filed December 15, 1888—Not to be reported.)

Banks—Officers—Trust—Evidence—C. being indebted to a bank, and also to A., its president, executed a mortgage and deed to A. and H., the cashier of the bank, in their own right and name, but upon the promise and trust by them as officers and agents that they would, out of the proceeds of the property, collect and pay the debt due by C. to the bank. While H. was a party to the transaction, A. seems to have controlled and managed the property and received the proceeds of what has been sold; and the board of directors, relying upon his assurances repeatedly given that the debt of the bank would be thus ultimately paid, made no effort to collect it in any other way. In this action by the bank against A.'s executrix, Held—1. A.'s estate is liable to the bank. It was not necessary for the board of directors, by a formal resolution, to either authorize the agreement to be carried out or to sanction it after it was done.

2. The agreement by A. to cause the debt due the bank to be paid out of the proceeds of the property acquired by him for that purpose was not a promise to pay the debt of another, and is not within the statute of frauds.

3. It is not material to the validity of the agreement whether or not the bank had the right, under its charter, to acquire and own real estate.

4. Before applying the proceeds of the land to the payment of the debt due the bank, A. and H. are entitled to be reimbursed for money advanced by them to C. to pay off a lien on the land, and which was used for that purpose.

5. While it is not necessary that a witness should be a party to, and directly interested in, the result of a suit against the representative of one who is dead in order to render him incompetent to testify as to a transaction with the decedent, yet, to render such testimony incompetent, it must appear that it will have the effect to directly or indirectly benefit the witness pecuniarily. Therefore, H. was a competent witness to prove the agreement by A. to pay the debt of C. out of the proceeds of the property received by him.

Henry L. Stone for appellant.

W. H. Holt, B. J. Peters and O. S. Tenney for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellee, the Exchange Bank of Kentucky, brought this action November, 1878, against appellant, E. S. Apperson, executrix of R. A. Apperson, who

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died in January of that year, to recover $2,674.58, being the principal sum of $1,736.78, and interest from July 9, 1869, Wm. Hoffman being also a defendant, though only nominally so.

It is stated in the petition as the cause of action that at the date last named one J. W. Clay owed the bank the sum named, being what he had overdrawn, and at the same time owed R. A. Apperson about $1,000; and by an agreement between Hoffman, who was cashier of the bank, Apperson, the president of it, and Clay, a tract of about forty-seven acres of land belonging to the latter was publicly sold and bought in by Apperson for the benefit of the bank and himself, the proceeds or profits which might arise from any future sale to be divided in proportion to the respective amounts of the two debts. It is further stated that prior to that purchase Clay had mortgaged to Apperson and Hoffman, acting for the benefit of the bank, to secure a debt, a lot of whisky, and by agreement between the three parties 2,500 gallons thereof were applied to pay one Roberts, vendor of the land, the purchase price, no part of which had been paid, and thereupon the latter made a deed to Apperson and Hoffman for the purpose mentioned. It is alleged Apperson had the use of the land from March, 1869, the date of the deed, to January, 1875, when he sold it for $3,087, Hoffman, in furtherance of the agreement previously made, uniting with him in a deed to the purchaser; that it was held, used and sold for the joint benefit of the bank and Apperson, and that he continued president up to a short time before his death and promise to pay the claim. The relief prayed for was judgment subjecting the proceeds of sale, rents and profits of the land received by Apperson, now in the hands of his executrix, to pay the amount sued for.

Appellant denied the material allegations of the petition, presented various defenses, and made her answer a cross petition against appellee, Anderson. But we will first endeavor to ascertain the actual character and purposes of the different transactions relating to this controversy, incidentally considering the questions upon the competency of evidence raised by appellant.

There was, in February, 1869, a public sale of the land before, not, as stated in the petition, after the execution of the mortgage mentioned. But it does not appear what Apperson bid for it, nor that either he or Clay treated it as valid and binding for any purpose. March 1, 1869, Apperson and Hoffman borrowed from the bank $4,500, for which they gave their joint note, or bill, and that money they loaned to Clay, taking his note of that date, payable July, 1869, for $4,650; and, to secure the payment of it, Clay executed to them on the same day a mortgage upon thirty-five barrels of wine, about 100 barrels of whisky, and a tract of 106 acres of land, now claimed by appellee, Anderson. By the terms of the mortgage the property was delivered to the mortgagees, with authority to sell the same, or any part of it, and appropriate the proceeds to the payment of the mortgage debt, and they had the privilege to apply enough of the whisky to pay Roberts the purchase price of the forty-seven acres of land; and, in pursuance of that agreement, 2,500 gallons were delivered to him for that purpose, and he thereupon, with the consent of Clay, conveyed the land to Apperson and Hoffman. In this connection it is proper to say that the estate of Apperson, if liable to the bank at all, can not, according to the evidence before us, be made accountable for any of the mortgaged property, except the two tracts of land; for the wine proved worthless, and nothing was realized from it, and it does not appear

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the residue of the whisky was used otherwise than in paying taxes due to the United States Government and a part of the mortgage debt.

The agreement alleged to have been made between Hoffman, representing the bank, and R. A. Apperson, and the promise by the latter to pay the balance due to it by Clay on February —, not July 9, 1869, was testified to substantially by Hoffman, some of the directors of the bank, and to some extent they were sustained by Clay. But it is contended the evidence of Hoffman is incompetent because, being liable on his bond as cashier for the loss caused by permitting Clay to overdraw his account without the sanction of the directors, he is interested in proving the agreement by Apperson to pay it.

Subsection 2, section 606, Civil Code, provides that no person testify for himself concerning any verbal statement of, or transaction with, or any act done or omitted to be done by one who is dead when the testimony is offered.

While we do not think it was intended to limit the operation of that section to the testimony of a person, a party to and directly interested in the result of a suit with the representative of one who is dead, yet to render such testimony incompetent it must appear that it will have the effect to directly or indirectly benefit the person giving it pecuniarily. No action has been brought on the bond of Hoffman, nor is there enough before us to fix any liability by him to the bank if there had been.

It seems to us there is no room to doubt the existence of an agreement in February, 1869, between Apperson and Hoffman to act together in the effort to save the two debts mentioned, in which Clay was willing to aid them. For though the public sale to Apperson of the forty seven acres of land proved abortive because no part of the purchase money had then been paid, the subsequent arrangement to loan Clay the money borrowed from the bank was evidently made for the purpose of enabling him to free the whisky from bond, and use it to pay for the land, which, together with the other mortgaged property, was to be applied, after first satisfying the mortgage debt, to what he owed Apperson and the bank. The transaction can be accounted for in no other way; for neither Apperson nor Hoffman had any other apparent motive for incurring the debt they did to the bank and risking a loan of the money to Clay, who was then in a failing condition financially.

We will now consider the various grounds of defense made for appellant, none of which, in our opinion, can be considered valid, when the motive and object of the agreement upon which the right to recover is based, and the attitude and relation of the parties to the bank are correctly understood.

The amount overdrawn by Clay on February, 1869, was a subsisting debt due the bank, which it was the duty of Apperson, the president, not less than of Hoffman, the cashier, to use reasonable diligence and skill to secure if, as was actually the case, it was not then practicable to collect in the usual mode. And the agreement between Apperson and Hoffman was simply a plan or scheme, resorted to by them as officers and agents of the bank, to accomplish that object, and, at the same time, make safe and collectable the debt of $1,000, which Clay and Apperson owed. And the evidence in this case shows that the directors of the bank, relying upon the assurance and promise repeatedly given by Apperson that its debt would be thus ultimately satisfied and paid, not only made no attempt to collect it in any other mode, but permitted Apperson to acquire the mortgage lien on Clay's

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property, which, before that, might have been made subject to its debt. It was, therefore, not necessary for the board of directors, by a formal resolution, to either authorize the agreement to be carried out, or sanction after it was done. Nor do we perceive what pertinency there is in the question raised, whether the bank had or not the right, under its charter, to acquire and own real estate. For the mortgage and deed were executed to Apperson and Hoffman in their own right and name, but upon the promise and trust by them, as officers and agents, that they would, out of the proceeds of the property, collect and pay the debt due by Clay to the bank. We think, for the same reason, the plea of the statute of frauds is equally unavailing. For the right to recover in this case is not founded upon the promise of Apperson to answer for the debt, default or misdoing of Clay, but upon his undertaking and implied, if not express promise, as an officer and agent of the bank, to secure and, out of the proceeds of property acquired by him for the purpose, to cause to be collected and paid over the debt which Clay owed.

It is satisfactorily shown that within five years before the commencement of this action Apperson promised to collect and pay to the bank the Clay debt, and the officers of the bank, relying upon the promise, left the entire matter in an unsettled condition to the time of his death, not even requiring him to pay the money borrowed by him and Hoffman in 1869 to loan to Clay for the purpose before mentioned. Though Hoffman was a party to the entire transaction, Apperson seems to have controlled and managed the property, and received the proceeds of what has been sold. It is true, as stated by counsel, Clay continued to do business with the bank up to July, 1869, but the deposits made by him seem to have been prinicpally of the money borrowed from Apperson and Hoffman and made in the course of paying the government tax on the whisky, and obviously whatever credit he got was upon the faith, if not in furtherance of the arrangement between him and Apperson and Hoffman.

But we think the lower court erred in giving a preference to the bank debt, and applying the proceeds of the forty-seven acres to the payment of it, while the note given by Clay to Apperson & Hoffman, or any part of it, remains unsatisfied. For it was with the money loaned by them to him that the taxes were paid on the whisky, and enough of it, rendered available to pay for the forty-seven acres of land, and manifestly neither of them would or could have been expected to loan the money to Clay without being assured the property mortgaged would be first applied to reimburse them. Moreover, the title of the forty-seven acres of land being acquired by them under an agreement contained in the mortgage, we know of no principle of equity requiring the debt of the bank to be paid before they are reimbursed for the money advanced by them, without which the land could not have been available to pay either.

It seems to us appellant has the right to have the proceeds of the property which Clay mortgaged, as well as that he conveyed, first applied to pay whatever of the mortgage debt remains unpaid. And that what may remain of the proceeds of the forty seven acres, together with the proceeds of the tract of 106 acres, should be applied to pay the debt of the bank, and the one of $1,000 due appellant. For we perceive no reason whatever for the judgment of the lower court dismissing the cross petition against Anderson, who never paid anything for the 106 acres of land, and has no title or claim to it. The evidence, which at best is vague and unsatisfactory, shows no more than authority to him at one time to sell it, not for his own benefit, but as

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agent. We think the mortgage lien of appellant and Hoffman exists beyond question, and should be enforced on that tract.

Wherefore, for the errors mentioned, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Judge Holt not sitting.

HUME v. McNEES.

(Filed January 19, 1889—Not to be reported.)

1. Settlement of partnership—As the judgment in this case, which involves the settlement of a partnership, is based upon the report of a commissioner, who has adjusted the differences of the partners in a just and equitable manner, it is affirmed.

2. Same—Failure to keep accurate accounts—As the partner whose duty it was to keep the accounts accurate has failed to do so, the chancellor will not be diligent in shaping the accounts so as to enable him to profit by his own negligence.

A. H. Ward and T. T. Forman for appellant.

L. M. Martin for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Pryor.

It is evident from the report of the commissioner and the facts of the record that Hume obtained a credit for all the tobacco purchased, and the question of shrinkage has nothing to do with this case, except the ascertainment of shrinkage on tobacco purchased by Hume & Owen. Hume, whose business it was to keep the accounts accurate, and who purchased this tobacco and sold it, has so confused the purchases for Hume & McNees with those of Hume & Owens as to bring about all this trouble and litigation, that otherwise would have been needless, and the chancellor will not be diligent in so shaping the accounts as to enable him to profit by reason of his own negligent conduct. Still he is entitled to an equitable adjustment of the partnership business, and this has been done by the commissioner's report. The commissioner ascertained the quantity of tobacco sold by Hume & Owen, and adding to that the shrinkage that would naturally take place during the time intervening between the purchase and sale, has ascertained the precise number of pounds purchased by them. This tobacco and the costs of handling, together with the tobacco raised on the farm of McNees, Sigers' tobacco and Gillen's deducted from all the tobacco purchased as heretofore divided, shows the quantity purchased by Hume & McNees, and there is no difficulty in ascertaining the amount realized from the sales.

The amount of money paid out by Hume & McNees or by Hume for tobacco, and the amount collected from the sales of the tobacco, presents a simple arithmetical proposition by which the loss or profit is determined. The cost of the Hume & McNees tobacco, including expenses and cost of handling, as well as the cost of the factory built for handling, is $46,768.77. The factory cost $1,050. Deducting this from cost of tobacco and it leaves $45,718. The tobacco sold for $56,751.09, leaving profits, as the commissioner

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finds, of $10,032.32. When settling the personal accounts of the two partners, leaves Hume due McNees $2,105.48. This is the result of the commissioner's report.

The appellant makes the cost of the Hume & McNees tobacco, including expenses, exceed $50,000. This is done by assuming that the shrinkage on the whole tobacco purchased should be added to the amount sold, and in this way ascertain the quantity purchased, when it plainly appears how much money Hume & McNees paid for it, for which the firm is credited or Hume, and then charged with the sum for which the tobacco was sold. If the amount of money paid for the tobacco is found, then what it sold for will show the difference. This is the view taken of the question by the commissioner. The theory of the appellant and its result follows from an imaginary state of facts, while the commissioner has ascertained what was actually paid out, and then what the tobacco sold for.

It was proper to deduct the value of the factory from the sum realized from tobacco. This would show the amount of money due from Hume to McNees, leaving the parties the owners of the building.

We perceive no error in the settlement by the commissioner, and if any loss has been sustained, it results from the negligent conduct of Hume in keeping the accounts. The commissioner has taken a broad and practical view of the rights of these parties, and adjusted their differences in a just and equitable manner. As we understand this case, the cost of the Hume & McNees tobacco is obtained from the actual purchases made, and not by the estimate of sales. The account of sales realized is stated to show the profit. No injustice had been done appellant by the settlement, and the judgment below is affirmed.

FLOOD, &c. v. WALL, GD'N, &c.

(Filed February 9, 1889—Not to be reported.)

1. Pleading—Liability of devisee—In this action in which a devisee of the debtor was sought to be made liable to the extent of assets received, the chancellor was authorized, under the prayer for proper relief, to direct the sale of the land described in the petition as that devised, instead of rendering a personal judgment.

2. Costs of appeal—As the judgment is reversed for an error as to interest which might have been corrected by bringing to this court but a small part of the record, each party must pay his own costs on the appeal.

W. H. Wadsworth & Son for appellants.

Bateman & Harper and H. P. Willis for appellees.

Appeal from Bracken Chancery Court.

Opinion of the court by Judge Pryor.

We find no question raised in this case except that made by the appellant, Patrick Flood, who was brought into this case by the service of process nearly one year before the judgment was rendered. That he held and owned the real estate sought to be sold, under the will of his brother, Edward Flood, is admitted by his failure to answer the specific allegations of the amended petition in that regard. The land is definitely described by metes and bounds, as well as the title under which Edward Flood claimed. This amendment alleges that the appellant, Patrick, and his brother owned the

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personalty in common and not the land, and the fact that it was alleged in a reply made to the answer of the defendants that the two brothers held the whole estate jointly, filed at a time when Patrick Flood was not a defendant, affords no excuse for his failure to answer the amendment by which he was made a party, and the specific allegations of which he might have ascertained by the most cursory examination. The record shows, taking the averments of the pleading to be true, that Edward Flood was the sole owner of the land, having obtained a conveyance from Conrad Byers. The liability of the devisor, Edward Flood, as surety, is not questioned, and his estate that passed to his executor and to the devisee, Patrick Flood, should be subjected to its payment. The devisee, Patrick Flood, obtained the land under the will of his brother, and to the extent of assets received is liable. If a judgment could have been rendered making him liable to that extent, we perceive no reason why, under the prayer for proper relief, the chancellor might not have directed the land sold, without rendering a personal judgment, so as to enable the sheriff to execute his mandate. The land was described in the petition as the land devised, and the devisee asked to be made liable for that reason, and the mode of enforcing the judgment in no manner prejudiced the appellant.

There is an error in the record as to the amount of interest on what is termed the pension money, amounting to about $84. There was an exception to this error by the appellants, and no notice taken of it by the court below. For this reason the judgment is reversed, but as this error might have been corrected by bringing to this court but a small part of the record, the reversal must be had by each party paying his own costs. The cross appeal in this case is at the instance of, or indorsed on the record, as made by the appellants and not the appellee, so the question as to the propriety of allowing Bryan anything for the support of the appellee has not been considered. It is manifest, from the record, that she has not obtained a judgment for any greater sum than she was entitled to.

The judgment is reversed that the error may be corrected as to the interest on the pension money, leaving the judgment to be enforced when that correction is made.

TREADWAY, &c. v. TURNER, &c.

(Filed February 26, 1889—Not to be reported.)

1. Fraudulent conveyances—In this action by a creditor to set aside a conveyance by the debtor to his wife as fraudulent, it appears that in a previous action by another creditor attacking the same conveyance as fraudulent a judgment was rendered for the sale of the land, which was purchased at the commissioner's sale by the wife of the debtor, who received the commissioner's deed. She does not allege that the money with which she paid for the land was her separate estate. Held—That in the absence of such an allegation the presumption is, she paid for the land with money to which her husband was entitled, and, therefore, the land is still liable for the husband's antecedent debts.

2. Same—Where land fraudulently conveyed has passed from the fraudulent vendee into the hands of purchasers for value without notice of the fraud the land can not be subjected to the debts of the fraudulent grantor in an action thereafter instituted for that purpose, but as long as the proceeds of said land can be traced into other lands purchased and held by the fraud-

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ulent vendees, such lands may be subjected to the payment of the debts of the original fraudulent grantor.

3. Same—Venue—The proceeds of land fraudulently conveyed having been traced into separate tracts of land lying in different counties, it was not necessary that a creditor of a fraudulent grantor seeking to subject said laid lands should bring a separate action in each county, the legal title to both tracts being in the same person, and it being sought to subject both to the same debt. A single action in one of the counties to subject both tracts was sufficient; and it is immaterial that the land lying in the county in which the action was brought was not subjected, as the failure to subject it was not due to the want of right in the plaintiff to subject it, but to the fact that it was covered with liens to such an extent that the sale of it, subject to these liens, would have yielded nothing.

4. Same—Return of nulla bona—More than a year having elapsed since the death of the debtor, and no administration having been granted, the plaintiff had the right to sue to set aside the conveyances by the debtor as fraudulent, although he had not obtained a return of "no property," there being no one against whom execution could issue, and the defendants being under greater obligation than the plaintiff to have an administrator appointed.

J. H. Hazelrigg, R. Gudgell and W. S. Gudgell for appellants.

Thos. Turner for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Bennett.

Stephen Treadway, in 1875, conveyed to his wife, Martha Treadway, about forty acres of land lying in Montgomery county, Kentucky. Thereafter, in the same year, he and his wife conveyed to the appellants, Louisa Treadway, etc., four acres of said land. In 1874 the appellees obtained a common-law judgment against Stephen Treadway for money. In 1883, Stephen Treadway having died a little over a year theretofore, and no administration having been granted upon his estate, the appellees instituted this action in equity against the appellants and Martha Treadway to have said conveyances set aside because, as alleged, they were made without any valuable consideration therefor, and with the design to defraud Stephen Treadway's creditors.

It appears from the testimony of the witnesses in the case that the conveyances were voluntary, and were made with the design to defraud Stephen Treadway's creditors. Besides, the record shows that in 1876, one of the creditors of Stephen Treadway, by an action in the Montgomery Circuit Court against Stephen and Martha Treadway, etc., attacked said conveyance to Martha Treadway as fraudulent. This action was sustained, judgment was rendered for the sale of the land, and Martha Treadway purchased it at the commissioner's sale, and received the commissioner's deed for it. So the fact that the conveyance by Stephen Treadway to Martha Treadway was fraudulent was established by the judgment of a court of competent jurisdiction.

Martha Treadway does not allege that she paid for this land with money, to which she was entitled in her own right. In the absence of such allegation the presumption is that she paid for the land with money, to which her husband was entitled. This presumption arises from the fact that the husband is entitled to the money that his wife may be in the possession of during coverture, unless it is shown that she holds it as her separate estate, and the burden is on her to establish that fact. She does not allege that the

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money with which she paid for the land was her separate estate. The land, therefore, was still liable for her husband's antecedent debts.

It also appears that this land was sold by Martha Treadway, and the proceeds of the sale were invested in the purchase of another tract of land containing sixty-six acres, lying in Montgomery county, the deed to which was taken in the name of the appellant, Treadway, wife of the appellant, Sam Treadway, in trust, as is alleged, for the benefit of Martha Treadway. It is not denied that the proceeds arising from the sale of the forty-acre tract of land were not put in this land in trust for Martha Treadway. The denial is, that the entire payment on the land was made with the money belonging to Martha Treadway. As this denial does not put in issue the fact that the money arising from the sale of the forty acres of land was put in this land in trust for Martha Treadway, the allegation in that regard must be regarded as true.

The four acres of land conveyed to the appellant, Louisa Treadway, was sold and the proceeds invested in a tract of land lying in Bath county, Kentucky. The deed to this land was made to the appellant, Louisa Treadway, etc.

The appellee sought to trace the proceeds arising from the two pieces of land, originally fraudulently conveyed, into the two tracts, one in Montgomery, the other in Bath, subsequently purchased in the manner above mentioned, and to subject said tracts to the payment of his common law judgment. As the title to the two pieces of land, originally fraudulently conveyed, passed from the fraudulent vendees into the hands of purchasers for value without notice of the fraud, said lands could not be, by the appellee's action thereafter instituted, subjected to his debt. But as long as the proceeds of said lands could be traced into other lands purchased and held by the fraudulent vendees, the appellee had the right to subject said lands to the payment of his debt. The action to subject said two tracts of land to the payment of the appellee's debt was brought in Montgomery county.

The legal title to the tract lying in Montgomery county was in the appellant, Treadway, wife of Sam Treadway, in trust, in part at least, for Martha Treadway; also the legal title to the Bath county land was in the appellant, Louisa Treadway, and her children, who are co-appellants.

It is said that as to the Bath county land the Montgomery Circuit Court had not jurisdiction to subject the same to the debt. This is true unless there was some other fact that gave the Montgomery Circuit Court jurisdiction. Such fact does exist, for the land originally fradulently conveyed was situated in Montgomery county, and the proceeds of a part of it had been invested in land in Bath county, to reach which it was necessary to show that the conveyance of the Montgomery county land was fraudulent. For this purpose the appellants and other vendees were proper parties to the action for the purpose of setting aside the conveyances of the Montgomery and Bath county lands and subjecting them to the payment of appellee's debt; there was but one debt and but one cause of action, and both pieces of property were liable to that cause of action; and the Montgomery Circuit Court having jurisdiction to subject the land lying in Montgomery county to said cause of action, it follows that it had jurisdiction to subject the Bath county land also. (Civil Code, section 62.) Otherwise, there would be the absurdity of having two actions—one in Montgomery and the other in Bath—against the same parties and for the same cause of action.

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But, it is said that as the lower court failed to set aside the deed and subject the land lying in Montgomery county to the payment of the debt, it had no jurisdiction to set aside the deed and subject the land lying in Bath county to the payment of the debt. This failure was not attributable to the want of the right of the appellee to have said land subjected, for it was subject to his demand, but for the fact that it was covered with bona fide liens to such extent that the sale of it, subject to these liens, would yield no fruit; therefore, the court did not order the sale of it.

It is contended that the appellee, not having obtained a return of nulla bona on his common-law judgment, is not entitled to maintain this action.

The reason why a plaintiff is required to obtain a common-law judgment and a return of nulla bona before he can institute an equitable action to set aside a fraudulent conveyance made by the defendant is, that the plaintiff must resort to and exhaust his legal remedies before he can resort to an equitable action on a return of nulla bona. Here there was no administration granted upon the estate of Stephen Treadway; and more than a year after his death, there being no administration, the appellee resorted to this equitable action to subject his real estate in the hands of the appellants and Martha Treadway to his debt. The legal remedy was exhausted, for there was no one against whom execution could issue, and the appellants were under greater obligation to have an administrator appointed than the appellee. So, in the absence of a person against whom execution could issue, there is no legitimate reason why the appellee could not proceed against the appellants and Mrs. Treadway to subject the real estate in their hands, belonging to the deceased, to the payment of his debt. The title to said estate, so far as the antecedent creditors were concerned, never passed from the deceased, and the estate was subject to their demands against him.

This action was brought within ten years from the perpetration of the fraud and within five years from the discovery of it.

The judgment is affirmed.

Judge Holt not sitting.

HICKMAN v. BROWN.

(Filed March 16, 1889.)

1. Married women—Power to make will—A married woman can not dispose by will of estate secured to her separate use by a parol antenuptial contract. It is only estate secured to her separate use "by a deed or devise" that she is empowered to dispose of by will.

2. Same—Where the will of a married woman is offered for probate it is the duty of the county court to reject it, unless it appears that the estate disposed of was such as the statute empowers married women to dispose of by will.

P. J. Foree and Montgomery, Lindsey & Botts for appellant.

E. E. Settle and Joseph Blackwell for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Pryor.

Mrs. Lou Moody, of the county of Shelby, married Judge Brown, of the county of Owen, in the year 1877. Both of the parties had been previously

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married and were somewhat advanced in years, and it seems contemplated and perhaps entered into a parol antenuptial contract in regard to their marital rights. Mrs. Brown died in November, 1886, and, prior to her death, in March of the same year, executed a paper properly signed and attested, purporting to be her last will and testament by which she devised her property, consisting of money and bank stock, to her husband for life, and then to her collateral kindred. After the wife's death the paper was offered for probate in the Owen County Court and rejected. An appeal was taken to the circuit court, where it was also denied probate, and is brought here by the devisees in remainder. All the statutory requirements in regard to the execution of a will were fully complied with, and the paper was rejected as the will of Mrs. Brown, because of her coverture, the probate being opposed by the husband.

It is insisted by counsel for the devisees, or for those who would take if the paper was admitted to probate, that the parol antenuptial contract entered into between the husband and wife on the eve of their marriage divested the husband of all interest in the estate of the wife, and by its terms the property owned by her becoming her separate estate, she had the power to execute a last will and testament, although in opposition to the wishes of her husband. If this be the correct doctrine the paper should have been probated. The statute in regard to wills must control that question. By section 2 of chapter 113, General Statutes, it is provided, in substance, that every one can make a will having testamentary capacity, except those under twenty one years of age or a married woman, and it, therefore, follows, from this section, that no such right is given to those laboring under the disability of coverture, but, on the contrary, the right is expressly denied them. The same statute, however, makes an exception in regard to married women, and this exception is found in section 4 of the same chapter, that provides: "A married woman may, by will, dispose of any estate secured to her separate use by deed or devise, or in the exercise of a written power to make a will."

This statute, in regard to wills, must be construed as containing all the law on the subject with reference to those who are competent to make a will and the manner of its execution. We find no separate estate secured to the wife by either deed or devise, and no written power authorizing her to make a will of either her general or separate estate, and, therefore, the paper was not a will for the reason that the wife had no power to make it, under any reasonable construction, however liberal, that could be given the statute. It is insisted by counsel that it was the duty of the county court to admit the will to probate, so that the question as to whether the estate in the wife was her separate or general estate might be determined by a court learned in the law, and that it was never intended by the law making power to vest in the county judge the power of determining such an intricate legal question. While it is often difficult in determining the character of an estate, still the right or power of the feme covert to make a will is made to depend upon the character of the estate devised or conveyed to her. If general estate, she has no power to dispose of it unless in the exercise of a written power. No deed or devise to the feme of this property was exhibited to the county court, nor any written power to make a disposition of either her general or separate estate, and the county court having all the original jurisdiction over the subject-matter could do nothing else but deny the probate. While the rejection of the paper may and does divest those who are named as devisees of all

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title under it, still that fact does not determine the character of the estate in the wife or the right of her husband or next of kin to the property. The only question this court has to deal with is the right of the married woman to execute a valid will. There is nothing in the record showing that she could exercise such a right, and the judgment is, therefore, affirmed.

HILL, &c. v. LANCASTER, &c.

LANCASTER, &c. v. WHITE.

(Filed March 9, 1889.)

1. Homestead—Res adjudicata—In an action by creditors of the grantor in a deed against the grantor and grantees to set aside the deed as fraudulent, and subject the land to the payment of the grantor's debts, the grantor filed an answer denying the alleged fraud and asserting that he had no interest whatever in the land. The court rendered judgment setting aside the deed and subjecting the land, and at the next term the grantor and his wife offered to file their joint petition in the same action, asserting a claim to a homestead in the land. Held—That the debtor having permitted judgment to be rendered subjecting his entire interest in the land without asserting the right to a homestead, it was afterwards too late to do so, the judgment being final. And the fact that the wife of the debtor now joins him in asserting the right does not strengthen his case, as the husband has the exclusive right to the homestead, and may sue or be sued for it without his wife being joined.

2. Guardian and ward—A guardian having resigned his trust, one who was indebted to him was appointed his successor. The former guardian being indebted to his wards, in a settlement between him and his successor, the latter accepted as so much cash his own note held by the former guardian, who, at that time, regarded the note as perfectly good. It appears that both parties acted in perfect good faith. Held—That the former guardian is not liable to the wards for the amount of the note thus turned over to his successor, although it would be otherwise if he had known that his successor was insolvent, and had turned over the note to save his debt at the expense of the wards.

Brown & Haycraft and Wilson & Sprigg for Lancaster.

Montgomery & Poston for Hill.

J. P. Hobson for White.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Bennett.

On the 22d of December, 1874, the appellee, Lancaster, as the county judge of Hardin county, permitted the appellant, James F. Hill, to execute bond and qualify as the guardian of Susan F. and R. L. Burnett, infants. After said wards arrived at the age of twenty-one years the appellant, James F. Hill, having failed to pay them the money that he owed them as their guardian, they instituted an action against him and his sureties on his bond and recovered judgment against them for the amount due. Execution was issued upon this judgment, and returned, as to the appellant, Hill, and all his sureties, no property found. Thereafter said wards instituted an action

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against the appellee, W. D. Lancaster, and his sureties on his bond as county judge, in which they sought to make him and his sureties liable for the amount that went into the appellant's (Hill's) hands as their guardian. The wards sought to hold W. D. Lancaster and his sureties liable upon the ground that Lancaster negligently failed to take from the appellant, Hill, a bond with sufficient surety. After a protracted litigation the wards succeeded in establishing the charge of a negligent failure to take a bond with sufficient surety, and obtained judgment against Lancaster and his sureties for the amount of money that went into the hands of Hill as their guardian. Lancaster's sureties paid off this judgment. Thereafter, in April, 1887, said Lancaster and his sureties instituted their action in equity against the appellant, Hill, and the appellee, White, and Williams and others for the purpose of setting aside a deed to some real estate which appellant, as was alleged, caused to be made to his daughter, Mrs. Williams, and two grandchildren, which real estate, it was alleged, belonged to the appellant, and that the deed was made without any consideration and for the purpose of defrauding Hill's creditors. It was also alleged that the appellee, George W. White, as the former guardian of said wards, had in his hands a considerable amount of their money; that the appellant, Hill, was indebted to said White, which was evidenced by his note without security of any kind; that appellant was known by White to be hopelessly insolvent; that by an arrangement entered into between appellant and White the latter was to resign his guardianship, and the former was to be appointed in his place, and take his own worthless note that White held upon him in lieu of the money that White owed said wards; that in order to carry out this arrangement White fraudulently induced Lancaster to appoint the appellant, Hill, as guardian, and accept a bond that was wholly worthless. The appellant, Hill, and his alleged fraudulent vendees answered and denied all fraud, and alleged that the conveyance was for a valuable consideration. The appellee, White, traversed the allegations in reference to him. The trial of the case resulted in a judgment setting aside the said conveyances and subjecting the said real estate to the payment of the said demand and rejecting the demand against the appellee, White.

At the following term of the court the appellant, Hill, and his wife, she not having theretofore been a party, filed their joint petition, which was made an answer, setting up their right to a homestead in said real estate. And the same having been sold by the court's commissioner and not having brought exceeding $1,000, they asked that either the land or its proceeds be set apart to them as a homestead. They also asked that the judgment theretofore rendered and the sale of the land be set aside. The chancellor eventually overruled said motions and sustained a demurrer to their petition. They have appealed to this court, complaining mainly upon the ground of the refusal of the chancellor to allow them a homestead. Lancaster and his sureties have appealed from that part of the judgment that rejected their claim against the appellee, White.

The cases of Wing, &c. v. Hayden, &c., 10 Bush, 276, and McGrath v. Berry, 18 Bush, 391, were actions upon mortgages executed by the husbands, in which their respective wives did not join. Nor were they made defendants. Thereafter the husband in each case, together with his wife, sought to recover a homestead in the land which had been sold to satisfy the mortgage lien. This court held, in each case, that the default judgment was not a bar

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to the claim of homestead. It was so held upon the ground that the mortgage in each case showed that the homestead had not been relinquished in the manner pointed out by the statute; that it could not be made liable to the mortgage lien unless it was relinquished in the manner pointed out by the statute, and the mortgage in each case showing conclusively that the homestead was not relinquished, no default judgment would have the effect of barring the right to a homestead, and the purchaser at the decretal sale would buy the land subject to it.

The case at bar is unlike those cases. Here the appellees, Lancaster, etc., sought to subject the appellant's entire right and title to this real estate to the payment of his debt. He joined issue upon the merits, denying that he had any interest whatever in the land, not only not claiming a homestead, but not disclosing any fact or circumstance which would, in any contingency, entitle him to a homestead. The chancellor decided the issue against him and rendered judgment subjecting his entire interest in the real estate to the payment of the debt. His judgment was final. The power of the chancellor over the judgment, it being final, ceased upon the close of the term at which it was rendered. At a subsequent term the appellant sought to file a petition, in the nature of an answer, setting up his right to a homestead. But, it having been adjudged that his entire interest in said land should be sold, which judgment, as said, was final, the chancellor correctly rejected the petition.

It is not denied, indeed it is a fact, that the appellant, as between him and the appellees, Lancaster, &c., as his creditors, were entitled to a homestead in said real estate; but his entire interest in this real estate having been sought to be sold to satisfy the demand of these creditors. and he having appeared and defended upon the merits, and having failed to set up his homestead right, which would have been a complete bar to the appellees' action, if the real estate was not worth more than $1,000—if more than $1,000, then a bar to the extent of a thousand dollars' worth of the land—his effort to set up his right to his homestead came too late. To allow a defendant to split his defenses, relying upon one until judgment is rendered upon it against him and at the next term open the judgment and plead another defense, and so on, would be a mockery of legal justice. Therefore, it is a universal rule that the final judgment of a court of competent jurisdiction is not only conclusive of all issues actually decided, but of all that might and should have been decided by it. And there is no good reason why the assertion of a homestead right should be made an exception to this salutary rule. The fact that his wife joins him in asserting the right can make no difference, for the right to the homestead is exclusively his; he may sue for it without joining his wife, if sued for it he may defend the action without joining his wife, and the decision will be conclusive of his right; he may make a valid sale of it without joining his wife. So, the fact that the appellant's wife joined in the petition added nothing to the strength of his cause. (Snapp v. Snapp, ante, page 598.)

The judgments of the lower court subjecting said real estate to the payment of said debt, and sustaining the demurrer to the petition setting up claim to a homestead, and refusing to set the sale aside, are affirmed.

In the case of W. D. Lancaster, &c., as appellants, against George W. White, appellee, the weight of evidence is clearly against the appellant's

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contention. The evidence shows almost conclusively that the appellee, White, did not directly or indirectly solicit or procure the appointment of Hill as the guardian of said children; that Hill was appointed such guardian in the place of White at the request of the mother of the children; that the appellee, White, at the request of the county judge, gave his opinion as to the sufficiency of the proffered bond, which was, that he believed the bond would be perfectly good; not, however, that the proffered sureties would make it good, but that the name of Hill alone was sufficient for that purpose; that at the time of giving this opinion the appellee regarded Hill as perfectly solvent, and his neighbors generally regarded him in that light; that the county judge had ample opportunities outside of the opinion of the appellee to know the financial condition of Hill. It also appears that when Hill, after his appointment, approached the appellee for the purpose of obtaining the money that the latter held as former guardian, he asked Hill if he would take his (Hill's) own note in part payment of said sum, to which Hill replied, "of course," and took his note as so much cash. It also appears that at the time of this transaction the appellee regarded this note as perfectly good, and that he did not surrender it to Hill in lieu of the money that he held belonging to Hill's wards for the purpose of saving a doubtful debt; nor does it appear that there was any agreement or understanding, expressed or implied, between Hill and the appellee that, in consideration of being appointed guardian, Hill was to take his note in lieu of the money belonging to his wards; nor does it appear that the appellee contemplated such a purpose; on the contrary, it appears that the appellee regarded the note as good as gold, and proffered to surrender it as equivalent to so much money, and it was so accepted. Suppose the appellee had paid Hill the money itself, and on that day or the next Hill had taken up his note with this same money, and the appellee had known that it was the same money, would it be contended that he would have been liable to the wards for it? Surely not. Instead of this indirection the same thing in principle was done directly, and the transaction was equally fair and innocent. So we see no good reason why the appellee should be held bound for this money. However, we do not mean to intimate that if the appellee had had reason to believe that Hill was insolvent, and had surrendered his note to him in lieu of the money that was due his wards for the purpose of saving his debt at the sacrifice of the interest of said wards, he would not be liable; on the contrary, we believe he would, in that state of case, be liable.

Judgment in both cases is affirmed.

CRIGLER, &c. v. CONNOR.

(Filed March 16, 1889—Not to be reported.)

Homestead—The homestead of the wife passed to the surviving husband and children in the same manner it would have passed to the widow and children if the wife had survived the husband. And as the property is susceptible of division, and worth not less than $2,000, the chancellor should have the property divided and allot to the husband $1,000 in value, including the dwelling if it can be done, and subject the life estate of the husband in the remainder to his debts.

Harlan P. Whitaker and A. G. Simrall for appellants.

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Collins & Fenley for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

We think it manifest, from the testimony before us, that the appellee was allowed to retain too much of the real estate for a homestead. The realty belonged to the wife, and at her death passed to her children subject to the husband's curtesy. The homestead of the wife, under section 15 of article 13, chapter 38, General Statutes, passed to the surviving husband and her children in the same manner the homestead would have passed to the widow and children if the wife had survived the husband. The property is susceptible of division and is worth not less than $2,000. The chancellor should have had the property divided and then allotted to the husband $1,000 in value, including the dwelling, if it can be done, and subject the life estate of the husband in the remainder to the payment of his debts.

We find no error in allowing the husband $383 in lieu of the property exempt from execution as provided by section 1 of the act of May 17, 1886.

The judgment is reversed and cause remanded for proceedings consistent with this opinion.

ELLIOTT v. SAUFLEY.

(Filed March 16, 1889.)

1. Assignments by operation of law—A creditor having a valid lien upon the property of his debtor, can not be prejudiced by a conveyance by the debtor made in contemplation of insolvency, and with a design to prefer one creditor to the exclusion of others; and, therefore, is not concluded by a proceeding under the statute, unless he is made a party and served with process.

2. Limitation—Written contract—The acceptance of a deed by the grantee and the possession of the land under it operate as an agreement on his part to pay the purchase price recited in the deed, and an action therefor is founded upon "a contract in writing" within the meaning of the statute of limitations.

3. Vendor and vendee—Warranty—To enable the vendee of land to maintain an action on a covenant of warranty, all that is necessary for him to allege and show is, that he has lost the land under a judgment of eviction in an action to which the vendor was a party, or of which he had notice.

In this action upon a covenant of warranty it appears that the vendor was made a party to the action in which the judgment of eviction was rendered, but instead of making defense to the merits he filed a demurrer upon the ground that he was not a proper party, which was sustained. Held—That the vendor can not defeat this action because the vendee failed to defend the action in which the judgment of eviction was rendered, even if it could be made to appear that he might have successfully defended it.

Harrison & Belden for appellant.

Hill & McRoberts for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Lewis.

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In 1872 John W. Estis and others, heirs at law of James Estis, conveyed a tract of land of about thirty-two acres to George W. Estis, likewise an heir; and following a recital in the deed that their father had, in his lifetime, sold and given bond to convey the land to George W. upon payment of the purchase price, $650; of which $150 had been paid, and that by a settlement with the county judge he, as administrator of James Estis, was charged with said purchase money, and found indebted to the estate $509, was the stipulation that a lien was retained on the land until he settled and paid said indebtedness, to be made evident by a receipt of each of the heirs and grantors filed in the clerk's office. In 1878 an action was instituted by one W. M. Estis, a creditor of George W. Estis, in which a judgment was sought and rendered subjecting his property and effects, as provided in section 1, article 2, chapter 44, General Statutes, for the benefit of his creditors generally, upon the ground he had previously mortgaged said tract of land to one Fair, in contemplation of insolvency, and with the design of preferring him to the exclusion in whole or part to his other creditors; and in pursuance of that judgment the land was sold and purchased by appellee, Saufley, to whom a commissioner's deed therefor was made in 1880, and who sold and conveyed the land in 1882 to appellant, Elliott.

In the same year, but subsequently, Nancy Walls and others, the heirs at law of James Estis and grantors in the deed of 1872, instituted an action in equity against George W. Estis and others, including appellee, Saufley, and appellant, Elliott, to set aside the sale made to Saufley in the first-mentioned action, to enforce their lien, and to subject the land to payment of their debt of $509 and interest; and in 1883 judgment was rendered for sale of the land to satisfy the debt, and it having been sold, appellant, Elliott, was, in virtue of a writ of possession ordered in the same action, evicted. Whereupon he brought this action against appellee, Saufley, for breach of his warranty of title, to recover back the purchase money paid to him for the land, and interest from date of eviction, W. G. Welch, who joined in the deed, being also made defendant.

In the answer filed the allegation of the petition that no valid defense could have been made to the action by Nancy Walls and others as well as the one that appellant was evicted by paramount title were denied. To the reply a demurrer was sustained, followed by judgment dismissing the action.

And as the demurrer had the effect to bring previous pleadings before the court for consideration, the first inquiry is in regard to the sufficiency of the answer, for it seems to us the facts already mentioned, and which were stated in the petition, constitute prima facie a cause of action.

In our opinion, as Nancy Walls and others were not parties to the action instituted by W. M. Estis in 1878, the judgment therein rendered did not bind them. For the statute under which the proceedings in that action were had was intended for the benefit and protection of general creditors, as heretofore distinguished by this court from those who, having valid and subsisting liens, can not be prejudiced by a conveyance of the debtor made in contemplation of insolvency and with a design to prefer one to the exclusion of others. (Brooks, Waterfield & Co. v. Staton, 79 Ky., 174.) And although it is provided such conveyance shall operate as an assignment and transfer of all the property and effects of the fraudulent debtor, and shall inure to the benefit of all his creditors in proportion to the amount of their respective demands, manifestly it was not intended to thereby impair or lessen the

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value of a lien or security fairly acquired, or that one holding it would be concluded by proceedings under the statute without being made a party and served with process. For if it was so the statute intended to protect bona fide creditors against fraudulent sales and conveyances by debtors would, in many cases, work hardship, and might, in such one as this, be permitted to carry out fraudulent designs of one against another class of creditors.

It was also pleaded in the answer, and is now argued, that the enforcement of the lien of Nancy Walls and others was, when they commenced their action, barred by the five years' statute of limitaiton. That position rests upon the assumption the action was not founded upon a contract in writing in the meaning of the statute.

It is stated in the deed the land was sold by James Estis in his lifetime for an agreed consideration to Geo. W. Estis who held a title bond, and that by a settlement of his accounts as administrator in the county court he was, after being charged with the balance of the purchase money, found indebted to Nancy Walls and others a stated sum, to secure payment of which a lien was reserved in the deed. It seems to us the right of action in that case was clearly founded on a contract in writing, which not merely created a lien upon the land, but the acceptance of the deed and possession of the land by Geo. W. Estis operated as an agreement on his part to pay the purchase price.

But whether valid defenses could or could not have been made to the action by Nancy Walls and others, it seems to us is, in this action, immaterial. For it has been held by this court, and may be regarded as settled, that all necessary for the vendee of land, in order to maintain an action on a covenant of warranty, is to allege and show he had lost the land under a judgment of eviction in an action to which the vendor was a party, or of which he had notice. (Woodward v. Allen, 3 Dana, 164; Beard v. Basye, 7 B. M., 150.)

To the aciton in which the judgment of eviction was rendered, appellee, Saufley, was a party, and instead of making defense to the merits he filed a demurrer upon the ground he was not a proper party, which was sustained. It seems to us, therefore, he can not defeat this action upon the ground appellant failed to make defense to that action, even if it could be made to appear he might have successfully defended it, and consequently a demurrer ought to have been sustained to the answer.

Therefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

FLYNN v. SPARKS, &c.

(Filed March 16, 1889—Not to be reported.)

1. Conflict of boundary—In this action to recover for a trespass upon land and for cutting and carrying away timber therefrom, the defendant alleged that the timber was cut from land belonging to him. The plaintiff and defendant claim under the same grantor, and both deeds were executed on the same day, but defendant's deed calls for certain objects in plaintiff's line. Held—That this is sufficient to show that plaintiff's deed was executed first, and, therefore, if there is a conflict of boundary, plaintiff's title to the extent of the conflict is superior to that of defendant. And an instruction requiring the jury to believe, in order to find for plaintiff, not only that plaintiff's deed covered the land, but that defendant's deed did not cover it, was more favorable to defendant than he was entitled to.

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2. Same—Adverse possession—The court properly refused to instruct the jury as to the law of fifteen years' adverse possession, as the defendant did not plead such a defense. And, moreover, if the plaintiff's deed covered the land in controversy, he being in the actual possession of some part of the survey, and claiming to the extent of the boundary, the defendant's occupancy of his survey outside of the conflict did not have the effect of extending his possession to the land within the conflict.

J. B. White for appellant.

Riddell & Fluty for appellees.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Bennett.

The appellees, Levi Sparks and Cynthia Sparks, his wife, and their children, sued the appellant for trespassing upon their land and cutting and carrying away timber therefrom. The appellant denied the trespass and alleged that the timber was cut from land belonging to him. The jury found that the appellant cut the timber upon the appellees' land. The lower court having overruled the appellant's motion for a new trial, he has appealed.

Wm. Flynn, deceased, father of the appellant, and Cynthia Sparks were brother and sister. Their father, Levi Flynn, deeded to each of them their respective tracts of land on the same day. The deed to Wm. Flynn calls for a sugar tree as the beginning corner in Cynthia Sparks' line, and also calls for another sugar tree in her line. Therefore, we regard it as certain that Cynthia Sparks' deed was executed first. This fact being established it follows that if there is a clash of boundary the title of Cynthia Sparks, to the extent of the conflict, is superior to that of the appellant. The appellees claim that one of their corners is at a point of rocks at "16," as shown in Parson's plat. Whereas, the appellant claims that the true corner is at a point of rocks at "10," as shown on Benton's plat. If the former proposition be true the timber cut by the appellant was on the appellees' land; if the latter proposition be true, the timber was cut on appellant's land.

Benton, the surveyor, the appellant and others fix appellees' true corner at the point of rocks at "10." On the other hand, Morris' corner is called for in the appellees' deed. This corner is established as being at the place designated by the surveyor, Parsons. This corner being established, to run from thence the course and distance mentioned in the appellees' deed leads to the point of rock at "16." This point of rock, as appears from the evidence, is at the head of the sage field branch—another point called for in the deed. Also, in running the line from Morris' corner, near two white oaks, to "16," passes near the slate bank. This fact was proven by several witnesses. Also, it was proven by several witnesses that William Flynn said, in his lifetime, that he and the appellees owned timber at the head of sage field branch, and that they ought to help open a road to it. Also, the survey, made by Parsons, makes a complete boundary of the land, consistent with the courses and distances and natural objects called for in the deed, except as to the course of one line. On the other hand, to get from "10" to "11" in Benton's plat, the course must be changed from N., 39 E. to S., 83½ E. Also, it is clear that after the deed was made Levi Flynn, the father, recognized the fact that the appellees' deed called for the point of rocks at "16." But which fact was not in accordance with his intention,

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and he proposed to let the appellees have other land so as to make up the deficiency caused by placing the corner at point "10," the place that he wished it to be; but this proposition was not accepted by the appellees. So, counsel is mistaken in his recollection that there was no proof before the jury showing that the true corner was at the point of rocks at "16." On the contrary, there was strong proof before the jury of that fact.

The court instructed the jury, if they believed from the evidence that the land in controversy was covered by the appellees' deed, and not by the appellant's deed, they must find for the appellees the value of the timber cut thereon.

This instruction was more favorable to the appellant than he was entitled to, for the reason that the jury were required to believe not only that the appellees' deed covered the land in controversy, but the appellant's deed did not cover it; whereas, the appellees' deed being older than that of the appellant, the appellees' deed invested them with a paramount title to all the land covered by the said deed, and the fact that the appellant's deed might have covered the same land did not have the effect of shielding him from liability to pay for the value of the timber which he took therefrom.

The court also instructed the jury that they could not find for the appellees if they believed that the appellees consented that the corner to their land should be at the letter "A" in Benton's plot. In view of the fact that if they consented to such an arrangement it was equivalent to consenting to the entry of the appellant on the land in controversy and cutting timber thereon, the instruction was correct. The court also instructed the jury that the burden of proof was on the appellees.

The court refused to instruct the jury as to the law of fifteen years' adverse possession. In this the court was right, for the reasons—first, the appellant did not plead that he and others under whom he claims had held the adverse possession of the land in controversy for the period of fifteen years; second, if the appellees' deed covered the land in controversy, they being in actual possession of some part of the survey and claiming to the extent of the boundary, the appellant's occupancy of his survey outside of the conflict did not and could not have the effect of extending his possession of the land within the conflict.

The instructions given by the court covered fully and fairly the issues raised by the pleadings and evidence. The instructions offered by the appellant were, therefore, properly refused.

The judgment is affirmed.

JONES, &c. v. ALLEN & CO.

(Filed March 21, 1889.)

1. Judicial sales—Execution lien—Pending an action to enforce a lien on land, an execution creditor may have his execution levied on the land as foundation for coming into the action and enforcing the lien created thereby. And even where the execution lien is created after the land has been sold under judgment of the court, the execution creditor may come into the case and file exceptions to the report of sale, and have the sale set aside, if good grounds exist therefor, and then have the property sold to satisfy both his debt and that of the plaintiff.

Appellees had an execution levied on the land of their debtor after it had been sold under judgment of the court in this action to enforce a lien thereon,

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and then upon petition were made parties to the action, and filed exceptions to the report of sale upon the ground that the property had not been appraised or properly advertised. The sale was set aside and a sale ordered to satisfy both the debt of the plaintiff and the debt of appellees. Held—That this was proper.

2. Joinder of actions—Election—The appellees, after asserting a lien on the land, filed an amended answer and cross petition, alleging that the debtor had sold the land, and seeking to subject the unpaid purchase price, making the vendee a party. The defendants moved the court to require appellees to elect which cause of action they would prosecute, but the court overruled the motion. The defendants then made known that the note executed by the vendee for the purchase price had been assigned for value, thus placing them beyond appellees' reach. Held—That even if the court erred in overruling the motion to require appellees to elect, the ruling of the court worked out equitably, and the defendants can not complain.

3. Verbal sales of land—Executions—A deed executed pursuant to a previous verbal sale of land does not relate back and overreach an execution lien created between the date of the sale and the date of the deed, and before any money had been paid by the vendee, and, therefore, before he had acquired any equity.

4. Levy of execution—Where the officer having an execution goes to or upon the land of the defendant and actually levies upon it, and indorses the levy upon the execution within a reasonable time thereafter, it is not necessary to the validity of the levy that he should notify the owner or occupant of the land. The officer may, however, dispense with going to or upon the land by getting the consent of the owner or agent to the levy upon the particular land, or by notifying him that he intends levying upon it. But in that event he must still indorse the levy upon the execution within a reasonable time. He may, however, dispense with thus indorsing the levy by both going to the land and notifying the owner or occupant of the levy; and in that event the levy may be established by parol evidence.

R. Gudgell and W. S. Gudgell for appellants.

J. J. Nesbitt for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Bennett.

Scott and Hurst, in 1879, obtained a judgment in the Bath Circuit Court against the appellant, Spencer Boyd, for the price of some lumber, with which they furnished him to build a dwelling house on a tract of land belonging to him. They having taken proper steps to retain a lien on said house and land for the price of the lumber, judgment was also rendered directing a sale of the land to satisfy the debt.

The land was not sold until the 8th day of December, 1884. On that day the master commissioner sold the entire tract for $114, the balance then due, and Samuel Jones, the son of the appellant, became the purchaser. Thereafter, on the 31st of December, 1884, the appellees caused two executions, aggregating about $140, besides interest and costs, to be levied upon said tract of land. Thereafter, in February, 1885, the appellees, upon their petition setting up a lien upon said land, by virtue of the levy of said executions, were made parties to the action for the purpose of asserting said lien. They then filed exceptions to the report of sale, upon the grounds: First, the land was not appraised; second, it was not advertised, as required by law. The court sustained the exceptions and set the sale aside. Thereafter

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on the 23d day of March, 1885, the appellees filed an amended answer and cross petition, in which it was alleged that the appellant, Spencer Jones, on the 2d day of March, 1885, had sold and conveyed said land to the appellant, Thompson Jones, for the sum of $1,600, $1,000 of which was paid down, and the remaining $600 was to be thereafter paid. Thompson Jones having been made a party, the appellees, without abandoning their execution liens, sought to subject a sufficiency of this sum to payment of these executions.

The appellants then moved the court to compel the appellees to elect which remedy they would prosecute; but the court overruled the motion. Whereupon, the appellants, by their answer, made known that the note evidencing said sum of $600 had been, before the appellant, Thompson Jones, was made a party, assigned to a third person for value. So, if it be true that the court erred, which we do not decide, in not compelling the appellees to elect, nevertheless, the appellants have no right to complain, for they developed, by their answers, the fact that the money that the appellees sought to reach was not subject to their debt, which fact they knew at the time they made the motion, and evidently intended to put appellees in pursuit of a shadow, and let the substance slip from their grasp. Therefore, the judgment of the court, if erroneous at the time, worked out equitably, and the appellants can not be heard to complain.

The appellees contend that the appellant, Thomas Jones, verbally purchased the land on the 23d day of December, 1884, just a few days before the appellees' executions were levied; and that his deed of the 2d of March following relates back to the verbal purchase, and invests him with a title superior and anterior to the lien of the appellees. The verbal purchase did not invest the appellant with any legal or equitable title whatever, and, as he paid no money on that purchase, with no equity of any kind; therefore, if the appellees acquired an execution lien on the land between the times of making the verbal purchase and the execution of the deed, the title acquired by the execution of the deed could not have the effect of supplanting the execution lien.

The sheriff went on the said tract of land, and not finding its owner or occupant, he levied on it, and returned to town and caused the levy to be indorsed upon the executions. He did not post a copy of the executions upon the land; nor do any other thing than that above mentioned to apprise the owner or occupant of the land that he had levied on it. Was it a valid levy? To make a valid levy upon land it is only necessary for the officer to go to or upon the land and actually levy upon it and indorse the levy upon the execution. However, the indorsement need not be made while the officer is at or upon the land. If it be made within a reasonable time thereafter, it will be sufficient to hold the levy. It is not necessary to the validity of the levy in the case above indicated, that the officer should personally notify the owner or occupant of the land of the levy. Also, the officer may make a valid levy upon land without going to or upon it, in either of two ways: first, by seeing the owner or agent and get his consent to the levy upon the particular estate; or, second, by apprising the owner or agent of the particular estate that he intends levying upon. In either of the two cases last named the officer must make, within a reasonable time, an official and specific entry upon the execution. But when the officer goes to or upon the land and levies on the same and notifies the owner or occupant of the levy, such levy may be established by parol evidence. (McBurnie v. Overstreet, 8 B. Mon., 304.)

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The appellees had the right to levy the executions on the land and thereby create a lien upon it, not for the purpose of selling the land under the executions, but for the purpose of enabling them to come into the case to subject the land to the payment of their debt, subject, however, to the lien of the judgment creditor. Were the appellees denied this right, it would result in a sacrifice of their rights as creditors. The facts of this case illustrate the wisdom of allowing the levy upon the land as a foundation for coming into the case to enforce the lien created thereby. For here, land worth in cash $1,600, was bid off at the commissioner's sale for $114, which sale, but for allowing the appellees to come into the case and assert their lien, would have been confirmed, and the appellees would have lost their debt. But as the chancellor recognized the right of the appellees to create a lien upon the land by levying upon it as a foundation for coming into the case to enforce their lien, their rights as creditors were saved. It is true that such a proceeding will not be allowed to interfere with the rights of the purchaser at the commissioner's sale; but here, according to the facts in this record, the person to whom the land was knocked off acquired no rights as purchaser; and the court did him no wrong by setting aside the report of sale.

The judgment is affirmed.

BELFONT IRON WORKS v. McGUIRE.

(Filed March 21, 1889--Not to be reported.)

Vendor and vendee—A vendee resisted the recovery of an unpaid balance of the purchase money because the title of another to a part of the land was adjudged superior to that of his vendor, relying upon an alleged parol agreement that he was not to pay the balance sued for until the land was freed from this claim, and not upon the ground that the deed contained a covenant of good title. The parol agreement was not established. Held—That a personal judgment against defendant was proper.

R. D. Davis for appellant.

E. F. Dulin for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Lewis.

This action was brought to recover $150, alleged balance of $900, the purchase price of a tract of 150 acres of land sold and conveyed by appellee, McGuire, to appellant.

The defense to the action is that when the land was sold and conveyed, one Watson was claiming a part of it, and it was agreed between appellee, McGuire, and appellant no more than $750 was to be paid until the land was freed from his claim. And to the end of having the conflict between McGuire and Watson settled, the answer was made a cross petition against the latter, who filed an answer setting up title to about fifty acres of land which the court finally adjudged superior to that of McGuire. But nevertheless, a personal judgment for the $150 claimed in the petition was rendered against appellant, and from that part of the judgment this appeal is prosecuted.

Appellant does not rely upon a covenant of good title contained in the

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deed, nor can we say the deed contains any warranty, for it does not seem to have been filed, but the defense is based upon a parol agreement which there was no attempt made to establish by proof, though it was denied.

If a recovery had been resisted upon the ground the deed contained a clause of warranty of title, that McGuire was, as alleged, insolvent, and appellant had, by the judgment in favor of Watson, lost fifty acres of land, as was the case, undoubtedly the personal judgment would have been erroneous. But as the record stands the judgment must be affirmed.

WHITLOCK'S AD'MR v. PENNSYLVANIA CO.

(Filed March 21, 1889—Not to be reported.)

Negligence—Special verdict—In an action against a railroad company to recover for the killing of plaintiff's intestate by the alleged gross and willful neglect of defendant, the jury, by reason of disagreement, were unable to answer certain special interrogatories propounded to them, but by their answers to other interrogatories found that the injury to plaintiff's intestate was caused by her own negligence, and not by any neglect—ordinary, gross or willful—of the defendant's agents or servants in charge of the train. Held—That judgment for defendant was proper.

R. C. Davis, Matt. O'Doherty and W. C. Trabue for appellant.

Chas. H. Gibson for appellee.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellant's intestate, Mrs. Whitlock, was in the habit of going upon the private property, in the city of Louisville, that was being used by the appellee at the time the intestate was killed, for the purpose of gathering up pieces of waste wood. She had been frequently warned by policemen and others to keep off of said ground, but she, notwithstanding the warning, continued to go upon the same for said purpose.

The appellant's intestate was sitting or squatting on a little space that is between the railroad track and the platform. Her back was resting against the banisters of the platform that was designed to keep persons from getting under the platform. Her face was set in the direction that the appellee's cars were being backed up to the platform. The front car passed her without striking her; the next car being wider than the front car, jammed her up against the platform, which killed her.

The appellant, as administrator, sued the appellee for damages for killing his intestate by gross and willful neglect. Upon the special findings returned by the jury selected to try the issue the lower court gave judgment for the appellee.

The twenty questions submitted to the jury presented every conceivable view of the case. Some of the questions the jury did not answer, because the answers to other questions superseded the necessity of answering these. By question 16 the jury was asked whether or not it was the reasonable duty of the appellee's agents in charge of the train when uncoupling or switching cars on a private track to have a brakeman or other person in the rear of or

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on the top of the car to keep a lookout to avoid collisions with persons on or near the track? The jury, because of disagreement, could not answer this question. By question 17 they were asked if the injury to said intestate could have been avoided by the presence or exercise of ordinary care of a brakeman in the rear of or upon the top of the rear car? The jury, because of disagreement, failed to answer this question.

While the jury failed to answer these two questions, yet their answers to other questions authorized the lower court to render judgment for the appellee. They found that the track of the railroad where the appellant's intestate was killed was on the private property of McFerran & Co., and that the track at said place was in frequent use for hauling and switching trains, and that the intestate knew that it was frequently used for such purpose; that she was not using said track as a passway or crossing; that she, by the use of ordinary care and prudence, could have avoided the injury; but she took no care or precaution to avoid the injury; that the injury was the result of her negligence.

The jury also found that there was no brakeman or other servant on the rear car, but the bell was ringing as the signal of the backing of the train. They also found that the death of the intestate was not caused by any neglect—either ordinary, gross or willful—of the appellee's agents or servants in charge of the train.

Although the jury was unable to determine whether or not it was the duty of the appellee, in order to avoid collisions with persons on the track, to keep a look out at the rear of or on top of the rear car while the cars were being backed, or that with such look-out the injury to the intestate could have been avoided, yet they do find that the death of the intestate was caused by her own neglect, and not by any neglect of any kind of the appellee's agents or servants. The jury must have regarded the propositions contained in questions 16 and 17 as abstract, and not necessary to be settled, in order to determine the question as to whether or not the death of the intestate was caused by the negligence of the appellee, else they would not have found that the appellee was not guilty of negligence in any of its degrees.

The questions propounded and the instructions given by the court covered the whole case, therefore, those asked by the appellant were properly refused.

The judgment is affirmed.

McADAMS v. STURGEON, &c.

(Filed March 21, 1889—Not to be reported.)

1. Mental capacity—In this action against the surety in a promissory note and to enforce a mortgage executed by her to secure the note, the defense that defendant, by reason of her physical and mental condition, was unfitted to transact business, is not sustained by the evidence.

2. Vendor's lien—Waiver—A vendor, by accepting the joint note of one to whom the vendee had assigned the title bond, and another, supposing that both of the obligors were interested in the land and were principals in the note, did not waive his implied lien on the land.

3. Principal and agent—An agent having general authority to manage the principal's business, was authorized to sign the principal's name to a note for the unpaid balance of the purchase price of land purchased by the principal.

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T. B. McIntire for appellant.

Edwards & Hazelip for appellees.

Appeal from Edmonson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, P. A. McAdams, and R. T. Kinslow executed a note for $60 to the appellees; the note was executed to the appellees for their fee as attorneys for defending R. F. Kinslow against a criminal charge; the appellant signed said note as Kinslow's surety and executed a mortgage on her tract of land to secure the payment of the note. The appellees, by their petition in equity, sought to obtain judgment on this note and to enforce their mortgage lien to satisfy the judgment.

The appellant filed an answer of six closely written pages. The substance of which is: Owing to delicate health she "was, at best, unfit and unqualified to do or transact any business of any importance." That, owing to a severe attack of neuralgia, which she had had for a day or two before signing the note and mortgage, and the further troubled condition of her mind growing out of the recent difficulty between her codefendant, who was her relation, and A. S. Kinslow, who was her son-in-law, she was, at the time of signing the note and mortgage, "both mentally and physically disqualified to do or transact any business."

The evidence fails, in toto, to sustain the appellant's defense. It is not alleged that she was a non compos mentis. She, in her evidence, gives as a reason why she did not know the nature and character of the writings that she signed, that her mind was not on the writings; that she was "pestered" and "excited." She does not pretend that she was induced to sign the note and mortgage by the persuasion of any of the appellees. Several of her friends, among whom was her daughter, think that she was not capable of transacting any business of importance, owing to the fact that her health was delicate and she suffered with the neuralgia. On the other hand, it clearly appears from the evidence that she possessed good sense and good judgment; that R. F. Kinslow was in jail in Brownsville, and his examining trial was set for a certain day; that on that day she went to Brownsville in his interest; that the appellees made known to Kinslow that he was a stranger to them and had no property, and they could not trust him alone for their fee; that he proposed to give the appellant as his surety, and the appellees agreed to take her if she would give them a mortgage on her land; that they explained to her that as Kinslow was without property and a stranger, they would not trust him alone for their fee; that she knew him and if she felt like it she could go his surety and give them a mortgage on her land; that she agreed to do so and did so; that the only thing she hesitated about was the increasing of the fee from $50 to $60, and the fear that her son-in-law, A. S. Kinslow, would be angry with her for executing the mortgage; that it was not represented to her by the appellees that R. F. Kinslow would, upon his release, which would be in a few days, go to work and pay off the note and she would not have it to pay. It also appears that she came to Brownsville for the purpose of assisting R. F. Kinslow out of his trouble, and that she was an important witness for him at his examining trial and testified in a clear and straightforward manner. So, the evidence for the appellant, including that of her own, does not make out her defense.

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But, considering the case in the light of the appellees' evidence, which is intelligent, clear and explicit, she has not the semblance of a defense.

The appellee, Barr, who was made a defendant to the petition of the appellees, Sturgeon, &c., upon the ground that he claimed a lien upon the land for a balance of purchase money, filed his cross petition against the appellant, in which he set up the fact that he sold said land to the appellant, and that he held a note on her for $75, subject to a credit of $25, which she executed for the balance of the purchase money due on said land.

Said note bears date September 3, 1877. Barr made the deed to the appellant in 1876. To the note as obligors are the names of A. S. Kinslow and the appellant. The appellant contends that said note was not given for the unpaid purchase money, but in this she is mistaken; for A. S. Kinslow says that a man by the name of Bird purchased the land by title bond, and he assigned the land to the appellant, and Barr made her a deed, and thereafter he (Kinslow) paid Barr $80 on a balance of the purchase money, amounting to ——— dollars, which left a balance due of $75; that the note sued on was executed for said balance; that his and the appellant's names were signed to said note at the request of Barr; that his (Kinslow's) wife signed their names to the note. But the appellant says she only signed or authorized her name to be signed to the note as the surety of Kinslow. In this she is mistaken, as the following facts show: She owned the land, and Barr had a lien on it, which he never intended to release; and he says that, believing Kinslow had some interest in the land, he desired both to sign the note as principals, which they did. Kinslow sustains Barr; Mrs. Kinslow sustains the appellant. But Barr is sustained by the logic of the attending circumstances.

The purchase was made after the General Statutes went into effect, under which an implied lien for unpaid purchase money as between the vendor and vendee exists, unless the vendor has waived the same. Here the appellant was the assignee of the title bond. Some of the purchase money, at the time of the assignment of the bond, was unpaid. The vendor made the deed to the appellant, with the understanding that she was to pay the balance of the purchase money due on the land, and that he had a lien thereon to secure the payment of the same; that thereafter he took the joint note of the appellant and A. S. Kinslow, her son-in-law and business manager, for the balance then due, supposing that both were interested in the land, and were principals in the note. Therefore, Barr did not waive his implied lien on the land.

According to the testimony of the appellant, Kinslow and his wife had general authority to manage appellant's business, and the signing of her name to said note by Mrs. Kinslow was in accordance with that authority.

The objection to the appraisement of the land was passed on by the chancellor, and we see no objection to his ruling thereon.

The judgments on the note for $60 and enforcing the mortgage lien, and on the purchase-money note and enforcing the vendor's lien, are affirmed.

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OSBORNE v. PENNSYLVANIA CO.

(Filed March 21, 1889—Not to be reported.)

1. Special verdict—In this action against a railroad company to recover for injuries received by plaintiff while acting as brakeman, the failure of the court to submit to the jury, by the special interrogatories propounded, the question as to the negligence of the engineer, was not error, although the issue was made by the pleadings, there being no testimony tending to show that he was negligent.

2. Same—As the jury found that the plaintiff's fellowbrakeman, whose negligence was complained of, was competent and did his duty in a reasonably skillful manner when the accident happened, and there was evidence to support the findings, the defendant was entitled to judgment, the special findings being entitled to the same weight as the verdict of a properly-instructed jury.

3. Negligence—Fellow-servants—The brakeman being competent to the performance of his duties, even had he been guilty of neglect, the plaintiff could not recover, they being fellow-servants engaged in the performance of like duties.

4. Special verdict—The appellant can not complain of the failure of the jury to answer special interrogatories, the answers to which could not have affected the result.

R. C. Davis and Matt. O'Doherty for appellant.

Chas. H. Gibson for appellee.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

The appellant, Edward Osborne, while engaged as a brakeman of the appellee, The Pennsylvania Co., in uncoupling a freight car from an engine, was so injured by the latter being run back upon him by the engineer that his leg had to be amputated to save his life. The crew of the train consisted of the engineer, the fireman and two brakemen, the appellant being one of them.

The petition avers, in substance, that he was required by the conductor to uncouple the car that it might be placed upon a side track, and that while he was doing so the other brakeman, who was incompetent for the business and known to the appellee to be so, signaled the engineer to run the engine back, and that through the gross negligence of the two the injury occurred. An issue was fully formed as to all these matters, the answer also pleading the negligence upon the part of Osborne as the cause of his injury.

The train appears to have been made up, when the conductor found that the car next to the engine did not belong in it. In order to remove it the engine and it were cut loose from the balance of the train, and it was taken beyond a switch and then run back upon it, where it was to be uncoupled from the engine and left. The preponderance of the testimony shows that the conductor directed the other brakeman to attend the switch and do the coupling and uncoupling. The appellant, however, testifies that he was directed to do it. It is immaterial, however, to the settlement of the legal questions presented whether the one or the other or both of them were so ordered. The accident occurred at night, and it is reasonably certain that the presence of the appellant between the car and the engine was unknown to both the engineer and the other brakeman. The latter could have done

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all that was required. He threw the switch and then signaled the engineer to move back upon the side track. He did so, and the appellant, being then between the car and engine for the purpose of uncoupling them, was, in some way, caught by the wheel of the latter and injured. There is evidence tending to show that he went between them when they were backing, and that no signal was given to back the train while he was between them. The brakeman at the switch did not and could not have seen him when he went between them. It being night time, the engineer acted and was, of course, authorized to act, upon the signal given by the light of the brakeman at the switch, especially when he did not know that the appellant had gone between the engine and the car.

A special verdict was directed and upon it a judgment was rendered for the appellee.

Two grounds for a reversal are urged: First, that the questions submitted to the jury for the special finding did not cover the issues made by the pleadings.

It is contended that while they embraced the question whether the brakeman was incompetent for the proper performance of his duties, and whether he was guilty of negligence when the appellant was injured, yet the question of negligence upon the part of the engineer was not submitted to them.

This is true, but it is perfectly evident, from the appellant's own testimony and that of the other witnesses introduced by him, that his complaint rested upon the alleged negligence of the brakeman and his unfitness for the work, together with a knowledge upon the part of the company of this latter fact. The court submitted to the jury every question that was offered by either side. Not one was refused.

The testimony clearly shows that the appellant was not relying upon any negligence upon the part of the engineer. Moreover none was shown, and indeed there was no attempt to show it. There was no testimony tending in the slightest degree to support the assertion to this effect, and the appellant can not, therefore, complain. While the issue was made, there was no evidence whatever to support the affirmation of it. Indeed the contrary appeared.

The jury, by their answers to the interrogatories submitted to them, found that the brakeman was competent, and did his duty in a reasonably skillful manner when the accident happened; that the appellant was not required to assist in the duties incident to the leaving of the car upon the side track; that the train was moving backward when he went between the car and the engine; that the brakeman did not give any signal to back the train when the appellant was between the engine and car, nor could he have known, by the exercise of ordinary care, that he had gone between them to uncouple them; and that by the exercise of ordinary care upon his part he could have avoided the injury to himself. These answers were decisive of the case. There was evidence to support them, and we shall not undertake to review them. They are entitled to the same weight as a general verdict of a properly-instructed jury. There being no evidence whatever of negligence upon the part of the engineer, and the brakeman being competent to the performance of his duties, the case was for the company, even had the latter been guilty of neglect, since he was a fellow servant of the appellant, engaged in the performance of like duties with him, and was not, therefore, the agent of the company as to his fellow-laborer. The jury found, however, that he discharged his duties at the time in a reasonably skillful manner.

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Secondly. It is contended that the findings should have been set aside and a new trial granted, because the jury did not respond to all the questions submitted to them. Numbers two and three were not to be answered unless they found in answer to the first one that the brakeman was incompetent. Four and five were framed upon the idea of his incompetency; and as the jury had found otherwise, it was unnecessary to respond to them. It was equally unnecessary to answer the sixth one, relating to the damages the appellant had sustained, because the other findings precluded their allowance. The remaining unanswered question was a proper one. It asked a finding whether it was proper for the appellant to assist the other brakeman in executing the order of the conductor to get the car out of the train; but whether answered one way or the other, it could not, in view of the other findings, have affected the result.

The appellant excepted to a portion of the deposition of one Safford. It was taken by the appellee, but appears to have been used by the appellant. He made the witness his own, and in any event the evidence objected to was competent, as it merely tended to show the opportunity of the witness to observe the custom of brakemen in the performance of their duties, this being the subject as to which he was testifying.

Judgment affirmed.

ROBINSON v. COMMONWEALTH.

(Filed March 23, 1889.)

Former jeopardy—Indictment for bigamy—After the accused in a felony case has been put upon trial, the discharge of the jury, save in case of necessity or by the consent of the accused, operates as an acquittal and bars another trial for the same offense. And while the accused may waive his right to object to a second jeopardy, he does not do so by merely remaining silent when the jury is discharged.

Upon the trial of an indictment for bigamy it appeared that the name given in the indictment as that of the woman to whom the defendant was last married was not her real name, but that she was sometimes known by that name. The court sua sponte discharged the jury, dismissed the indictment and referred the case to another grand jury. The defendant did not object. An indictment was returned giving the real name of the woman, and upon the trial thereunder the defendant pleaded former acquittal. Held —That there was no necessity for discharging the jury upon the first trial, and, therefore, the action of the court operated as a bar to another trial.

R. S. Montague for appellant.

P. W. Hardin for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Holt.

Richard Robinson was indicted at the June term, 1888, of the Taylor Circuit Court for bigamy. The indictment charged him with marrying one Harriet Anderson in 1871, and while she was yet his lawful wife, and on March 22, 1888, with marrying one Mag White. At the indictment term he was put upon trial, the plea of "not guilty" entered, and a jury sworn to try the issue. The testimony for the Commonwealth having been heard in

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part, it appeared that the last named woman had been divorced from one John White, her name prior to her marriage to him being Margaret Sharp, and that at the time of her marriage to the accused she was sometimes called Mag White and sometimes Mag Sharp. The court thereupon sua sponte, and over the objection of the attorney for the State, discharged the jury and referred the case to another grand jury. The accused neither objected nor consented to this being done. He remained silent. This action of the court was had that he might be charged with marrying Margaret Sharp. It is manifest it was unnecessary. It had been shown that Mag Sharp and Mag White were one and the same person, and that she was called by both names. The jury were not discharged, therefore, from necessity. The appellant was re indicted at the January term, 1889, the new indictment charging him with marrying Margaret Sharp, his wife, Harriet, being yet alive. Upon trial under it he pleaded not guilty and former acquittal.

The former indictment and the record relating thereto were put in evidence. It thus appeared that the accused had formerly been put upon trial, and that it had progressed so far that a part of the testimony for the State had been heard when the court discharged the jury. It was also shown upon the second trial, as it had been upon the first, that Mag White and Mag Sharp were one and the same person, she being called sometimes by the one and then by the other name. The lower court refused to either instruct the jury to acquit the appellant or to give any instruction as to the defense of former acquittal, although it fully appeared that he was again on trial for marrying the identical woman named in the first indictment and he having been convicted, now claims that the proceedings under the first indictment constituted a bar to any further trial.

Section 14 of article 13 of our State Constitution, says: "No person shall, for the same offense, be twice put in jeopardy of his life or limb." It was held in Williams v. The Commonwealth, 78 Ky., 93, that this provision in spirit, and, therefore, in fact, embraced a case where liberty only is involved, and that it was intended to cover all felonies or cases where the punishment is infamous. In that case, after the jury had been sworn and the testimony for the Commonwealth had been heard, its attorney moved to dismiss the indictment and refer the charge to another grand jury. There was no necessity for it. It was, however, done over the protest of the accused, and this court held that the former proceedings were a bar to a trial upon a second indictment. (1 Bishop on Criminal Law, section 990.)

It is said, however, as is true, that in that case and also in O'Brian v. The Commonwealth, 9 Bush, 333, the accused objected to the jury being discharged, and it is contended that because the accused, in this instance, did not, upon the trial of the former indictment, protest against the jury being discharged and demand that it proceed to a verdict, he can not now rely upon the proceedings then had in bar of a second trial.

The courts of the country have differed somewhat as to the interpretation to be given to the constitutional provision above cited, and which is also found in the Constitution of the United States. Some have understood it as merely meaning that where a person has been tried upon a sufficient indictment and a final verdict of acquittal or conviction been pronounced, he can not be tried again upon the same charge. They have, therefore, held that one is not placed in jeopardy within the meaning of the organic law, save when there is a verdict of a jury and a judgment thereon, and that,

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therefore, no discharge of the jury during a trial will bar a second one. Others have, however, held that the putting of the accused upon trial merely is placing him in jeopardy within the proper meaning of the constitutional restriction, and that when this has been done the discharge of the jury, save in case of necessity or by his consent, operates as an acquittal and bars a retrial.

That this last view is the proper one we have no doubt. It is the only one which renders secure this right, recognized by perhaps every system of jurisprudence now existing or which has ever existed. This court has adopted it and it accords with the current of authority. It is true that sections 243 and 252 of our Criminal Code, attempted to authorize a dismissal of an indictment by the States' attorney by the permission of the court at any time prior to a final submission of the case to the jury without its being a bar to another prosecution for the same offense; but these Code provisions, in so far as they attempted to authorize the dismissal of an indictment for felony after jeopardy had attached without its being a bar to a future prosecution for the same offense, were held in Williams v. The Commonwealth, supra, to be unconstitutional.

It must always be understood, however, that if the dismissal be from necessity, it does not operate as a bar to a further prosecution. This is necessary to the proper administration of justice. A juror may absent himself or be taken sick or die; so too may the judge; or the prisoner may become too ill to proceed, or it may be impossible for the jury to agree upon a verdict. In all of these cases, and perhaps others not now called to mind, the discharge of the jury will not operate to bar a further prosecution because it is of necessity.

In the case now before us the jeopardy unquestionably attached. There was no necessity for the discharge of the jury. The guilt or innocence of the appellant could have been properly declared under the indictment upon which he was then being tried.

It would be exceedingly dangerous to leave this organic right to rest for its proper protection upon the mere will or even discretion of the trial court, however pure and elevated the judicial character might be, and no interference by the State, after the jury has charge of the case, can be tolerated unless upon facts establishing a case of necessity or by consent of the accused. (Stewart v. The State, 15 Ohio St., 155; Bishop on Criminal Law, section 995.)

The last-named writer says that the accused may waive his right to object to a second jeopardy, and that the waiver may be express or implied.

"If, during a trial, the jury is discharged with the prisoner's concurrence, this consent to the discharge is, by implication, a waiver to any objection to being tried anew, and he may be so tried. Even the consent to the discharge may appear, by implication, from the circumstances, as well as by express words." (1 Bishop on Criminal Law, section 998.)

In this instance, however, there was no express consent by the appellant to the discharge of the jury, nor any circumstances from which a consent can be properly implied. He was merely silent. The rule should not be extended so far as to require him, for the protection of this organic right, to object to the action of the court. If, upon the motion of the attorney for the Commonwealth, a nolle prosequi had been entered at the stage of the trial when the former indictment against the appellant was dismissed, it would certainly have operated to bar any further prosecution for the same

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offense, although the appellant might not have objected to it. If sane, he certainly would not have done so, and a discharge of the jury by the court, after jeopardy has attached, should have the same effect, save in cases of necessity, this exception being necessary to the administration of justice.

The lower court should, upon the record as now presented, have instructed the jury to find for the appellant, and the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

CAMPBELL v. COMMONWEALTH.

(Filed March 26, 1889.)

Homicide—Right of father to protect daughter from husband's assaults—Instruction as to manslaughter—A father being informed, for the second time on the same day, that his daughter was being abused by her husband, seized his pistol and went to the residence of his son-in-law, about three squares distant, and there found, at night, his daughter and her children in the streets, driven from their home; and after some words had passed between him and his daughter's husband, he fired at the husband, the shot producing death. Upon the trial of the father for murder, Held—

1. For the purpose of showing the good faith of the father in going to the rescue of his daughter, it was competent to show the previous bad treatment of the daughter by her husband; but enough being proven to show that she was in constant danger of bodily harm, the fact that proof of other acts of violence was excluded is not grounds for reversal.

2. It is not necessary that a blow should be given or a trespass committed on the person of the accused in such a case to reduce the crime from murder to manslaughter; and, therefore, it was error to give the ordinary instruction as to manslaughter. (See opinion for instruction which should have been given.)

3. The father had a right to protect the person of the daughter from great bodily harm, even against the assault and battery of the husband, and the jury should have been so instructed as matter of law.

4. The court erred in instructing the jury that the accused could not be acquitted on the ground of self-defense if "by his own wrongful act he made the harm or danger to himself necessary or excusable" on the part of the deceased, as the jury may have considered that the accused was guilty of a wrongful act in going to the house of his daughter to protect her, there being no other act to which the instruction could have referred.

5. Although the jury found the defendant guilty of manslaughter only, thus disregarding the instructions of the court, under which they must have found the defendant guilty of murder or have acquitted him, this court can not say that a proper instruction as to manslaughter would not have lessened the punishment.

6. It was competent for the defendant, upon the issue of self defense, to prove threats of the deceased against him and previous efforts by the deceased to take his life.

Frank Hagan and Asher G. Caruth for appellant.

P. W. Hardin, Alpheus Baker and Frank Parsons for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Peter Campbell, was indicted by the grand jury of Jefferson county for the murder of his son in-law, Michael Cady, the trial resulting in a verdict of manslaughter, with the punishment fixed at confinement

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in the State prison for the term of ten years. The deceased and the daughter of the accused had been married about five years, and, from the testimony in the case, it was not long after the marriage before his conduct towards his wife became cruel and inhuman. His blows upon her person caused the premature birth of a child. She was driven from his home at midnight with her two infant children, or her presence sought by the police of the city at that hour upon a warrant issued at the instance of the husband, and the policeman, instead of giving her shelter in the station house, carried her to the house of her father. At other times she sought shelter in the outhouses near the residence, or in the cabins of the humblest negroes in the vicinity; was abused and beaten in public by the husband, and denounced as a street-walker and common prostitute in the presence and hearing of her neighbors. This cruel treatment of the daughter was brought home to the father, who has been convicted in this case; and he remonstrated time and again with his son-in-law for this brutal conduct, resulting in widening the breach between them, and causing the deceased at one time to attempt to take the life of the accused by shooting him with a pistol, and was prevented by parties present from firing. On the Saturday night preceding the difficulty in which Cady lost his life the deceased had driven his wife from her house to her father's, and on the next day, Sunday, the deceased went to the house of the accused with a pistol in hand, threatening to kill him, and was prevented from executing his threat by the wife of the accused closing the door and hiding her husband from his sight. The deceased, from the evidence before us, had an unnatural aversion to both his wife and her father, and this passion, fed and inflamed by the constant use of intoxicating drinks, kept the wife in constant danger of his brutal assaults that seemed to increase as their married life progressed.

Such is, in substance, the history of their domestic troubles and the connection of the accused with them up to the 31st of May, about 9 o'clock at night, when the accused fired the shot that ended his son-in-law's life.

The accused was told about 4 o'clock in the evening of that day that the deceased was abusing his daughter, and at 8 o'clock another messenger arrived, informing him of what was transpiring. He lived about three squares distant from the residence of his son-in-law, and on receiving the last information, seized his pistol and hurried to the residence of the deceased, and there found his daughter and her children, at night, in the streets, driven from their home; and on meeting his daughter's husband, after some words had passed, according to the theory of the Commonwealth, fired at the deceased as he was leaving him, but from the weight of the evidence, when he was fronting him, the shot producing death.

The theory of the defense is based on the testimony of the accused and another, who state that when they met, Cady cursed and abused the appellant, and made a motion with his hand behind him as if to draw a pistol, when the appellant fired, and in this the accused is corroborated by an eye witness, who says he saw the pistol on the deceased at the time. Other persons, several in number, heard words pass between the accused and the deceased, but did not understand what was said, and their statements conducing to show also that the deceased was making no demonstration when he was shot, but in a defenseless condition.

This is, in substance, the testimony heard on the trial. The grounds for a reversal of the judgment of conviction arise from the instructions given by

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the court, and in refusing to permit evidence of the various assaults and batteries made upon the wife by the husband during their married life, with a view of showing the bona fides of the father in leaving his home on the night of the killing, with pistol in hand, and going to the rescue of his daughter. It seems to us, from the uncontradicted proof in the case, that there was evidence sufficient to satisfy any reasonable mind that the apprehension by the father of his daughter's danger alone prompted him to go to the house of the deceased on the night of the killing.

Threats had been made from time to time against the accused by his son-in-law, by reason of his having interfered for the protection of his daughter, and the entire circumstances and acts transpiring, from which these threats originated, were permitted to go to the jury with a view of sustaining the plea of self-defense by the accused, and his purpose in leaving his home on the evening of the killing. The details of the treatment of the daughter by her husband as stated by these witnesses placed before the jury the real facts of the case, and left no room to question the good faith of the father in the effort to protect his daughter. Other acts of personal violence than those admitted were excluded, but enough was admitted showing that the wife was in constant danger of bodily harm, and, therefore, this court could not well have reversed this case for the reason alone that this evidence was excluded. To have permitted such an investigation would have prolonged the trial, and shed no light upon the issue between the Commonwealth and the accused.

At the time of the shooting the daughter was not in imminent peril. The trouble had just ended, and the daughter and her children on the street when the accused reached the ground, and, therefore, there was no reason for permitting these threats against the accused or the assault and batteries of the wife to go to the jury in support of the proposition that the father shot his son in-law to save the life of his daughter. The previous bad treatment of the wife would not justify the accused in taking Cady's life, but it would be competent, as already indicated, to show the lawful purpose of the accused in going to the place of the tragedy.

The threats of the deceased to take the life of the accused, accompanied by an effort to do so, such as the attempt to draw his pistol, etc., would of course be competent on the issue of the defense of the person of the accused at the time he shot.

The surrender of all parental control in confiding to the deceased the care and custody of his daughter did not lessen the love of the father for his child, but seems to have created new ties of affection in the birth of two children that made her the more the object of his love than when she left the parental roof, and having a knowledge of such cruel treatment as not only destroyed her happiness, but endangered her life, it was his natural and legal right to go to the rescue of his daughter, to prevent the infliction upon her person of cruel and inhuman blows. Having the right to go to the premises of the deceased for this lawful purpose, he had the right to defend his own person whilst there from bodily injury. The objection to the manslaughter instruction is that it only follows the law as in ordinary cases of homicide, the jury being told that "if the killing was in a sudden affray, or in sudden heat and passion, produced by considerable provocation, such as a blow, an actual trespass to his person, then the jury should only find the accused guilty of voluntary manslaughter, and fix his punishment at confinement in the State prison for a term not less than two nor more than twenty years." It loses sight of the relation of these parties, and the right

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of the father to protect his child from the personal violence of the husband, and to go even on his premises for that purpose, and when considering the instruction in regard to self-defense, this error becomes still more apparent.

In this case there was no blow or trespass to the person, but from the testimony on the part of the State, the killing by the father was under the influence of sudden heat and passion in the effort made in good faith to protect his daughter against the assaults of her husabnd. It is not necessary that a blow should be given or a trespass committed on the person of the accused in a case like this to reduce the crime from murder to manslaughter. The true test is, "whether the law deems the provocation calculated to excite the passions beyond control; if so, it reduces the offense from murder to manslaughter." (Bishop on Criminal Law, page 711.) It is difficult to establish any rule defining the crime of manslaughter that will apply to every state of case, and hence the necessity of placing before the jury, in such a case as we have here, the right of a father to protect his child; for, if a stranger had appeared upon the street and taken the life of the deceased, not in self-defense, the crime could not be reduced to manslaughter upon the idea that he was provoked to take the life of the deceased because of the story of the wrongs perpetrated on the injured woman. Nor could the father, unless impelled by passion created at the instant of time, have the offense reduced to manslaughter; but the law in its wisdom, looking to the frailty of human nature and the passions common to all men, when there is a sufficient provocation, will punish for the lesser offense; but, as said by Christiancy, Justice, in the case of Maher v. The People, 10 Mich., 212 (81 Am. Dec., 785), "provocations will be given without reference to any previous model, and the passions they excite will not consult precedent."

Whether there has been time for the passions to subside and the better judgment to prevail, must necessarily depend on the facts of the particular case.

The father had long listened to the details of his daughter's wrongs. He knew that her life was endangered; that his own life had been threatened; and meeting her husband at the moment when the daughter and children had been turned into the street, with angry words passing between them, he fired the fatal shot. It was, if in the absence of malice, under great provocation and such as lessened the punishment, if there had been an absence of all proof as to self-defense. If a heinous offense should be committed on the person of a man's wife or his daughter, as said in the case referred to, the passion would hardly subside as soon as in the case of a sudden quarrel. All such questions are necessarily under the control of the court, and to be determined when evidence is offered in mitigation of the offense. Lord Hale stated a case like this: A, the son of B, and C, the son of D, fall out and fight. A is beaten, and runs home to his father all bloody. B takes his staff, runs to the field, three quarters of a mile off, and strikes C that he dies. It was held not murder in B, but sudden heat and passion. East & Blackstone both cite this case, and while some of the elementary writers criticise this illustration of the rule by saying that the blow was inflicted by a weapon not likely to produce death, it still serves to show the view taken of the question by the earlier writers on criminal law, and whether that decision turned upon the one question or the other is immaterial in determining the question presented here.

In this case the jury returned a verdict of manslaughter, and it is, there-

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fore, maintained that no error existed by reason of the failure of the court to instruct the jury as to the right of the parent to protect the child. It is impossible to say what effect a proper instruction as to manslaughter would have had on the minds of the jury as to the duration of the punishment for the crime of which the accused was found guilty. It is manifest that under the instructions given, the appellant was either guilty of murder or entitled to an acquittal on the ground of self-defense, and if the question of provocation, caused by the beating of appellant's daughter, had been inserted in the instruction, the verdict as to the term of punishment might, and doubtless would, have been lessened. The jury should have been told as a matter of law that the father had the right to protect the person of his daughter from great bodily harm, even against the assault and battery of the husband, and further, that if they believed, from the testimony, the daughter of the accused, prior to the day on which the deceased lost his life, had been assaulted and beaten by her husband so as to endanger her life, or he had inflicted upon her person great bodily injury, and that the accused was apprised of that fact, and if they further believe that the assault and battery of the wife was renewed on the night of the 31st of May, and that he was informed of that fact, the accused had the right to arm himself and go to the residence of the deceased to protect his daughter from the personal violence of the husband, and if, on reaching the place of trouble, he found his daughter and her children expelled from their homes into the street by the deceased, and suddenly meeting with the deceased in sudden heat and passion caused by the beating and ill-treatment of the wife from the appearances then surrounding them, shot the deceased when not in his necessary self-defense and without malice, he is guilty of manslaughter.

In ordinary cases of homicide, where the party kills when there is no reasonable ground for belief on his part of immediate danger of great bodily harm, the offense is murder. Not so when the husband pursues the adulterer and takes his life before there is time for his passions to subside, or the father flying to the relief of the child, whose life has been endangered by repeated cruelty of the husband. In all such cases the parent exercises no greater right than nature has assigned to the beasts of the field that prompts them to fly to their offspring when in danger of bodily harm.

The error in failing to give such an instruction as the one indicated, becomes the more apparent when considering the qualification annexed to the instruction in regard to self-defense. That qualification reads: "Unless by his own wrongful act he makes the harm or danger to himself necessary or excusable on the part of said Cady." What wrongful act had been committed by the accused is not developed by the testimony, unless it consisted in his going to the house of his daughter in order to protect her. The jury may have so considered it, and treated this case with no greater right on the part of the father to interfere for the protection of the daughter than if he had been an entire stranger to both the wife and husband. This qualification should be eliminated from the instruction, and while the jury, in the exercise of a humane feeling, have, by their verdict, lessened the rigor of the law as expounded by the court, nevertheless the appellant was entitled to have considered by the jury his rights as parent, and the provocation that prompted him in the endeavor to protect his daughter from the cruel assaults of her husband.

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The judgment is, therefore, reversed and cause remanded, with directions to award the appellant a new trial and for proceedings consistent with this opinion.

MARION NATIONAL BANK v. ABELL'S ADM'X.

(Filed March 26, 1889.)

1. Evidence—Rule to produce books—The court, in behalf of a party to an action, may, by rule, compel the adverse party, or one who is not a party to the action, to produce in court any documents in his possession to which the person applying for the rule has an exclusive right or a right in common with another. But the court will not thus require the production of books or documents in which the party applying for the rule has no right or interest. If the party having the custody of the books or documents testifies as to their contents, he may then be compelled to produce them for the inspection of the parties, but not in advance of that time.

In this action by an administrator against the surviving partners of his intestate for a settlement of partnership accounts, the plaintiff asked for a rule against appellant, the bank with which the several firms of which it was alleged plaintiff's intestate was a member kept their accounts, and filed an affidavit stating that he had employed expert bookkeepers to examine said accounts, and that such an examination was necessary to the preparation of his case. The rule was awarded, and from an order making it absolute this appeal is prosecuted. Held—That the court erred in awarding the rule. When the officers of the bank testify, but not in advance of that time, they may be required to produce the bank books for inspeciotn, by the parties and their attorneys, of the accounts between the bank and the several firms of which it is alleged plaintiff's intestate was a member.

2. Same—A party, preparatory to bringing suit on documents in his adversary's possession in which he has an interest, may maintain an action in the nature of a bill of discovery in order to compel their production in court that they may be delivered up to him if his right to them is exclusive, or that he may obtain a copy if his right to them is in common with his adversary.

3. Same—Letters—A party to an action may, by rule, require the production of letters he has written to his adversary, for the purpose of using them as evidence of a contract between them.

4. Final order—An appeal may be prosecuted from an order making absolute a rule requiring the production of books.

Rountree & Lisle for appellant.

Avritt & Russell for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, as the administratrix of her deceased husband, W. I. Abell, filed her petition in equity in the Marion Circuit Court against J. C. and H. B. Phillips, surviving partners of her husband, in which she sought to set aside a settlement of the partnership business made between the surviving partners and W. I. Abell's committee, Cameron, who was appointed a short time before the death of Abell, and to recover a large balance due Abell's estate as profits arising from said partnership business. It was claimed that these profits grew out of the partnership business that was con-

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ducted in Lebanon and other places. The defendants put in issue the matter of profits, and that Abell was a partner in any place except in Lebanon.

After filing the petition, the answer, reply and rejoinder, the appellee, Mrs. Abell, filed an affidavit in the case, in which she stated that her husband and the defendants did business as partners under different names—sometimes under the firm name of Phillips & Bro.; sometimes under the firm name of H. B. Phillips; sometimes under the firm name of G. B. Phillips & Co., and probably under other firm names; that they kept accounts with the appellant and with its predecessor, whose books were in the possession of the appellant, in each of said firm names; that she had no personal knowledge as to how said accounts were kept; that she had employed expert bookkeepers to examine said accounts; that it was necessary for the preparation of her case that they should examine them; but the bank officers refused to let her experts make the examination. Upon the filing of this affidavit the court issued a rule against the appellant to show cause why it should not allow the examination to be made. Its response denying the appellee's right to make the examination was overruled and the rule made absolute, and the appellant superseded and appealed to this court.

It seems to be well settled that the court, in behalf of a party to an action, may, by suit, compel such party's adversary to produce into court any document that he may have in his possession, to which such party has an exclusive right or a right in common with his adversary, if it appear that such document is material to the maintenance of his contested rights. Also a person preparatory to suing his adversary on documents in his adversary's possession, in which he has an exclusive interest or an interest in common with his adversary, may maintain an action in the nature of a bill of discovery against him in order to compel him to produce them into court to be delivered up to him if his right to them is exclusive, or to obtain a copy of them if his right to them is in common with his adversary. Also, a party to a suit may acquire, by the court's rule, his adversary to produce not merely documents upon which suit may be brought, but letters written by him to his adversary for the purpose of using them as evidence of a contract between them. Also, a party to a suit may, by the aid of the court's rule, compel a person, not a party to the suit, to produce into court any documents in his possession, to which such party has either an exclusive right or right in common with his adversary or other person, proper orders being taken for the preservation of such documents and the restoration of them to the persons who are required to surrender them, and who have a right to their custody.

Here, it is not claimed that the appellee has any right, title or interest in the books of the bank. All that is claimed is that said firms, under their various firm names, made deposits in the bank and checked on them from time to time; that the appellee does not know how these accounts stand, nor the number of firm names that appear on the books of the bank as having had dealings with it, but that the books will show these things, and she wishes experts to overhaul them and report to her. These officers of the bank are competent to testify to all these things. When they give their depositions, if they should be taken, either side may compel them to produce the bank books and submit them to the inspection of the parties themselves and their attorneys, or either of them, for the purpose alone of inspecting the accounts between the bank and said firms; also, the officer testifying may be compelled to give a full statement of the accounts, item by item, as

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they appear on the books, and to file with his deposition a transcript of said accounts. In this way, which is the plain way pointed out by the common rules for the production of evidence, the appellee can obtain the whole truth relative to the firms' transaction with the bank, which is all that she is entitled to. No one ever heard of a witness being ruled to make known to either party what his testimony would be until after the case was put under investigation and he put upon the witness stand. We see no good reason for making him submit his books to either party for his inspection in advance of the time that he may be required to introduce them as witnesses in the case.

The appellant had the right to appeal from the judgment making the rule absolute.

The judgment is reversed, with directions to dismiss the rule.

KENTUCKY SUPERIOR COURT.

FALLY, &c. v. STEINFIELD.

(Filed March 6, 1889.)

Conflict of laws—Act of 1856—As a general rule a contract valid by the laws of the place where it is made is valid everywhere.

A mortgage executed and recorded in Indiana, on property having its actual situs in that State, being valid under the laws of that State, can not be attacked here as a fraudulent preference under the act of 1856. And it is not material that the negotiations for the mortgage were had in Kentucky, or that the property was afterwards delivered to the mortgagee in Kentucky.

H. L. Stone and Dodd & Dodd for appellants.

M. A. & D. A. Sachs for appellee.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Barbour.

Isaac Steinfield, who was a retail merchant, residing and doing business at Newburg, Ind., in contemplation of insolvency and with the design to prefer Lewis Steinfield to the exclusion of his other creditors, mortgaged to said Lewis the stock of goods in his store at Newburg to secure him in a debt of $2,900. Lewis Steinfield and the appellants, who were also creditors of the mortgagor, resided in Louisville, Ky., and this action was brought by the appellants in the Louisville Chancery Court to have the mortgage adjudged an assignment for the benefit of all the debtor's creditors under the statute prohibiting preferences by insolvent debtors. In addition to the facts recited, it is averred in an amended petition that the preference complained of begun in Kentucky and was conducted in part in Indiana and was consummated here, and that the negotiations for the mortgage contemplated that the goods should be delivered in Kentucky, and that they were thereafter delivered and the transaction completed here. We can attach no importance to the fact that the negotiations for the mortgage were had in Kentucky. The mortgage was executed and recorded in Indiana.

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It is conceded that by the laws of Indiana the common-law right of a debtor to prefer creditors existed.

It is an elementary principle that a contract, valid by the laws of the place where made, is, generally speaking, valid every where; and we know of no exception to that rule when applied to a contract made by a resident of the State concerning his property which has its actual situs in that State. Surely it will not be claimed that a debtor living in Indiana can not deal with his property there as he is authorized by the law of his State to do, because he has creditors in this State Lewis Steinfield, having acquired his right to the property in Indiana by a valid contract, he certainly would not lose that right by bringing the property into Kentucky.

None of the authorities cited by counsel conflict in the slightest with this rule. Most of them are cases where parties asserted claim to property which was in this State at the time the contract under which they claim was made in another State, and their right was denied upon some other ground than that which would prevent them from contracting as authorized by the law of the State where the contract was made.

In Brown v. Early, 2 Duvall, 370, the act of the nonresident, which was adjudged an assignment for the benefit of creditors, was the conveyance of land situated in this State

In Lehmer v. Herr, 1 Duvall, 360, the court declined to decide whether our law, in relation to involuntary assignments, applied to the case of an assignment preferring certain creditors, made in Maryland, so as to make the assignment fraudulent as to the personal property of the assignor which was in Kentucky. and in a contest between the nonresident assignee and an attaching creditor, sustained the attachment upon the ground of actual fraud.

The question which the court avoided was, however, a very different one from that presented here. Lewis Steinfield is not asking the court's aid in an attempt to seize property in this State, but is simply claiming the right to hold that which he rightfully acquired in another State.

The judgment dismissing the petition of the appellant is affirmed.

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SUPERIOR COURT ABSTRACTS.

AGRICULTURAL INSURANCE CO. v. YATES.

Filed April 17, 1889. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Insurance—Loss before issual of policy—Where an application for insurance has been accepted by an agent subject to the approval of the company at its home office, and the property is destroyed before the applicant receives notice that his application will not be accepted, he has an enforceable contract of insurance.

2. Proofs of loss—Waiver—Where no policy had been issued at the time of the loss, the refusal of the company to comply with the demand of the insured for a policy in order that she might make preliminary proofs of loss was a waiver by the company of its right to require such proofs.

3. Misrepresentations—A misrepresentation as to value will not avoid the policy unless there was a fraudulent purpose to overvalue the property.

4. Extent of recovery—The fact that the insurance was effected as if the insured was the absolute owner of the property, when, in fact, she owned only a life estate therein, did not render the contract void, there being no inquiry made as to the character or extent of her interest. But the contract being to pay to the insured such loss or damage as she may sustain, not exceeding the amount of the policy, she can recover only the value of her interest in the buildings destroyed, and not their full value.

S. H. Bush for appellant; J. P. Hobson for appellee.

ARMSTRONG & CO. v. DARBRO, &c.

Filed April 17, 1889. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Unrecorded lien—Notice—A bona fide lien, though unrecorded, will prevail over the claim of an execution creditor who has actual notice of the lien at any time before the property is sold under the execution.

2. Sales of personal property—Lien—While a sale of personal property without a change of possession is void as to creditors, yet the purchaser has a lien upon the property for any sum which he may, in good faith, have paid thereon, and this lien will prevail over the claim of a creditor who has notice thereof before he has subjected the property to sale.

Gaunt & Downs for appellants; Winslow & Winslow for appellees.

MAYOR AND CITY COUNCIL OF HICKMAN v. BUCHANAN.

Filed April 17, 1889 Appeal from Fulton Circuit Court. Opinion of the court by Judge Barbour, affirming.

Towns and cities—Power to employ attorney—A city council is not authorized to employ counsel in every case that may be of interest or benefit to the city without regard to the character of that interest.

The county judge having refused an application for license to retail liquors, which prevented a city in the county from granting license, the city council, conceiving that the refusal of the county judge to grant the license was arbitrary, and would result in depriving the city of a large part of its revenues, employed attorneys, at an agreed fee, to take such legal steps as would be necessary to secure the license for which application had been made, the applicant himself having abandoned his application. Proceedings against the county judge for a mandamus were instituted in the name of the applicant, resulting in the granting of the license, and thereupon the city granted its license and received the tax. This action was then instituted by appellees, city taxpayers, to enjoin the city council from paying their attorneys

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any fee for their services. Held—That the employment of counsel by the city council was unauthorized, and appellees were entitled to the relief sought by them and granted by the lower court.

Tyler & Tyler and Campbell for appellants; Smith & Robbins for appellee.

COLLINS v. ALVERY.

Filed April 17, 1889. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Contracts—Consideration—Appellant, as an inducement for appellee to subscribe to the capital stock of a corporation, proposed to guarantee to her a dividend of 10 per cent. upon all of her paid-up stock if she allow him the dividends actually earned by the company. This proposition was accepted, and appellee subscribed the amount proposed and appellant gave to her a writing whereby he agreed to pay her "a 10 per cent. dividend" on the amount of her paid-up stock in the corporation referred to. Appellee paid the amount of her subscription. Held—That the contract is binding upon appellant. It is based upon a sufficient consideration and is not illegal. Nor can the agreement be restricted to the payment of the dividend for one year. It must be construed as continuing during the life of the company, which, unless sooner ended by the act of the stockholders, is to continue, as fixed by the articles of incorporation, for a period of twenty years.

2. Evidence to explain writing—If the writing can be regarded as ambiguous, extrinsic circumstances are competent to explain its true meaning.

Montgomery & Poston for appellant; J. P. Hobson for appellee.

MORSE & CO. v. McALPIN, POLK & HEBBARD.

Filed April 17, 1889. Appeal from Henderson Circuit Court. Opinion of the court by Judge Bowden, withdrawing former opinion and affirming.

A power of attorney empowering the attorney to represent creditors in a bankrupt proceeding authorized only three things to be done by the attorney —first, to attend meetings or sittings; second, to vote at the same; and third, to accept for the signers of the power of attorney the appointment of assignee. The concluding words were: "Or for any other purpose in our interest whatsoever." Held—That the attorney was not authorized to do any act outside of the bankrupt proceedings to which the power of attorney related; and, therefore, was not authorized to enter into an agreement to release the bankrupt in consideration of his surrendering to the assignee property which was exempt, the agreement not being a part of the bankrupt proceedings. The concluding words of the power must be referred to the general purpose for which it was given, which is to represent the constituent in the legal proceedings to which it relates.

H. F. Turner and R. H. Cunningham for appellants; Hughes & Hughes for appellees.

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KENTUCKY COURT OF APPEALS.

JENKINS v. BASS.

(Filed March 23, 1889.)

1. Bills and notes—Extrinsic evidence to explain—Where a promissory note signed by two obligors reads: "We promise to pay to the order of myself," etc., extrinsic evidence is competent to show which of the two obligors was intended as the payee.

2. Same—Assignment—Where a promissory note is made payable to one of two obligors the other obligor is bound thereon to the payee, and if the payee endorses the note to a third person both obligors are bound thereon to the endorsee.

3. Same—Under our statute a person who makes a promissory note payable to himself may become bound thereon to another person by writing his name on the back of the note and delivering it to such person.

Dulaney & Mitchell for appellant.

Wright & McElroy for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, James L. Jenkins, declared on a writing that reads as follows:

"Bowling Green, Ky., July 8, 1886.

"Sixty days after date we promise to pay to the order of myself $360, value received, negotiable and payable at Warren Deposit Bank without defalcation.

"E. R. MURRELL,
"J. V. BASS."

Endorsed on the back of this writing is the following: "Pay to James L. Jenkins or order. E. R. Murrell."

The appellant, as the above-named assignee, declared on this writing as a promissory note, and sought to recover judgment on it against E. R. Murrell and the appellee, J. V. Bass, as the makers. E. R. Murrell made no defense, but the appellee, Bass, filed a general demurrer to the petition, which the lower court sustained. The appellant then filed an amended peti-

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tion, in which he alleged that the note was executed by E. R. Murrell and the appellee, Bass, for the purpose of enabling the former to borrow money upon it; but it was not known at the time the note was signed from whom he could or would obtain the money. So Murrell and the appellee, Bass, agreed that a space should be left in the note for the purpose of inserting the name of the lender as the payee, or that Murrell might insert the name of himself as payee, and by an endorsement on the back of the note order the same payable to whomsoever he chose; that pursuant to the authority of the appellee, Bass, Murrell wrote the word "myself" in said space, which word he intended to represent his own proper name; and thereafter, Murrell having sold said note to the appellant for value, he endorsed the same to appellant by writing his name across the back of it, which was pursuant to the authority of the appellee.

The lower court sustained a demurrer to this amended petition, and the appellant, declining further to amend, his action was dismissed, and the case is here by appeal.

Section 13 of chapter 22 of the General Statutes reads: "Whenever a promissory note is made by the obligor payable to himself or to his order, and is signed on the back thereof by the said obligor and then delivered, such signature and delivery shall operate as a promise to pay the face of the note at maturity to the party to whom the same shall have been delivered, and such party may fill up the blank with words of promise and recover thereon in the same manner as if such party had been named as payee in the note, and such note shall be assignable as are other promissory notes."

According to common law principles a promissory note made payable by a person to himself creates of itself no liability upon him to pay it. This is so, not for the reason that it is contrary to public policy, immoral or illegal, but for the reason that a person can not contract with himself. So the statute supra provides that a person who makes a promissory note payable to himself may become bound thereon to another person by writing his name on the back of the note and delivering it to such person. In such case he becomes bound upon the writing as his promissory note to such person. In the case at bar, if the name of E. R. Murrell instead of the word "myself" had appeared on the face of the note as payee, it will not be denied that he, by writing his name on the back of the note and delivering it to the appellant, would have become bound thereon to the appellant. In the case just supposed is there any reason why the appellee would not have been bound to E. R. Murrell on said note? It is true that Murrell would not have been bound to pay himself, not, as above suggested, because it was contrary to public policy, immoral or illegal, but because he could not, in the nature of things, be a debtor to himself; but the appellee could become debtor to him, and by signing a note as payor, with E. R. Murrell as payee, he would make himself debtor to E. R. Murrell the amount the note called for. Would the fact that E. R. Murrell's name was also signed to the note as payor render the note unobligatory upon the appellee? We think not. The fact that he also signed the note as payor would not render it, in any sense whatever, vicious; but he would not be bound, as above suggested, simply for the reason that he could not bind himself to pay himself a debt. Had a married woman signed with the appellee her act would have been void, but nevertheless the appellee would have been bound for the whole amount of the note. So, likewise, he would have been bound to E. R. Murrell if his name had

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been expressed in the note as payee, notwithstanding the fact that he did the nude act of trying to make himself, in conjunction with the appellee, debtor to himself. So, also, in the case supposed, had E. R. Murrell assigned the note to the appellant the appellee, without doubt, would have been bound to him on the note, and under the statute supra E. R. Murrell would have been also bound to the appellant.

It is also contended that as the word "myself" as used in the writing refers equally to E. R. Murrell or the appellee as payee, parol evidence can not be introduced for the purpose of showing which one was meant. This is a mistake. Such evidence will not contradict the writing. Here the note names a payee, and this payee is one of two persons, but the writing does not inform us which one is the person meant as the payee. Now, to show by extrinsic evidence which one of the two persons was meant is admissible. Such evidence does not contradict the writing, but merely explains which of two persons the pronoun "myself" refers to as the payee, the pronoun "myself" certainly referring to the one or the other as such payee. The rule is, without exception, as far as we have been able to ascertain, that if a payee is expressed in a note, but in such manner as leaves it ambiguous as to the particular person meant, extrinsic evidence may be resorted to for the purpose of showing that fact. (2 Parsons on Contracts, section 550; McCullough v. Wainright, 14 Pa. St., 171.)

In Jackson v. Sell, 11 Johnson, 201, it is said: "You must always look beyond the instrument itself, to some extent, in order to ascertain who is meant." In Garrison v. Owens, 1 Penn., 471, it was held that parol evidence was admissible to show in what capacity a person signed his name—whether as witness or party to the contract.

In the case of Kinney v. Flynn, 2 R. I., 319, the action was on an instrument of this kind: "I. O. U. the sum of $160, which I shall pay on demand to you." Signed, etc. Parol evidence was admitted to show who "you" was.

It is not competent to show what the parties secretly, and in fact intended when such intention contradicts the written contract, but when the inquiry is what they meant by the use of certain words in the writing which, as therein used, are ambiguous, extrinsic evidence is always admissible. (1 Greenleaf on Evidence, section 28.) So it seems to be clear that parol evidence is admissible to show who the parties meant by the word "myself" as the payee. This being shown, it would follow that the other party would be bound on the note as payor to such payee.

The petition, as amended, set out a cause of action against the appellee, and the demurrer to the amended petition should have been overruled.

The judgment is reversed and the cause remanded, with directions for further proceedings consistent with this opinion.

ALEXANDER, &c. v. GISH, &c.

(Filed December 11, 1888.)

Injunctions—Suit on bond—In an action by numerous taxpayers of a county against the county judge and others, an injunction was obtained restraining the defendants from levying and collecting a tax to pay certain county bonds issued in payment of a railroad subscription. Pending the action the appellants, bondholders, were made defendants upon their own

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motion, and upon their joint petition the action was transferred to the United States Circuit Court; and a judgment was rendered in that court that the injunction be dissolved upon the face of the petition and exhibits filed therewith. Subsequently a final judgment was rendered by that court dismissing the action. In this action by appellants, suing for themselves and all holders of the county bonds referred to, against the plaintiffs in the injunction suit and the sureties in the injunction bond, the plaintiffs allege in their petition that the injunction was wrongfully obtained, and that by reason thereof they and those for whom they sue have been kept out of their interest on said bonds; that the value of the bonds has been depreciated, and that they have been put to the expense for lawyers' fees, etc. A demurrer to the petition was sustained. Held—That this was error because—

1. All the existing conditions are stated in the petition which section 25, Civil Code, requires in order to authorize the plaintiffs in this action to sue for the other bondholders, having with them a common interest.

2. The plaintiffs have the right to sue on the bond, although they were not, as they ought properly to have been, parties defendants to the original action when the order of injunction was made, as, by the terms of the bond, the undertaking is to pay not merely the persons specially designated as defendants to the action in which it was executed, but to pay "all holders" of the bonds mentioned the damages they, or either of them, might sustain.

3. The order transferring the action in which the bond was executed to the United States Court must be presumed to have been regularly made, and the jurisdiction of the latter court can not be called in question in this action, therefore, the liability of the sureties is the same as if the injunction had been dissolved by the court in which the action was instituted.

4. It was not necessary for the court to ascertain and assess damages upon the dissolution of the injunction; that is necessary only where proceedings on a judgment have been enjoined.

5. Upon a final judgment dissolving an injunction a right of action upon the injunction bond immediately follows unless the judgment is superseded.

D. M. Rodman, M. C. Hay and E. H. Brown for appellants.

Thomas W. Brown for appellees.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Chief Justice Lewis.

March 18, 1878, an act was passed "to authorize the county of Muhlenburg to compromise and fund its outstanding bonded indebtedness, issue bonds, and levy and collect taxes to pay same."

The indebtedness referred to therein was created by a subscription on behalf of the county of $400,000 to the capital stock of the Elizabethtown & Paducah R. R. Co., and by reason of a failure to promptly and regularly meet the accruing interest on the bonds the indebtedness had, when the act was passed, become so onerous as to make it necessary to come to some terms of compromise with those holding the bonds, by which new bonds for a reduced amount would be taken in lieu of the old ones.

The funding process had been going on under the act, and up to July, 1885, about $250,000 of the debt was funded for $100,000 of new bonds, taxes were being levied to pay the interest thereon and provide a sinking fund for the ultimate extinguishment of the debt, when an action was instituted by R. H. Brown and about seven hundred others against the sheriff, county judge and members of the funding board created by the act, and two persons, hold-

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ers of the bonds. In that action an injunction was prayed for, and, by order of the judge of the Muhlenburg Circuit Court, granted, restraining the judge of the county court and members of the funding board, all named, from making any further levy of taxes for the purpose of paying the principal and interest of the bonds issued by the directions of said funding board, and also restraining the sheriff from proceeding to collect any taxes that may have or might be levied for such purpose. During the pendency of the action in the Muhlenburg Circuit Court James W. Alexander and Charles W. Trousdale, upon their petition, were respectively made parties defendants thereto; and upon their joint petition thereupon filed the action was, by order of that court, removed to the United States Circuit Court for the Sixth Circuit and District of Kentucky at Louisville.

November 10, 1885, a judgment was rendered in the last mentioned court that the injunction mentioned be dissolved upon the face of the petition and exhibits filed therewith. And February 24, 1887, a final judgment was rendered by that court dismissing the action, and that James Alexander and Charles W. Trousdale recover their costs in that court and in the Muhlenburg Circuit Court. It was also adjudged that the motion of the plaintiff to reinstate the injunction be overruled.

This action was instituted February 26, 1887, by appellants, James Alexander and Charles W. Trousdale, suing for themselves and all holders of original and compromise bonds of Muhlenburg county issued in payment of subscription of said county to the Elizabethtown & Paducah R. R. Co., against D. J. Gish and numerous others named, some of them the plaintiff in the action instituted in the Muhlenburg Circuit Court, before mentioned, and others of them sureties in the injunction bond, given as a condition of the issual of the order of injunction referred to. In their petition and amended petition the plaintiffs, appellants, recite the institution of the action in the Muhlenburg Circuit Court, the order of injunction, execution of the bond, and final judgment in the United States Circuit Court. They state the order of injunction was wrongfully obtained, and that by reason thereof they and those for whom they sue have been kept out of their interest on said bonds, the value of the bonds have been depreciated, and they have been put to expense for lawyers' fees, etc. They pray judgment against the defendants, who signed said bond as sureties only, for the sum of $3,000, and against those who were plaintiffs in said action in the sum of $40,000.

A demurrer for various causes set out was filed, and upon the ground stated in the opinion of the judge of the lower court it was sustained.

By the injunction bond the sureties thereto undertook, in substance, that the plaintiffs, whose names were set out in the caption, would pay the defendants, Tinsley, sheriff, Morton, county judge, Kittinger and others, members of the funding board, Glenn, holder of original bonds, Parks, holder of compromise bonds, and all holders of original bonds and all holders of compromise bonds, the damages not exceeding $3,000, that they or either of them might sustain, by reason of the order of injunction in the action, if the same be adjudged wrongfully obtained.

1st. All the existing conditions are stated in the petition, which section 25, Civil Code, requires in order to authorize the two plaintiffs in this action to sue for the other bondholders, having with them a common interest.

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2d. By the terms of the injunction bond the undertaking is to pay, not merely the persons specially designated as defendants to the action in which it was executed, but to pay all holders of either kind of the bonds mentioned the damages they, or either of them, might sustain. To exclude appellants from the right to sue on the bond because they were not, as they ought properly to have been, parties defendants to the action when the order of injunction was made, or because they are not named therein, would not only be in disregard of an express stipulation in it, but enables a designing party, by making those having a nominal interest defendants, to do irreparable injury to those really interested.

3d. The condition upon which the obligors in the bond we are considering undertook to pay the damages sustained is that the order of injunction be adjudged wrongfully obtained. The order of the Muhlenburg Circuit Court transferring the action in which that bond was executed to the United States Circuit Court must be presumed to have been regularly made, and the jurisdiction of the latter court to try the action is not, nor can be, called in question in this action, and consequently the liability of the sureties is precisely the same as if the injunction had been dissolved by the first-named court.

4th. It has been expressly decided by this court that it is only where proceedings on a judgment have been enjoined that the court upon the dissolution of the injunction is empowered to ascertain the damages and render judgment for them. In all other cases the remedy is on the bond. (Logsden v. Willis, 14 Bush, 183; Rankin v. Estes, 13 Bush, 428.) It was not, therefore, necessary or proper for the United States Circuit Court to ascertain and assess damages in this case.

5th. Section 278, Civil Code, provides that the court, judge or officer granting an injunction shall, in the order granting it, fix the amount of the bond to be given, and may prescribe its terms. If the terms be not prescribed, it shall be to the effect that the party giving it will pay to the party enjoined such damages as he may sustain, if it be finally decided that the injunction ought not to have been granted. The terms prescribed in the bond in question are substantially the same as are required in section 278.

A final decision that an injunction ought not to have been granted is, in the meaning of that section, equivalent to a final judgment dissolving the injunction, upon which immediately follows a right of action upon the injunction bond. And such has been the ruling of this court. (Wood v. Laylock, 3 Met., 193; Pugh v. White, 78 Ky., 210.) For a final judgment dissolving an injunction is just as much a final determination that the condition exists upon which the person enjoined may sue on the bond, and his right to sue just as reasonably follows as is the right of the successful party to an execution upon a judgment for debt. To stay or prevent either the unsuccessful party, if he appeals, must supersede, and until he does so there is not, nor ought there to be, any obstacle to an action on the bond or enforcement of the judgment.

We think appellants had the right to bring this action as soon as the judgment was rendered in the United States Circuit Court, and it was error to sustain the demurrer to the petition as amended, and the judgment of the lower court is reversed and cause remanded for further proceedings consistent with this opinion.

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KENDALL v. CROUCH.

(Filed February 5, 1889.)

1. Usury—Limitation—The statute limiting the right to recover usury which has been paid to one year after payment does not apply to payments of usury made upon a judgment where there has been a reversal of the judgment, and the proceeding is to enforce restitution.

2. Same—Where, in the renewal of a note, there is a change of payee or of a part of the obligors, those bound upon the old obligation will be discharged because there is a new contract; but such a novation is not a payment of usury, and if usury be carried into the new note it will, upon plea, be extracted, any payments theretofore made being treated, at the election of the debtor, as paid upon principal and legal interest, although paid as usury.

A. H. Ward for appellant.

T. T. Forman for appellee.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Holt.

This action is upon a promissory note. The defense of usury was interposed. The answer gives the appellee Crouch's version of the history of the debt, stating, according to his side of the case, the various renewals, payments and changes of obligors.

The lower court, acting doubtless upon the idea that by the change of obligors at different times when the note had been renewed, as stated in the answer, there had been such a novation as cut off the defense of usury, sustained a demurrer to it and rendered a judgment for the appellant. It was replevied soon after, and then paid. An appeal was taken to the Superior Court by the appellee about twenty-two months after the rendition of the judgment and about eighteen months after its payment, and upon hearing it was reversed. Upon the return of the cause the appellee sought, both by rule and pleading, to get his money back that he had paid in discharge of the subsequently reversed judgment. The appellant resisted upon three grounds, and issues were made as to them by proper pleading. He denied, first, that the claim was usurious, and his version of the history is entirely different from that of the appellee.

The latter claims that one S. D. Godman, with his father, Allen B. Godman, as his surety, obtained a loan from the appellant in 1857; that the note was renewed by them several times, various payments being made; that after the death of the father, in 1868, S. D. Godman, in 1869, renewed the note, with Jerry and W. B. Godman and the appellee as his sureties; that in 1873 W. B. Godman and the appellee became the only sureties upon it, and that, owing to payments, the entire amount of the note then executed was usury, and that finally the note sued upon, dated March 5, 1878, and due twelve months thereafter, was given by way of renewal by W. B. Godman and the appellee, the principal obligor, S. D. Godman, not uniting in it.

Upon the other hand the appellant claims that the debt of 1857 was settled in 1869, and that the note given in the latter year arose out of an entirely different transaction, and was based upon an altogether different consideration. The distinguished counsel for the appellant attempts to demonstrate by calculation that his client is right, but the trouble is that it was impos-

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sible to show, after a lapse of twenty years or over, exactly what payments had been made upon the debt, or at least when they were made, hence any calculation can not be otherwise than uncertain as to the truth of the matter. Both the lower court and its commissioner found that his client was mistaken. There was, at least, a conflict of testimony. In fact we think the weight of it supports the appellee's version of the transaction: but in any event it was a common law issue of fact, and the conclusion reached below as to it, and that the entire amount of the note sued upon was usury, will not be disturbed.

The next ground relied upon by the appellant was that the change of obligors and the extension of time of payment for twelve months was such a novation as to be equivalent to payment, and that, therefore, the plea of usury was unavailing.

There was no new party introduced, however, by the execution of the last note. There was no new obligor or new obligee or new consideration; moreover, the claim upon which it was founded was not valid in law or equity. The principal obligor in the previous note was merely dropped; and it may now be regarded as settled law in this State that such a novation will not deprive the debtor of the plea of usury if it has in fact been embraced in the new note. Any payments theretofore made will be treated as having been paid upon the principal and legal interest without regard to how they were in fact made or received. They will be so treated at the election of the debtor, although they were paid as usury; and so far as the usury has been carried into the new note it is without consideration, and can not be recovered.

A change of payee or of a part of the obligors will discharge those bound upon the old obligation because it is a new contract; but it is not a payment of usury; and if it be carried into the new obligation as a part of the sum to be paid upon it, it is to that extent tainted, and the usury will, upon plea, be extracted. (Fitzpatrick, &c. v. Apperson's Ex'tx. 79 Ky., 272)

Finally the appellant urges that as the appellee paid the judgment and did not appeal for about eighteen months thereafter, the statute of limitation forbidding the recovery of usury, unless it be sued for within a year after the payment, applies, and prevents a recovery. (General Statutes, chapter 71, article 3, section 4.)

The Civil Code, section 745, gives a party the right to appeal from a judgment at any time within two years from its rendition; and the question, now for the first time presented to this court, is whether, under these circumstances, the period of limitation as to the recovery of usury began to run from the time of the payment of the judgment?

The unsuccessful party to the litigation had a right, as the successful party knew, to appeal at any time within two years. The rights of no third party were involved. It was a matter between the parties to the litigation only.

Even where real estate is aliened after a judgment by the successful party, and the interest of a third party thereby becomes involved, the right to appeal operates for a reasonable time as notice to the latter, and for that length of time he will be affected as by a lis pendens, although there has been a final judgment in the lower court. This rule is based upon expediency and natural right, and is necessary to prevent a failure of justice. The true reason for the rule of lis pendens is not that it amounts to a notice of a litigation, but that the alienation of the property in litigation shall not prevail

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to the prejudice of the opposing party. If this were not so, no litigation could ever be brought to a successful end.

Mr. Pomeroy, in his valuable work on Equity Jurisprudence, section 684, says: "Even a judgment in favor of the defendant does not necessarily at once terminate the lis pendens. If the unsuccessful party is entitled to appeal the constructive notice continues during a reasonable time for an appeal to be taken." Even in such a case, where the rights of third parties may be affected, if an appeal be taken within a reasonable time, the lis pendens is prolonged until the final decision, although there has already been rendered a judgment of a final character. (Debell v. Foxworthy, 9 B. M., 228; Clark's Heirs v. Farrow, &c., 10 B. M., 446; Ludlow's Heirs v. Kidd, 3 Ohio, 541.) In such a case the litigation is regarded as still continuing, at least for a reasonable time, notwithstanding there has been a final decree by a court of original jurisdiction

In the case now before us, however, only the rights of the parties to the action are involved; and if the doctrine of lis pendens applies the litigation should, from the necessity of the case and for the purpose of doing justice, be regarded as still continuing during the period given to the party within which he may appeal

The reasonable and obvious conclusion, to our minds, is that the statute of limitation as to the recovery of usury could not commence to run while the judgment of the lower court allowing it was in force. This judgment said that there was no usury in the note sued upon; and until it was annulled the debtor could certainly take no steps to recover the usury, which the judgment required him to pay. He could only rid himself of it by an appeal; and he had an absolute statutory right to resort to it at any time within two years. A different view would practically deny to the party any benefit arising from his right of appeal unless he were able to supersede the judgment. It was the reversal of the judgment of the lower court which made the question of usury again an open one. Until then the matter was res judicata, and it, therefore, seems to us that the only statute of limitation which was running in the interim was that relating to the right to appeal. A judgment of a court of competent jurisdiction was in force, declaring there was no usury in the debt. It required the debtor to pay it. Certainly he could not, in the face of it, recover the money paid in satisfaction of it as usury. If the rule applicable in case of the alienation of real estate involved in litigation, and where the rights of third parties become involved, covered his case, yet he would have a reasonable time within which to take an appeal; and this would, pro tanto, suspend the running of the statute because it dates from the time of payment.

We can conceive a case where the party might be guilty of such laches in the prosecution of his appeal, when taken, as to deprive him of right. But no such case is now presented. The appellee at once took steps upon the reversal of the judgment to recover back the money paid under it; and it would result in a defeat of justice if, where a court has erroneously compelled a party to do a thing, and he, upon an appeal and a due prosecution of it, has reversed the judgment, it could not place him in statu quo.

The statutory limitation as to the recovery of usury is not applicable to such a case, and the judgment is affirmed.

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MORTON v. CLACK.

(Filed February 14, 1889—Not to be reported.)

1. Vendor and vendee—Rescission—Appellee sold to appellant a tract of land, for which he held a title bond from P., whereby P. undertook to make him a general warranty deed. This bond appellee assigned to appellant, representing that P. had a good and perfect title. In this action by appellee to enforce his lien for purchase money he tenders to appellant a deed of special warranty only, which, by its terms, is expressly subject to all the conditions contained in the deed to P. That deed provides that if at any time the property shall cease to be used for milling purposes it shall revert to the grantor. Appellant had no actual knowledge of the provisions of that deed. Held—That as such a deed has not been tendered to appellant as he is entitled to under his executory contract, appellant is entitled to rescission on equitable terms. While the deed of P. was of record, appellant was not required to take notice of its provisions in the face of the vendor's representations as to his title, upon which appellant had the right to rely.

2. Parties to actions—The grantor in a deed is not a necessary party to an action by one of several grantees to reform it, where the only question is as to the extent of the interest of the several grantees as between themselves.

W. L. Porter and Lewis McQuown for appellant.

W. P. D. Bush and Boles & Duff for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Holt.

December 16, 1882, Edwin Vincent conveyed a small lot of land to Thomas Walton, Ivy Prescott and Mary Poynter. The deed does not expressly define the interest of each of them, but, being jointly to them must, upon its face, be regarded as a conveyance to each of a third interest.

The deed contained this provision: "It is further expressly agreed and understood that if, at any time in the future, the premises above described shall cease to be used for milling purposes, or the milling machinery be removed, then from then, and in that case, the above described lot of land or premises shall revert to the said Edwin Vincent, his heir and assigns. So long as the above conditions as above described are strictly complied with, and the said Edwin Vincent will always warrant and defend the right and title to said lot of land during the exact observance of the aforenamed conditions by the party of the second part, with covenant of special warranty."

June 5, 1883, Mary Poynter and her husband, Edmund Poynter, sold to the appellee, John P. Clack, an undivided half interest in the property. Mrs. Poynter claimed to own this much interest under the purchase from Edwin Vincent. They, at the time of the sale, executed to the appellee a bond for title, which provides inter alia: "The parties of the first part bind themselves to make to said Clack, according to deed made to them by Ed. Vincent, a general warranty deed to said property on or before the day of possession."

The writing was of course not binding on Mrs. Poynter by reason of her coverture, but any question as to it is obviated by the fact that since the beginning of this suit, on March 9, 1885, she and her husband, on May 22, 1885, executed a deed, with covenant of general warranty, to the appellee for the half interest.

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September 15, 1883, the appellee sold it to the appellant, J. F. Morton, for $790, all of which the latter paid by conveying to the appellee's wife another tract of land, save $360, for which sum he executed his note to the appellee, who brought this action upon it and sought not only a personal judgment against the appellant, but one enforcing a lien upon the half interest in the property. When the appellee made the sale to the appellant he assigned him the title bond held by him (Clack) upon the Poynters.

Mrs. Poynter was also made a defendant to the action, as well as one Isham Vincent, to whom Walton and Prescott had conveyed their half interest in the property. The appellant defended upon the ground that Mrs. Poynter had title to but a one-third interest in the property instead of a half, and that even it was subject to reversion to her grantor by virtue of the clause above copied from the deed from him. His answer avers that when he purchased the appellee, Clack, represented to him that he was the owner of a half interest in the property, and that when he purchased of the Poynters they had a good and perfect title to it. The appellee, in his reply, admits that the deed from Edwin Vincent invested Mrs. Poynter with but a third interest in the property, but he avers that she in fact purchased one-half of it, and that the deed, by omission and mistake, failed to state that such was her interest; and, to the end that this might be corrected, he made his reply a cross petition against Edmund Poynter, Ivy Prescott and Thomas Walton. The record fails to show that the latter was brought before the court, but his deposition was taken, and he testified that he was a defendant to the suit; Prescott, being a nonresident, was only constructively served.

It is true Walton and Prescott had conveyed all the interest they appear to have claimed to Isham Vincent, and that he had been made a defendant to the original petition; but no pleading was filed, directed against him, seeking a correction of the alleged mistake in the deed. It is clear that Edwin Vincent was not a necessary party to an action to reform it in the respect sought because it was only a question of the extent of interest among the grantees.

The testimony plainly shows that the claim of a mistake in its execution was well founded, and that Mrs. Poynter was in fact the purchaser of an undivided half interest in the property. It is unnecessary to decide, however, whether, upon the record as presented, and considering who were before the court and the manner of bringing them, the lower court had the right and should have reformed the deed for this reason.

The appellee tenders a deed of special warranty only to the appellant, which, by its terms, is expressly subject to all the conditions contained in the one from Edwin Vincent to Walton, etc. The appel ant never accepted it. He had a right to believe, at the time of his purchase, from the terms of the Poynter bond assigned by the appellee to him, that the appellee and his vendor, Mrs. Poynter, had a perfect title to the land, and that he was acquiring it by his purchase.

The reply of the appellee admits that when he traded with the appellant he represented to him he was the owner of one half of the lot, and that "Poynter and wife had a good and perfect title" thereto when he purchased of them. It is true it also denies that he "studiously concealed" from the appellant the conditions of the Vincent deed, and denies that he made any representations as to its conditions except those named in it; but when the entire pleading is considered, and it must be construed most strongly against

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the pleader, it must be regarded as admitting the averments of the appellant's answer as to the representations made to him by the appellee as to his title at the time of the purchase.

The appellant had a right to rely upon them. It is true the Vincent deed was of record, but he had no actual knowledge or notice of its provisions, and he was not required to take notice of them in the face of the appellee's representations as to his title.

It is evident the appellant, when he purchased, believed he was thereby acquiring a good and perfect title to the mill property. The appellee professed to sell him such a right to it. This he did not and can not do because, granting that the interest of Mrs. Poynter in the purchase from Vincent was, as is no doubt true, an undivided one-half, and that the record as made up authorized the lower court to reform the deed from him, yet the property is still subject to reversion by the terms of the conveyance; it is an uncertain tenure: and such a title has not been made or tendered to appellant as he is entitled to under the terms of his executory contract of purchase, and it is evident the appellee can not comply with it.

The judgment is reversed, with directions to render a judgment rescinding, upon equitable principles, the contract between the appellant and appellee and any conveyances made thereunder, and for further proceedings in conformity to this opinion.

MUSGRAVE v. PARISH.

(Filed March 7, 1889—Not to be reported.)

1. Husband and wife—Wife's earnings—Property purchased with money earned by the wife during the existence of the marriage, and conveyed to her, is subject to the husband's debts created before the purchase, the husband being entitled to the proceeds of the wife's labor.

2. Homestead—Husband and wife each owned a house, which was exempt from execution for the husband's debts. Both houses were sold, and the proceeds invested in other property, now occupied by them as a homestead. Held—That the homestead is exempt from the payment of debts from which the houses sold were exempt, to the extent that the proceeds of those two houses were invested in the homestead.

John D. Hill and Geo. H. Towry for appellant.

A. Duvall and W. L. & F. Gordon for appellee.

Appeal from Webster Circuit Court.

Opinion of the court by Judge Pryor.

It is evident from the testimony in this case that there was no intentional fraud practiced on the creditors of Musgrave by reason of the conveyance to his wife of the lot of ground sought to be made subject to the payment of his debts. While the wife had no separate estate it is alleged and proven that her earnings during the existence of the marriage enabled her to accumulate some means that were invested in this property in good faith, and for her own benefit. The husband being entitled to the proceeds of her labor, the lot was properly subjected to the payment of appellee's debt that was created prior to the purchase of the homestead, unless there is some other reason for securing it to the wife.

It appears that the husband owned a house that was sold, and the proceeds

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invested in this property, and there is proof conducing to show that the wife also owned a house that she had purchased, and was claiming as her own. The two houses were exempt from execution, and being sold and the proceeds invested in this property, to that extent the wife should be protected. It is not material to the creditor what becomes of the property sold by either the husband or wife if that property was exempt from execution. As it could not have been subjected, the sale and application of the proceeds to the purchase of other property, likewise exempt, in no manner injured the creditor. It is not very plainly shown how much or to what extent the exempted property, or its value when sold went into the house and lot, but from the proof it is plain that some of it was so invested, and to that extent could not have been subjected.

The judgment below is, therefore, reversed and remanded, with directions to secure to the wife, in the sale of this property, the value of the exempted property, or its proceeds, that entered into its purchase and payment, and for further proceedings consistent with this opinion.

Further proof may be taken.

(Response to a petition for a rehearing—Filed April 27, 1889.)

On a petition for rehearing it is proper to say that if there were not two houses sold, and the proceeds applied as indicated, the appellant will not be allowed the sum invested as indicated in the opinion. The proceeds of the labor of the wife, unless derived from an employment by or under a third person, belongs to the husband.

Petition overruled.

ADAMS EXPRESS CO. v. HOEING.

(Filed March 16, 1889.)

Res judictata—Appeals—The Superior Court reversed a judgment in favor of the defendant and remanded the cause for further proceedings. Upon another trial the circuit court, following the law as laid down by the Superior Court, rendered judgment for plaintiff, and upon a second appeal the Superior Court affirmed the judgment and granted an appeal to this court. Held—That the Superior Court having complete jurisdiction of the first appeal, and no appeal being then granted to this court, this court can not now reverse a judgment following the mandate of the Superior Court, even if it differs from the conclusions reached by that court.

Breckinridge & Shelby for appellant.

D. G. Falconer for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

This action involves the liability of the Adams Express Co. for the loss of a package received from the appellee by that company, to be delivered in the city of New York to Julius Bien & Co. The printed stipulations of the receipt for its delivery relieve the company from liability, except for fraud or gross negligence, and limits its liability to the sum of $50, as the value of the article, unless otherwise expressed. On the trial in the circuit court, the loss of the package having been admitted and the company tendering

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the $50, the circuit court held that no other recovery could be had, and the plaintiff, insisting that he was entitled to recover the value of the package, appealed to the Superior Court, and that court held that the receipt relied on by the company as fixing the value at $50 was not a contract between the plaintiff and the company, and in effect held that the plaintiff was entitled to recover the value of his lost package if the facts alleged were true.

The demurrer was directed to be overruled for further proceedings. On the return of the case an issue was formed, and the court below, following the law as laid down by the Superior Court, rendered a judgment for the plaintiff for the value of the package, the law and facts having been submitted to the judge without the intervention of a jury. The value of the package was fixed at $300, and this is sustained by the testimony. A second appeal was taken to the Superior Court, and that court, following the doctrine recognized in the first opinion, affirmed the judgment, and allowed an appeal to this court. It seems to us the principal question was settled by the Superior Court in its first opinion, and, following that opinion, the circuit judge properly rendered a judgment for the plaintiff, and there is nothing left for this court to determine save the question as to the value of the package. It was lost by the neglect of the appellant, and the plaintiff swears that it was worth $300. He was nearly three months engaged in making the maps constituting the package, and the estimate placed upon his labor or its results is not too high from his statement. The court below finds that the appellee did not know the stipulations contained in the receipt as to value, and that the receipt was the ordinary receipt of the company, with the blanks to be filled, and it is evident that if the receipt is not the contract no representation was made by the appellee that misled the company. We have in fact nothing before us in this case, and could not, if we differed from the conclusions reached by the Superior Court, reverse the judge of the lower court for following the mandate of a court having full and complete jurisdiction of all the issues made on the appeal. If, on the first appeal, when the law of this case was settled by the Superior Court, an appeal had been allowed, this court would then have had full power to revise the action of the Superior Court, and the mandate would have gone directly to the court below. As it is the mandate went from the Superior Court, and we are now asked to reverse the judgment of the circuit judge because he followed the law as settled by a court whose opinion was as binding on him as if rendered by this court.

The court below finds there was no delivery of the package that contained maps of the geological survey; that no inquiry was made of the plaintiff as to its value by the defendant; that the package was lost by the neglect of the company. The fact that the appellant inserted the name of the consignee or the place of delivery did not estop him from recovering its value.

We perceive no error in the judgment. It is affirmed.

TOMLIN, &c. v. FRANKS.

(Filed March 23, 1889—Not to be reported.)

1. Character of possession—Acceptance of deed—A testator executed his will, valuing the real estate he had given or was about to give his children,

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and in two days thereafter executed deeds conveying to his children the several parcels as allotted, vesting in his daughters and their husbands a life estate, with remainder to their issue, and if none living at the death of the life tenants, then the land to revert to the testator's heirs. C., the husband of one of the daughters, after the death of his wife, sold to appellees the fee in the land conveyed to him and his wife, and he and his wife having died leaving no issue, the testator's heirs seek to recover the land from appellees, who claim that C. and wife held under a parol gift of the land from the testator, of which the will was a ratification, and that they did not have the deed recorded, and were ignorant of the fact that it had been recorded. Held—That the evidence shows that C. and wife held under the deed, the legal presumption being that the deed was recorded at their instance, which presumption is strengthened by the length of time (twenty years) the deed has remained undisturbed. Besides, it would be a dangerous precedent to permit the purchaser from the life tenant in such a case to show by parol a holding contrary to deeds of record evidencing the title that had been recorded for over twenty years.

2. Life estate—But even if the theory of appellees be correct, C. had only a life estate as tenant by the curtesy, as it is evident the gift was not to him and his wife as joint tenants.

Collins & Fenley and W. W. Dickerson for appellants.

Geo. C. Drane and T. H. Hines for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Pryor.

John Franks, of the county of Grant, died many years ago, leaving a last will and testament, and also several children surviving him. His will was executed on the 14th of July, in the year 1849, by which he valued the real estate he had given or was about to give his children, and on the 16th day of the same month, and in the same year, executed deeds conveying to his children the several parcels as allotted, vesting in his sons the absolute fee and in his daughters and their husbands a life estate, with remainder to their issue, and if none living at the death of the life tenants, then the land to revert to his heirs-at-law. One of the devisor's daughters married Perry Conyers, and the present controversy arises from the following clause in the conveyance to Conyers and wife: "To have and to hold the said tract or parcel of land to the said W. P. Conyers and Susan Conyers, his wife, and to each of them during their natural lives, and on their decease to descend to the issue of the said Susannah, and in failure of her issue to revert to her heirs-at-law." Conyers and wife had two children, both of them dying before their mother. Mrs. Conyers died in June, 1867, leaving her husband surviving her, and on the 5th of September, 1868, the husband, W. P. Conyers, sold and conveyed, with a clause of special warranty, the land to J. R. and B. S. Franks, the brothers of Mrs. Conyers, the latter afterwards conveying his interest to the appellee, Clements. In the month of June, in the year 1885, Conyers, the husband, died, and the other brothers and sisters of Mrs. Conyers are asserting claim to this land by reason of the conveyance made by the father of Mrs. Conyers in July, 1849, and as her heirs at-law. The deed or its execution was proven by the two attesting witnesses after the death of Franks, in October or November, 1856, and recorded in the clerk's office of the Grant County Court. As a defense to the action by the heirs of Mrs. Conyers the appellees, who purchased from her husband, pleaded that Perry Conyers and his wife entered upon this land under a

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parol gift from the father of Mrs. Conyers long before the execution of the deed in 1849, and that the will made by the testator in that year was a ratification of that gift; that they, Conyers and wife, never claimed to hold under the conveyance made two days after the execution of the will, but expressly repudiated that instrument. That they never had it recorded, and were ignorant of the fact that it had been acknowledged or put to record. They further say that when they obtained the conveyance from Conyers, they had no notice of the existence of the deed, and were innocent purchasers, having paid a full consideration for the fee in this land. Conyers and wife, both being dead, can throw no light upon the manner of their holding, but it is plain, from the record before us, that the appellees knew of the existence of this deed, and the special warranty by Conyers to the appellees, in the absence of any other proof, would indicate his entry and claim under the conveyance made by his father in law.

It seems that Conyers had purchased a small parcel of land, containing about three acres, to which Franks (the father in law) made him a deed attested by the same witnesses. These witnesses appeared before the county clerk in November, 1856, and proved the execution of both deeds, the one conveying the land in controversy to Conyers and wife for life, and the other conveying the three acres to Conyers. This was all done on the same day and at the same time One of the subscribing witnesses to the two deeds is dead, and the other testifies as to the attestation and proof made by him before the clerk. He (Carnes) has no recollection at whose instance he appeared before the clerk in order to prove the execution of the two deeds. This was in 1856, an event transpiring more than twenty years before the witness was called on to testify, and that his recollection must be indistinct is evident, still the fact appears that both deeds were proven and recorded at the same time, and for the benefit of the same party, and the presumption is strong that it was done at the instance of Conyers and wife. The legal presumption would be, if unexplained, that the beneficiary had the deed recorded, and with the facts connected with its record and the length of time the deed has remained undisturbed creates a still stronger presumption that it was at the instance of Conyers. Besides, Conyers knew the deed was of record, as this court must conclude. He was advised to make a special warranty deed, and in fact did make such a deed to these appellees.

Again, the decided preponderance of the testimony as to the manner of his claim shows that he regarded his interest as confined to a life estate only, and it, therefore, seems to us that the testimony is convincing on that branch of the case. It is proven by the appellees that one of the children, perhaps the administrator, was seen with this deed after the death of the testator. This fact is denied, and there was certainly no great incentive for him to have that deed recorded, for, at the date of its record, Mrs. Conyers and one of her children were living. These deeds to the children were made in two days after the will was written. They all entered upon or held the land given them by the testator, except, as is now urged by the appellees, Mrs. Conyers, and this defense is not interposed by her or her husband, but by the purchasers from the husband, who are attempting to convert his life estate into a fee upon the mere declarations and statements made by the ancestor and his daughter more than thirty years before this suit was brought, and when, at the same time, it is conceded that the title was investigated by one of the grantees. The vendees from Conyers were the brothers of his

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wife, at least one of them, and sons of the testator. They purchased other land from their brother-in-law and his wife, after the death of the father, that had not been divided in the father's lifetime, and for this land obtained a deed with a clause of general warranty, and the purchase by them after the death of Mrs. Conyers, and the acceptance of the deed from her husband for the land in controversy, can only be accounted for upon the idea that they were making a chancing bargain, however valuable the consideration paid. The facts that transpired when the conveyance was executed to Conyers and wife in 1849 may be conceded to exist as proven by the appellees, and that no county clerk was present to take the acknowledgment, and in fact the testimony is conclusive that no clerk or deputy was present, and still the fact that Conyers and wife claimed under the deed is sustained by facts and circumsatnces of the most convincing character. If the theory, however, of the appellees is the correct one, and the conveyance was never accepted by Conyers and wife, we still can not well see how Conyers, from the facts of the record, ever acquired any greater interest at the time he entered on this land than that of tenant by the curtesy in the event he survived his wife. His wife had children born alive, and, the husband surviving her, became a life tenant, and at his death all his right terminated. If the theory of appellees is sustained, at the wife's death the two claiming to hold under a parol gift and being tenants of the entirety, the whole tract of land passed to the husband as survivor under the laws as it existed in the year 1849, and the children had no interest. The gift of the land was to the daughter, and, as one of the appellees testifies, the only gift he knew of was the placing of his sister and her husband in possession. The fact is, the common ancestor made the same character of gift to his other daughters, and none of them had any title until these deeds were made defining by boundary the particular parcel for each one. These deeds were made two days after the will was written, and the parcel of land assigned Conyers and wife was a part of the farm on which the testator lived, Conyers and wife living with him.

The will passed no title to the land, either to the husband or to Mrs. Conyers. It only fixed the valuation on this land that the testator had given, or contemplated giving, his children, and that was consummated by the execution of these deeds. The will allows to Conyers and wife $1,500 in land they are to be charged with. A similar provision is contained as to the other children; the will evidently referring to land he had already given, but not definitely ascertained by any fixed boundary as to some of the children. This was not a gift of the fee or any part of it to Conyers, or the recognition of a previous parol gift made to him. The gift, as a matter of law, was to Mrs. Conyers, and at her death would have passed to her children, subject to the husband's life estate, if the children had survived her. The husband under such a gift as is proven here did not hold as a joint tenant of the wife, and could not hold adverse to her. On the day the deeds were made to the children the testimony of Carnes is to the effect that Mrs. Conyers cried and said she was as much entitled to an absolute estate as her brothers, and the old man took the deeds, and the old man said: "Well, Susan, I have already given you the land; keep it," and the husband remarked: "That is right, Susan, let the d—n deed go." It is true the same witness says that prior to that time the old man told him he had given to Conyers and wife the land that was afterwards assigned them, but such proof did not divest the wife

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of title or make the husband a joint owner with her. There is no such proof as would authorize the chancellor to say that the husband owned a part of the fee. They may have been dissatisfied with the deed, and if they never accepted it they entered and held as the wife's land, and the husband's interest was acquired alone by reason of his marital rights. So, in either aspect of the case, with or without a deed, the husband's interest was confined to a life estate, and at his death the next of kin to the wife became entitled. It would be a dangerous precedent to permit the life tenant to sell the fee and then to allow the purchaser from him to show, by parol, a holding contrary to deeds of record evidencing the title that had been of record for over twenty years, and the more dangerous to permit the purchaser to show that the daughter, whose right of inheritance is unquestioned, was to divide the fee with her husband upon such a flimsy character of testimony. The chancellor, upon such proof, will not convert the life estate into a fee, and deprive those interested of their rightful inheritance.

The judgment is reversed and cause remanded, with directions to make an equitable partition of this land and for proceedings consistent with this opinion.

MORRIS v. COMMONWEALTH.

(Filed March 23, 1889—Not to be reported.)

1. Continuance—The court did not err in overruling a motion for a continuance asked on account of the absence of a witness, for the reason that the testimony of the absent witness would have been merely cumulative; and for the further reason that it did not appear there were reasonable grounds to believe the attendance of the witness could, or would, be procured at the next term of court.

2. Evidence—Res gestæ—Upon the trial of appellant, jointly indicted with another for murder, it was competent to prove as a part of the res gestæ what appellant's codefendant said while in hot pursuit of and shooting at the deceased, whether heard by appellant or not. Moreover, as it was simply a declaration by the party that he intended to kill the deceased, which was made evident by his acts, appellant was not prejudiced.

3. Aiders and abettors—As appellant used an ax and his codefendant a pistol, it was proper for the court to instruct the jury that the appellant might be found guilty if the death of the deceased was caused by either one of the weapons, appellant being guilty as principal if he was present aiding and abetting.

4. Reversible errors—As there was some evidence to support the verdict, it must stand in the absence of error of law committed by the court.

Ewell & Smith and W. R. Ramsey for appellant.

P. W. Hardin for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Chief Justice Lewis.

The evidence in this case does not clearly show there was previous malice against Gregory, the deceased, on the part of either appellant or Crawford, jointly indicted with him; and though Crawford and Gregory had been pushing each other in such manner as to cause the woman in whose house they were to advise them to cease, because likely to result in a difficulty, Crawford protested they were good friends. The last act of such violence

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was on the part of Crawford pushing Gregory out from a shed, who thereupon went around the house, but soon returned with a pistol, which he presented at Crawford. But at that instant appellant, who seems to have also gone out of the house, struck Gregory on the head with an ax, and immediately thereafter, being requested by the woman not to use the pistol, Gregory remarking if she said so he would not, dropped it by his side. And then Crawford sprang at and got the pistol, and fired it at Gregory, and pursuing him into the house again shot him, replying to a remonstrance of the woman not to kill him, that he was trying to do so. The deceased, in his effort to escape, ran through and out of the house, finally falling a considerable distance away, where he remained alone in a dying condition for an hour and a half, appellant and Crawford refusing to let any person go from the house to his assistance. Though it does not appear appellant used towards the deceased any further violence than striking him with the ax, he did not make any effort to prevent Crawford seizing the pistol after it had been lowered and shooting him with it, which the blow with the ax had aided him in doing. Nor is it clear the deceased really intended to shoot Crawford with the pistol.

The court did not err in overruling the motion for continuance on account of the absence of Crawford, who, it seems, was at the time of the trial a fugitive, for it is not shown by the affidavit Crawford would have testified to any fact or circumstance tending to exculpate appellant, which did not appear from the testimony of witnesses who were sworn; nor did it appear there were reasonable grounds to believe the attendance of Crawford could or would have been procured at the succeeding term of court.

What Crawford said in the house while in hot pursuit of and shooting at the deceased was part of the res gestæ, and, therefore, competent, whether heard by appellant or not, which, however, does not appear. Moreover, it was simply a declaration by Crawford he intended to do what his actions made evident, that is, kill the deceased, and did not, therefore, prejudice appellant. Appellant was jointly with Crawford indicted for the murder of Gregory, and it did not make any difference whether he was killed with the pistol or ax, for appellant was guilty as principal if he was present aiding and abetting, and it was, therefore, proper for the court to instruct the jury he might be so found if the death was caused by either one of the weapons. The instructions were in fact more favorable to appellant than he was entitled to, for the excuse for using the ax was not placed upon the simple ground it was necessary to prevent commission of a felony by the deceased, but the court went further than the law authorizes, and in effect placed his right to strike upon the relation of uncle and nephew existing between appellant and Crawford.

As appellant was not prejudiced by the instructions regarding murder, having been found guilty of manslaughter only, it is unnecessary to decide whether they were or not correct.

Though it does not appear what appellant did further than to strike with the ax, nor what his feelings were towards the deceased, except as indicated by his refusal to permit any one to go to him after he was shot, and by a declaration that day made by him in effect that the deceased had to keep away from that house, the jury, who are judges of the fact, have found him guilty, and as there was no evidence to support their verdict it must stand in the absence of error of law committed by the court.

Judgment affirmed.

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GREEN, &c. v. ASHER.

(Filed March 23, 1889—Not to be reported.)

Nuisance—A public nuisance may become a private nuisance when special injury arises, and particularly when it is that character of nuisance that is continual and affects the party complaining to a much greater extent than the public generally.

Leonard Forman for appellants.

Hargis & Eastin for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Pryor.

It is well settled that a public nuisance may become a private nuisance when special injuries arises, and particularly when it is that character of nuisance that is continual, and affects the party complaining to a much greater extent than the public generally. It is alleged, and not denied, but confessed by the demurrer, that the appellant, by himself and others, and in violation of law, took an old boat that had been left by the high water, in a highway or public road in Bell county, fitted it up for a grog shop, where a number of disorderly persons assembled day after day, and engaged in fighting, cursing and other disorder, to the annoyance and disturbance of appellee's family, who lived near by, and who owned the fee over which the highway ran. There was a demurrer to the petition, and overruled and no answer filed. It is now complained that the court erred in refusing permission to file an answer. No answer was offered to be filed, and no defense made except by the demurrer. The chancellor properly abated the nuisance.

Judgment affirmed. (Ashbrook v. Commonwealth, 1 Bush, 140.)

KINCAID, ADM'R, &c. v. TUTT, &c.

(Filed March 23, 1889.)

1. Judicial sales—Final order—A judgment confirming a report of sale is a final judgment which the court, after the term at which it was rendered, can not vacate or modify unless it be for some one or more of the causes mentioned in section 518 of the Civil Code; and if any one of the causes mentioned in subsections 4, 5, 6, 7 and 8 of that section is relied on the party seeking to set aside the judgment must proceed by petition.

2. Right to set aside order of confirmation—The fact that the plaintiffs' attorney did not attend the sale, owing to the failure of the commissioner to comply with his promise to notify him of the time of sale, and that by reason of his absence the land did not bring as much as plaintiffs' debt, was a casualty sufficient to defeat the confirmation of the sale, but the plaintiffs having failed to appear and oppose the confirmation, can not now have the judgment of confirmation set aside upon that ground unless prevented by unavoidable casualty from appearing and opposing the confirmation, which does not appear.

H. C. Lilly & Son for appellants.

Wood & Day for appellees.

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Appeal from Wolfe Circuit Court.

Opinion of the court by Judge Bennett.

In the case of the appellants, Socrates Kincaid, as administrator, and others, against John Tutt, &c , the chancellor adjudged the sale of the land in controversy to satisfy a debt in favor of the appellants, amounting to about $1,600. Said land was sold by the court's commissioners as many as three times before the sale complained of on this appeal, but each of said sales was set aside on account of some irregularity, except the third, which was set aside on account of the failure of the appellant, Socrates Kincaid, who purchased the land at the price of $1,300, to execute bond for the purchase price. The sale complained of was made on the first day of September, 1884, and was reported on the 27th day of October, 1884, and confirmed on the first day of November, 1884. The sale was, in every respect, regular. At this sale the appellee, George Oliver, was the purchaser at the price of $250.

At a term of court next succeeding that at which the sale was confirmed H. C. Lilly, one of the appellants' attorneys, made known to the court by his affidavit, filed in the case, that he, as attorney of the appellants, requested the master commissioner, whose duty it was to make the sale, to notify him of the time that he would make the sale in time for him to attend in person, and bid the amount of the appellants' judgment on the land; that the commissioner did mail him a letter informing him of the time of the sale, but the letter was not mailed in time to reach him until after the sale had taken place; that the land was worth as much as $2,500; that at the succeeding term of court he was absent from court on account of sickness in his family. Upon the filing of this affidavit the appellee was ruled to show cause why the judgment confirming the sale and the sale itself should not be set aside. Issue was joined, proof heard and the rule discharged.

It may be regarded as established by the proof that H. C. Lilly, the appellants' attorney, did not attend the sale owing to the fact that the commissioner failed to notify him in time; also that he failed to attend the succeeding term of court owing to the sickness of this wife, but it must be remembered that a judgment confirming a report of sale is a final judgment, which the court, after the term at which it was rendered, can not vacate or modify unless it be for some one or more of the causes mentioned in the subsections of section 518 of the Civil Code. Here cause 7, unavoidable casualty preventing the appellants' counsel from attending the sale to bid on the land, and afterwards preventing his attending court, is assigned for setting the sale aside at the subsequent term of court.

As above intimated, it may be regarded as true that H. C. Lilly failed to attend the sale, owing to the failure of the commissioner to notify him in time of the time of sale, and that the land, by reason of his absence, did not bring as much as the appellants' debt, whereby their pecuniary interest suffered, and that said casualty was sufficient to defeat a confirmation of the sale if the appellants had appeared and opposed the confirmation. But their failure to do so was a waiver of their right to set the judgment of confirmation aside at the next term of court unless they were prevented from appearing and opposing the confirmation by some unavoidable casualty. It is clear, from the proof, that such casualty not only did not exist, but the sale was confirmed by the direction of another of the appellants' attorneys in the case, whose power of attorney in the case was equal to that of H. C.

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Lilly. In reference to the failure of proof Mr. Lilly does not say in his evidence that he proposed to attend court to object to the confirmation of the sale; nor does he say that he would have objected to the confirmation had he been in attendance. As the appellant, Socrates Kincaid, administrator and active manager of the estate, had abandoned the idea of contesting the sale (though he changed his purpose long after the confirmation), it is not probable that H. C. Lilly, the attorney, would have opposed the confirmation. Besides, it clearly appears that J. M. Oliver, with full power as one of the appellants' attorneys, caused the sale to be confirmed, and but for his direction the sale would not have been confirmed. This, of itself, was sufficient to defeat the appellants' motion unless his act was the result of a fraudulent arrangement between him and the appellee, of which there is not a particle of proof nor ground of suspicion.

In the case of Bean v. Haffendorfer Bros., 84 Ky., 685, this court decided that the power of the chancellor to vacate a judgment confirming a judicial sale was not dependent upon a valid defense to the cause of action or claim sued on; that the question of the validity of the sale was distinct from the question of defenses to the cause of action; that there might exist grounds for setting aside a sale that did not affect the judgment. In accordance with the foregoing views it has always been held that the sale, in the person of the purchaser, generally introduces a new party, or if one of the parties to the action becomes the purchaser his purchase introduces him in a new role; and the judgment confirming the sale establishes a property right in such party, which judgment is, and ought to be, final, and which can not be disturbed, although the judgment upon the cause of action may be thereafter reversed. So the judgment of confirmation, being distinct from the judgment on the cause of action, and final, it follows that it can not be vacated after the term of court at which it was rendered unless for some one or more of the causes mentioned in the subsections supra, and if for the causes mentioned in subsections 4, 5, 6, 7 and 8, the party must proceed by petition, as is provided in section 520 of the Civil Code.

The judgment is affirmed.

COMMONWEALTH v. MINOR.

(Filed March 26, 1889.)

1. Criminal law—Liquor traffic—Prescription by physician—A statute making it unlawful for a physician to prescribe whisky unless the person for whom it is prescribed is actually sick, and it is "absolutely required as a medicine," is not violated if the person for whom the whisky is prescribed is actually sick, and the physician, after a full and fair investigation of the disease, believes in good faith that his patient actually requires the whisky as a medical remedy.

2. Same—Where such a statute is enacted in order that laws against the sale of liquor as a beverage may not be evaded under the guise of a medical prescription it is constitutional, although it would be unconstitutional if construed to require the physician to act upon his peril, and to make him liable to punishment for a mistake as to the necessity for such a remedy, although he may have acted in perfect good faith after a full and fair investigation.

3. Burden of proof—It is no objection to such a statute that it casts the burden upon the physician to show that the whisky was needed as a medi-

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cine by the person for whom it was prescribed, as such a provision simply declares a well-known rule of evidence.

4. Same—In all statutory crimes it is competent for the legislature to say that the proof by the Commonwealth of any material fact or circumstance that shows a prima facie case of guilt shall be sufficient to cast the burden upon the accused.

P. W. Hardin for appellant.

Lindsey & Botts for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Bennett.

The legislature of this State, by an act approved May 9, 1884, authorized the legal voters of Owen county to vote on the question of local option in said county. At the time designated in the act a majority of the legal voters voting at the election voted against the right to sell spirituous, vinous or malt liquors in said county as a beverage. The appellant was indicted in the Owen Circuit Court for giving as a physician a written prescription to another person for whisky in violation of the 8th section of said act. The 6th section of the act prohibits the sale of whisky in Owen county as a beverage, and imposes a fine on any person that sells whisky in the county except as provided in the 8th section of the act. This section provides, in substance, that the act shall not apply to any druggist who sells for medicinal purposes on a prescription written and signed by a "regularly practicing physician." The act also provides: "No physician shall make or sign any such prescription, except the person for whom it is prescribed is actually sick, and such liquor is absolutely required as a medicine." For making or signing any prescription for whisky, except as provided for in section 8, the physician so making or signing the prescription is subject to a fine. Section 8 also provides, in substance, that if a physician is indicted for giving a prescription for whisky, and it is proven on the trial that he did give the prescription, such proof casts the burden upon him to show that the whisky was needed as a medicine by the person for whom it was prescribed.

Whisky is regarded in medical science, and is so recognized by the section supra as an essential medicine for many serious diseases. Medical science, owing to the complication of the human organization and the obscure causes of diseases, is an abstruse science, and is by no means perfect. It is progressing. New and more efficacious remedies for known diseases are being discovered every day, and new diseases are constantly springing up that require new remedies. It is impossible for any one man to be so thorough a master of the science as to be able to absolutely know what is a correct remedy even for known diseases, much less for new ones. He is liable, though never so learned, to not only be mistaken in the nature of the disease itself, but as to the proper remedy. It is conceded that it is essential not only to alleviate suffering, but as a material aid to the restoration to health, that we should have the assistance of physicians not only learned in the causes of diseases, but in the manner of treating it. To make him a warrantor that the particular drug he prescribes is absolutely necessary for the disease, and for a breach, the result of an honest mistake, to mulct him in a fine would drive him from the field. The act itself recognizes whisky as a necessary

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medicine, therefore, if that part of section 88 that prohibits a physician from prescribing it, unless it is "absolutely required" as a medicine for the person for whom it is prescribed, is to be construed to mean that the whisky prescribed must be "absolutely required" as a medicine for the sick person, and the physician, in determining whether or not it is "absolutely required" must act upon his peril and be fined, if his patient's disease was so complicated as to baffle a correct understanding of it, and the remedy required, and he made a mistake, though never so diligent, as to the remedy prescribed, the act thus construed would be unconstitutional.

But the act need not bear so rigid a construction; all it means is that if the person is actually sick, and the physician, after making a reasonably full and fair investigation of the disease, believes, in good faith, that his patient needs the whisky as a medical remedy, and prescribes it, he is not guilty of violating said section. The section thus construed, in reference to the particular act under consideration, is not unreasonable. And as the legislature has the constitutional power to authorize local communities to say they do not wish whisky to be sold in their midst as a beverage, and upon their saying so laws, adequate for the suppression of the sale of it as a beverage, are put in force, a law that reasonably guards the prescribing of whisky as a medicine, so that the sale of it as a beverage may not be evaded under the guise of a medical prescription, is not unconstitutional.

Section 8 also provides, in substance, that when it has been proven, on the prosecution of a physician for a violation of said section, that he gave a written prescription to another person for whisky, the burden is thereby thrown upon the physician to show that the whisky was needed as a medicine by the person for whom it was prescribed. It is contended that this part of the provision is unconstitutional We think not. The selling of whisky as a beverage in Owen county is made unlawful by said act. Also it is made unlawful for a physician to prescribe whisky for any person unless said person is actually sick, and the whisky is needed as a medicine. Unless the whisky is prescribed under the foregoing conditions the act treats it as having been prescribed for use as a beverage.

A person, though charged with crime in the most solemn manner, is presumed to be innocent until the contrary affirmatively appears by proof. He is not called upon to offer any proof of his innocence until his accuser, the Commonwealth, has introduced such proof of his guilt as, unexplained, makes out a case against him—in other words, presumptively establishes his guilt; then the burden is thrown upon him to rebut this presumption by proof explaining it away, and showing his innocence. Thus one is charged with the crime of murder; his guilt is presumptively established by proving that he killed the person with a deadly weapon; the burden is then cast upon him to show that he had some lawful excuse for doing the killing, or that he did it in sudden heat and passion. Also if it be proven that one struck another with his fist and killed him, a case of manslaughter is presumptively made out, and the burden of proof is thrown upon the accused to show a lawful excuse for the killing. The reason why the proof of the foregoing facts makes out a presumptive case of guilt is the fact that the act of killing a person by another person is unlawful unless such person has a lawful excuse for so doing, which he must show upon it being established that he did the killing. Also it is unlawful to sell whisky, even outside of a local option county, town or precinct without a license, therefore, if the selling be proven the case is presumptively made out, and the burden

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is thrown upon the party to show that he had license. Why? Because the act of selling the whisky is unlawful unless the person has been granted the privilege to sell it, which he must show. Here it is unlawful to sell whisky in Owen county as a beverage, and the 8th section of the act under consideration makes it unlawful for a physician to prescribe whisky for another person unless such person is actually sick, and requires the whisky as a medicine, otherwise he is to be treated as having prescribed it as a beverage, therefore, the fact that he prescribed the whisky makes out a presumptive case against him, and the burden is then upon him to show that the person was actually sick, and the whisky was required as a medicine.

So, leaving that part of the act in reference to the presumption out of view, the burden would be upon the physician, the fact that he prescribed having been proven, to show that the person was actually sick and needed the whisky as a medicine. The act, therefore, simply declares a well-known rule of evidence.

But in all statutory crimes it is competent for the legislature to say that certain acts, proven by the Commonwealth, shall be sufficient to make out a presumptive case against the accused, and cast the burden of proof upon him, provided the burden is not cast upon him to prove his innocence, without first requiring the Commonwealth to prove some material fact or circumstance conducing to prove the guilt of the accused. For instance, where it has been proven that a faro bank, or other table mentioned in the statute, has been set up in any of the houses mentioned in the statute, the statute makes such proof presumptive evidence that the faro bank or other table was set up by the permission of the person occupying or controlling the house, etc. The constitutionality of this provision has never been questioned.

In the case of Buford v. Commonwealth, 14 B. Mon., 24, the right of the Commonwealth to convict on such testimony was sanctioned. Also in civil matters, where a constable gives a receipt for notes or accounts placed in his hands for collection, the statute, after the expiration of a hundred and twenty days from the date of the receipt, makes the receipt presumptive evidence that the constable has collected the claim.

The judgment of the lower court sustaining the demurrer to the indictment is reversed and the cause is remanded, with directions to overrule the demurrer and for further proceedings consistent with this opinion.

Chief Justice Lewis dissenting.

SINTON v. GREER'S ADM'R AND HEIRS.

(Filed March 26, 1889—Not to be reported.)

1. Interest—Under the conventional interest law it was not essential to the validity of a contract to pay a greater rate of interest than 6 per cent. that there should be a time agreed on for the principal debt to become due. If the agreement was to pay the extra interest during the time that the money was used by the borrower such agreement was valid, although the money was lent without any agreement as to when it should be returned.

2. Same—Under that law, if the debt bearing a greater rate of interest than 6 per cent. was due at the payor's death, the debt from that time forward bore only 6 per cent., or if the debt was not due at the time of the death of the payor, after its maturity it bore only 6 per cent.

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8. Mortgage—Where a mortgage provides that upon the failure of the mortgagor to pay the taxes upon the mortgaged property when due the mortgage debt shall become due and the mortgage lien enforcible, the court will enforce the provision.

H. P. Whitaker for appellant.

A. G. Simrall for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Bennett.

On the 15th of March, 1876, A. L. Greer conveyed to the appellant the land mentioned in his petition. The conveyance was by deed of general warranty, which expressed a consideration of $15,000. On the same day the appellant and said Greer entered into a writing, which purported to be a lease of said property by A. L. Greer from the appellant for the term of ninety-nine years, and at the end of which time for ninety-nine years more, and so on. Said Greer was to pay as rent for each year of the lease $1,500, payable quarterly, at $375 per quarter, but for each prompt quarterly payment Greer was to have an abatement from such quarter rent the sum of $75, which sum, if abated on each quarter during the year, would make the yearly rent $1,200. It was provided in the lease, among other things, that if Greer failed to pay any one of the quarterly dues within ten days after its maturity such failure should entitle the appellant to put an end to the lease, and enter upon and take possession of said property. It was also provided that, within six months next after the lease had run ten years, said Greer, by paying the appellant the sum of $15,000, and all rent due down to that time, should be entitled to said property absolutely.

Said Greer having died on the 7th day of November, 1884, intestate, his administrator, filed his petition in equity in the Kenton Circuit Court against his heirs and creditors to settle his estate. In this suit it was developed that the real transaction set forth in said writing, instead of being a lease, was a loan of $15,000 by the appellant to A. L. Greer, and the writing called a lease was intended to be a mortgage upon said property to secure the payment of said sum, and interest thereon at the rate of 10 per cent. per annum, but to be reduced to 8 per cent. per annum if paid promptly at the end of each quarter.

The master commissioner, to whom the case was referred, found that A. L. Greer, during his lifetime, kept the quarterly interest at 8 per cent. promptly paid, which payments he allowed as interest; he also found that the administrator, after his qualification, paid two installments of interest at the rate of 8 per cent. per annum, which brought the payment of interest at 8 per cent. per annum down to April 1, 1885, from which time until February 15, 1886, the commissioner allowed interest at the rate of 7 per cent. per annum.

The guardian ad litem for the infant appellees filed exceptions to the commissioner's report upon the ground that all interest allowed by the commissioner in excess of 6 per cent. was usurious, which, amounting to $3,500, ought to be applied to the payment of the principal. The ground of the guardian ad litem's contention was that there was no contract as to the rate of interest to be paid, and no agreement as to when the indebtedness should become due.

As the said writing is admitted to be a mortgage on the property therein

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mentioned to secure the payment of the $15,000 and interest, its terms are that the appellant, having loaned A. L. Greer $15,000 for ninety-nine years, and then for ninety-nine years more, and so on, said Greer was to pay the appellant for the use of said money $1,500 per annum, payable quarterly, which sum was equivalent to 10 per cent. per annum; but said quarterly dues might be discharged at $300 each if paid promptly, which would be $1,200 per annum, or 8 per cent., for the use of said money. So it is clear that there was a contract as to the rate of interest to be paid for the use of the money, which contract, at the time it was made, was within the conventional interest law then in force in this State.

Under the conventional interest law it was not essential to the validity of a contract to pay a greater rate of interest than 6 per cent. that there should be a time agreed on for the money to become due. All that was required under the conventional interest law was to agree upon the time the extra interest was to run, which time might have been definite or indefinite. For instance, if the money was loaned for a year, and to bear interest for that time, or loaned to be returned on demand, or without any agreement as to when it should be returned, but to bear interest at the rate of 10 per cent. per annum until paid, such contract would, under said law, have been enforcible. In a word, if the agreement was to pay extra interest during the time that the money was used by the borrower, such agreement was valid. The chancellor, therefore, erred in declaring the interest in excess of 6 per cent. usurious.

But it was provided in said conventional interest law that if the debt, bearing a greater rate of interest than 6 per cent., was due at the time of the payor's death, the debt from that time forward should bear only 6 per cent.; or if the debt was not due at the time of the death of the payor it should, after its maturity, only bear 6 per cent.

The mortgage provides, among other conditions upon which the debt may become due and the mortgage lien enforcible, that if the said Greer or his heirs and assigns should fail to pay the taxes on said property when due, the debt should become due and the mortgage lien enforcible. The appellant alleges, in his answer filed on the 18th day of February, 1885, that there had been a failure on the part of said Greer and his heirs, etc., to pay said taxes at maturity, on account of which he claimed the right to a judgment for his debt and the enforcement of his mortgage lien. These allegations being regarded as true, because not denied, the appellant was entitled to a judgment for his debt, with 8 per cent. interest until the maturity of the same, which accrued at the time he filed his answer, and at the rate of 6 per cent. from that time until paid.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

FRY v. SCOTT, &c.

(Filed March 28, 1889—Not to be reported.)

1. Joint owners—Deeds—A deed by two of three joint owners of land to the third, with certain limitations and restrictions, did not in any way affect the title of the grantee to the remaining undivided third which he already owned.

2. Dower—A widow is entitled to dower in land in which the husband had a defeasible fee.

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W. M. Beckner for appellant.

John W. Rodman and Jas. M. Sebastian for appellees.

Appeal from Lee Circuit Court.

Opinion of the court by Chief Justice Lewis.

In the deed from Magowan & Winn to Daniel Scott for the land in dispute is this clause: "The said Magowan * * * and Winn * * * hereby convey the lands and real estate named herein, with the condition and restriction that if said Daniel Scott dies without issue or heirs of his body, and before this land is sold by said Daniel Scott, and the proceeds reinvested in other lands, then the lands or real estate named herein is to go to the brothers and sisters of said Daniel Scott then living, or the bodily heirs of any that may be dead, but nothing herein is, however, to prevent said Scott from selling said land during his lifetime and reinvesting the proceeds in other lands under the restrictions and limiattions named above."

At the time of that deed Scott, Magowan and Winn owned the tracts of land as partners, the interest of each being undivided third, and Scott having died without children, two questions are presented in this action brought by his administrator to settle his estate. The first is whether his brothers and sisters, at his death, the vendors of appellant, acquired title to the whole or only to the two thirds of the lands conveyed by Magowan and Winn; and, second, whether the widow of Daniel Scott is entitled to dower in the two-thirds, or any part, of the land.

As already stated, Daniel Scott had an undivided interest of one-third in the land before, and independent of, the deed from Magowan and Winn, and that deed did not in terms, nor by implication, impose any condition, or in any way affect his title thereto. Consequently his brothers and sisters were not, in virtue of that deed, invested with any title to that undivided third, nor able to pass the title thereto to appellant free from the debts of Daniel Scott.

The clause in the deed from Magowan and Winn to Daniel Scott, or a similar one in a deed to him for another tract of land, has heretofore been construed by this court in the case of Magowan, &c. v. Fry, &c., decided January 27, 1877, when it was held Daniel Scott took an estate in fee simple, subject to be defeated if he died without issue living at the time of his death.

Section 2, article 4, chapter 32, provides that "after the death of the husband the wife shall be endowed for her life of one-third of the real estate of which he, or any one for his use, was seized of an estate in fee simple at any time during coverture, unless her right to such dower shall have been barred or forfeited, or relinquished."

The statute in terms applies to and comprehends such an estate in the lands, or the undivided two-thirds thereof, as Daniel Scott had at the time of his death, which was what is defined a defeasible fee, and it can not, we think, be fairly so restricted in its operation as to exclude the dower interest of the widow for the benefit of those having a contingent interest in remainder.

In Northcut v. Whip, 12 B. M., 65, it was expressly held that the widow of a husband who had a defeasible fee in land was entitled to dower. In that case the question was fully considered and the rule laid down, which has since been adhered to, that in all cases where the husband is seized of such an estate in land as that the issue of the wife may inherit, if any she have, as heir to the husband, the widow is dowerable out of such estate.

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And as the children, if he had left any, would, according to the well-settled doctrine of this court, have taken the two thirds interest in the lands in dispute as heirs-at-law of Daniel Scott, his widow is clearly entitled to dower therein.

Wherefore, the judgment is affirmed.

KENTUCKY SUPERIOR COURT.

MILLER v. SWAN & BROWN, &c.

SWAN & BROWN, &c. v. FIDELITY TRUST AND SAFETY VAULT CO., &c.

SAME v. SAME.

(Filed March 6, 1889.)

1. Wills—Domicil—Jurisdiction—A will was admitted to probate in Hardin county, and thereafter a copy of the will was admitted to probate in Jefferson county. In this action by the Jefferson county administrator to settle the estate of the testatrix and to have her land sold to pay her debts, Held—That the burden is upon those who assail the Hardin County Court judgment to show, by clear and satisfactory evidence, that the testatrix had changed her residence from Hardin to Jefferson county.

2. Same—In determining whether the testatrix had changed her residence to Jefferson county, where she died, her repeated declarations that she intended to make that her home and did not intend to return to Hardin county, where she had formerly resided, outweighed the recital in the will that she was "of the county of Hardin," as this recital must be regarded rather as information for identity of person than as claim of residence.

3. Same—The order of the Hardin County Court was void, that not being the county in which the testatrix resided at the time of her death; and being void for want of jurisdiction it could be disregarded and the will admitted to probate in the county of her residence, or it could be attacked in any proceeding or suit where it was relied upon as conferring a right or sustaining a defense.

4. Same—Admitting copy to probate—While it may be grossly irregular to admit a copy of a will to probate without a showing that the original can not be produced, the order of probate is not void for want of jurisdiction, and, therefore, can not be attacked by a collateral proceeding. The only jurisdictional fact in the matter of probating a will is the place of residence of the supposed testator.

5. Decedents' estates—Allowance to attorney—As there was no personal estate, and, therefore, no assets to administer, and it is apparent this action for the sale of real estate was prosecuted in the interest of the only creditor of the decedent, it was error to make an allowance to the attorney of the administrator to be paid out of the proceeds of real estate.

6. Private entertainment—The law will not imply a contract to pay board, but if the evidence is sufficient to show that the host informed the guest that the stay at his house was not to be considered in the light of mere hospitality, but that he would require remuneration therefor, and the stay was prolonged under these circumstances and with that understanding, that is sufficient to sustain the claim for such compensation.

In this case the repeated declarations of the guest that she intended to pay board, in connection with other circumstances, are sufficient to justify the conclusion that the boarding was not intended as an act of hospitality.

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Willson & Thum for Miller.

Fairleigh & Straus for Brown, &c.

W. W. Thum for Fidelity Trust and Safety Vault Co.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Ward.

September 11, 1885, Mrs. Belle Compton made her will. February 2, 1886, she died in Jefferson county at the residence of T. B. Miller. February 15, 1886, the will was, as appears from an authenticated copy of the will and order of court found in the record, admitted to probate in the Hardin County Court in due form of law. November 10, 1886, F. P. Ditto, sole devisee of Mrs. Compton, conveyed the land devised to him, in connection with other property, to S. T. Hovey for the payment of certain debts, the debt due Swan & Brown being first of the second class. Sometime after this—just when it does not appear—Thomas B. Miller having a claim against the estate of Mrs. Compton for board, caring for her in her last illness, and expenses incurred in her burial, having taken legal advice relative thereto, and claiming that the residence of Mrs. Compton at the time of her death was in Jefferson and not Hardin county, procured from the latter court a copy of the will theretofore and therein probated, and had the said copy admitted to probate in the Jefferson County Court on the 14th of March, 1887, and had the Fidelity Trust and Safety Vault Co. appointed administrator with the will annexed. April 22, 1887, this suit was instituted in the Louisville Law and Equity Court by the administrator above named as the sole plaintiff, represented by the attorneys under whose advice Miller was acting. The object of the suit was to settle the estate of Mrs. Compton as an insolvent estate, and to have the land owned by her sold to pay her debts. It is shown that the testatrix had no personal estate except her wearing apparel, and owed no debts except the claim preferred by Miller. The devisee, Ditto, his trustee, Hovey, his creditors, Swan & Brown, Miller and the unknown creditors of Mrs. Compton were made defendants. The judgment was that Miller had no valid claim for board because no contract to pay board was established; that he had a valid claim on the other items of his account, amounting to $272.55, which should be paid out of the proceeds of the sale of Mrs Compton's land, and that the attorneys for the administrator should be allowed $150 for their services, to be paid out of said fund.

To this judgment Hovey, trustee, and Swan & Brown, creditors, object, first, for want of jurisdiction in the court to render any judgment; second, because of the allowance of $150 to the attorneys, to be paid as directed. To the judgment Miller excepts because his claim for board allowed by the commissioner was rejected.

The order of the Jefferson County Court, which is, of course, the basis of the jurisdiction of the court in which this suit was instituted, is not copied into the transcript, and does not appear to have been filed in the suit. The allegation with regard to it is as follows: "The said will was proven and admitted to probate heretofore in the office of the clerk of the county court of Hardin county, and thereafter a duly certified copy of said will and order of said county court of Hardin county was filed in the county court of Jefferson county, and thereupon said will was, by order of the county court of Jefferson county, duly admitted to probate and record in the county court

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of Jefferson county." It is alleged that Jefferson county was the county of Mrs. Compton's residence at the time of her death; that she did not reside in Hardin county at that time, and that the order of the county court admitting her will to probate was void. Issue was joined as to the place of Mrs. Compton's residence.

The contention of those claiming that the Hardin County Court order is valid, and must control, are:

1st. As that court assumed jurisdiction and admitted the will to probate, its judgment can not be attacked by this collateral proceeding; that if it be true in fact that Mrs. Compton did not reside in Hardin county at the time of her death, still, the judgment of probate having necessarily held that she did, is conclusive as to the fact of jurisdiction until reversed or annulled in the mode provided by law.

2d. If the Jefferson County Court had jurisdiction in the matter of probate it could not probate a copy of the will, the original being admittedly in existence.

3d. That Hardin was in fact the county of her residence.

The question of fact is first in order and importance. As to this, and in favor of the residence being in Hardin county, we have the admitted fact that Mrs. Compton lived in Hardin county for many years. She was living there when she separated from her husband. She obtained a divorce from him in the courts of that county in 1884. When the proceeding was instituted does not appear, but it may be inferred that it was in 1882 or 1883. She went from that county to the asylum. She begins her will, made in September, 1885, with the statement, "I, Belle Compton, of the county of Hardin."

In opposition to these admitted facts, we have testimony quite as conclusive, by a number of witnesses, to the effect that after her release from the asylum she went to the home of Mr. Miller, in Jefferson county, in 1882 or 1883 and claimed that as her home from that time to her death, unless the statement in her will, and the direction by her, as the draughtsman states, so to write it, can be treated as a declaration that Hardin was the county of her residence. She declared, on a number of occasions, that she would not return to her home in Hardin county, giving as reason therefor her former trouble and the associations thereby awakened. She made visits from Mr. Miller's not frequent or long in duration. The statement in the will may be regarded more in the nature of information for identity of person than of claim of residence, and must be so regarded if any value is to be attached to her frequent statements made, both before and after that date, that her home was at Mr. Miller's, and that she would not return to her old home.

The question of domicil, often one of much difficulty, is rendered more so in this case by the fact that the life of Mrs. Compton was necessarily destitute of surroundings which are usually resorted to for the purpose of determining the question of residence. She had no active political rights to exercise. In this she was passive. She had no occasion to use or control a house of her own, being an unmarried woman without a family. She had no business or occupation. So it seems that there is nothing else to look to except her declarations. If these are to control, the conclusion that Jefferson was the county of her residence can hardly be escaped, even admitting, as must be done, that the burden is upon those who assail the Hardin County Court judgment to show, by clear and satisfactory evidence, that she had

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changed her residence from Hardin to Jefferson. (Mitchell v. United States, 21 Wallace, 354; Provident Savings Society v. Ford, 114 U. S., 635.)

As to the first legal contention stated above we are clearly of the opinion that the order of the Hardin County Court was void, that not being the county in which the testatrix resided at the time of her death. Being void for want of jurisdiction it could be disregarded and admitted to probate in the county of her residence, or it could be attacked in any proceeding or suit where it was relied upon as conferring a right or sustaining a defense. (Masters' Ex'or v. Brinkers, 9 Ky. Law Rep., 841; Jacobs' Adm'r v. L. & N. R. R. Co., 10 Bush, 263; Stevenson, &c. v. Huddleson, 13 B. M., 208.)

Whether the county court of Jefferson had jurisdiction to admit to probate what it called a copy of the will, the original being confessedly in existence and within the power of the court, is a question about which we have had more difficulty. This question must depend for its solution solely on the question whether the production of the testamentary paper, if within the power of the court, is a jurisdictional fact, or the subject-matter to which the jurisdiction attaches. If it is, then there would be no jurisdiction without the production of the paper, or the claim that it was destroyed or could not be produced, and the offer of a copy as the best evidence of the contents of the absent paper.

After a careful examination of a number of cases we are satisfied that the only jurisdictional fact in the matter of probating a will is the place of residence of the supposed testator. That it would be grossly irregular to admit a copy of a will to probate without a showing that the original can not be produced may be admitted, but irregularity or error does not render a judgment void. The mode of correcting these is pointed out by law. A judgment can be disregarded or attacked by a collateral proceeding only when void for want of jurisdiction. "In deciding whether probate ought not to be granted the county court, it is true, should require the original will to be produced, if to be had; not, however, because it is necessary to give them jurisdiction of the matter, but in obedience to the rule requiring the best evidence the nature of the case is susceptible of." (Happy's Will, 4 Bibb, 553; Payne's, 4 Mon., 428.)

In Walters, &c. v. Ratliff, &c., 5 Bush, 576, the order of probate showed that a copy of the will was admitted to probate. No fact was stated showing the loss of the original paper, yet the order was held to be conclusive in a proceeding to vacate and set it aside. However erroneous the order of the Jefferson County Court may be, we are satisfied that it is not void for want of jurisdiction, and is, therefore, valid and conclusive as a basis of jurisdiction in this case.

The order making an allowance of $150 to the attorney of the administrator, to be paid out of the proceeds of real estate, was erroneous. There were no personal assets. There was nothing about which the administrator needed advice in the administration because there were no assets to administer. It seems that there was no debt to be paid except that preferred by Miller, and it is apparent that this suit was prosecuted in his interest. If a creditor having a claim against a decedent, instead of proceeding against the administrator, heir or devisee, can, by having the administrator institute a suit for the settlement of the estate, thereby shift the attorney's fee to the estate instead of paying it himself, then the law has provided a way by which the estates of the dead may be subjected to a burden not allowed against the living.

Attorneys' fees allowed in the settlement of insolvent estates must rest on one or the other of two facts: First, that the fee was incurred by the admin

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istrator in the management and distribution of the personal estate, and is allowed out of personal assets as a necessary and proper expenditure; or that a suit for the sale of land by one creditor to pay many debts was necessary in order to prevent multiplicity of suits, and to ascertain what, if anything, would be left for division. In that case one may incur a debt for the benefit of many, and each may be justly held to contribute his proportion to the common burden. This case does not fall within either class, and the allowance was improper. We are satisfied from the evidence that the claim for board by Miller, as reported by the commissioner, should have been allowed.

The evidence does not show an agreement to pay any stipulated amount for board, nor do we understand that it is necessary to do so in order to recover. The law will not imply a contract to pay board, but if the evidence is sufficient to show that the host informed the guest that the stay at his house is not to be considered in the light of mere hospitality, but that he would require remuneration therefor, and the stay is prolonged under these circumstances and accepted with that understanding, this is sufficient to sustain the claim for such compensation as is reasonable. (Henderson v. Stringer, 2 Dana, 292.) In Royal's Adm'r v. Bryan, 1 J. J. Mar., 434, the court held that an acknowledgment by the guest that he was to pay board was sufficient, in connection with other circumstances, to sustain a finding that there was an agreement to pay board.

Here the facts are that Mrs. Compton, after her release from the asylum, went, with all her personal belongings, to the house of Miller, who had married her niece. She was delicate in body as well as mind, and needed and received kind attentions. She remained there for two or three years, claiming it as her home, establishing that as the county of her residence. She stated, while on the road to Mr. Miller's, that she was going there to board, and often said that she expected to pay him, and that he would be paid. She had an estate sufficient to pay her board, and no fact is proven which shows that any one had peculiar claims upon her bounty, or that Miller's circumstances were such as to require such an extended act of hospitality. These circumstances would not alone justify the inference that there was an agreement to pay board, but they illustrate and explain the well-established avowals, and show satisfactorily, as we think, that the boarding was not intended or accepted as an act of hospitality.

The judgment is reversed, with directions to set aside the order of allowance of an attorney's fee, and to overrule the exceptions to the commissioner's report to the claim of Miller for board. Each party will pay his costs incurred in the appeal.

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SUPERIOR COURT ABSTRACTS.

WHITAKER, AGENT v. BROOKS.

Filed April 24, 1889. Appeal from Kenton Chancery Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Taxation—Under chapter 92 of the General Statutes (revision of 1873) the stockholders in corporations, and not the corporations themselves, were required to list and pay taxes on their stock unless otherwise expressly provided; and where the stockholders were required to list and pay tax on their stock the corporation was not liable for tax on its property. And the fact that the corporation may have paid tax on its property when it was not liable therefor does not exempt the stockholder from paying tax on his stock.

2. Same—Since the act of April 22, 1884, which took effect from its approval and covered the taxation of that year, the corporation and not the stockholder has been liable to taxation; and it is immaterial whether or not the corporation has listed its property and paid the tax. It is a sufficient defense to the stockholder to show that the corporation was liable to taxation.

3. Same—In an action to enjoin the collection of a tax the taxpayer can not, for the first time, object to the sufficiency of the information in the county court. Failing to make the objection in the county court, it must be regarded as waived.

H. P. Whitaker for appellant; O'Hara & Bryan and Hallam & Myers for appellee.

NEWPORT NEWS & MISSISSIPPI VALLEY R. R. CO. v. REED.

Filed April 24, 1889. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Ward, reversing.

1. Carriers—Authority of agent—In this action by appellee against appellant the appellee sought to recover damages because of appellant's failure to receive a lot of logs from him at a place on its road other than a regular station, at which it was alleged appellant had agreed to receive them for transportation. The evidence tended to show that appellant's general freight agent had made such a contract, but also tended to show that he had no power to make such a contract, and that this power belonged to the superintendent or general manager. The court refused an instruction submitting the question of the agent's authority to make such a contract. Held—That this was error. Any individual shipper who claims such a privilege or special contract should show that it was made with an agent having authority to make it, and to control trains so that the contract might be executed without danger to the lives and property of others.

2. Delay in transportation—The plaintiff sought also to recover damages resulting from delay in transportation. There was evidence tending to show that defendant had enough cars to meet the usual demands upon it for the transportation of freights, and that the delay was caused by an unexpected press of business; that it allotted to plaintiff his due proportion of cars, and transported his logs as soon as they could be under the circumstances. Held—That if these things were true they constituted a defense.

3. Same—Measure of damages—The damage for delays in transportation of freight, in the absence of special contract or specific notice of any special reason for immediate transportation, is the difference in its market value at the time it should have reached its destination and the time it did reach it.

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4. Same—Evidence—The fact that some of the defendant's cars were off on other roads and were not returned constituted no defense, and evidence of that fact was not competent. It was the duty of the defendant to keep the means of transportation under its control.

J. P. Hobson and P. H. Darby for appellant; Bush & Robertson for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. ASHER.

Filed April 24, 1889. Appeal from Bell Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Eminent domain—Damages—In a proceeding to condemn land for a railroad, if the railroad company refuses to pay the damages assessed in a county court and appeals, the damages are to be assessed as of the time of the trial of the appeal.

2. Same—Evidence—In such a proceeding it was error to allow witnesses to state what, in their opinion, the land would be worth in the event a railroad should run by or near it, but not upon it. The evidence should have been confined to the value of the land in its actual condition at the time of the trial. But as the admission of this incompetent evidence was not made one of the grounds for new trial there can be no reversal on that account.

3. Same—It was error to allow witnesses to state the value of fruit trees upon the land, upon the assumption that they were thrifty trees of good quality, when the trees had never borne fruit, and there was no evidence as to their quality.

4. Same—As parts of the just compensation to which the owner is entitled he should be allowed the value of the land taken and the diminished value of the balance of his property by reason of the injury resulting to it from the construction of the road. (Asher v. L. & N. R. R. Co., ante., 185.)

5. Same—The evidence should have been directed to the value of the land in its then condition; and while, in ascertaining this, it was competent to consider the house, barn, fruit trees, etc., yet it was error to direct the evidence to their value, independent of the land—it was the value of the land as enhanced by them which was to be ascertained.

Wilson & Rawlings, J. W. Alcorn and W. Lindsay for appellant; W. M. Beckner for appellee.

RUBEL v. LOUISVILLE BANKING CO.

Filed April 24, 1889. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, reversing.

1. Assignments for creditors—Where an assignment for the benefit of creditors executed by a debtor in another State secures to creditors in this State all the rights they would have under an assignment executed in this State the courts of this State will aid the assignee in securing the property of the debtor in this State, whether visible property or choses in action, and he will be preferred to a creditor in this State who sues out an attachment subsequent to the assignment. And it is not material that the courts of the State in which the assignment was executed would, in a similar case, prefer a resident attaching creditor to a nonresident assignee.

2. Same—The failure of an assignee for creditors to execute bond until after an attachment has been sued out does not affect his claim.

3. Same—The mere fact that a debtor, prior to the making of an assignment for creditors, preferred one or more creditors to the exclusion of others does not invalidate the assignment.

C. B. Seymour and J. B. & R. C. Kinkead for appellant; Barnett, Miller & Barnett for appellee.

MORRIS v. COMMONWEALTH.

JESSUP v. SAME.

Filed April 24, 1889. Appeals from Christian Circuit Court. Opinion of the court by Judge Barbour, reversing.

Jurisdiction—The provision of the General Statutes, that the county judge "shall have all the powers of a justice in penal and criminal proceedings,"

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does not confer jurisdiction upon the county judge where the legislature has subsequently created an offense and provided that the fine shall be recovered before a justice of the peace.

An act of the legislature of April 9, 1886, created an offense and provided that the penalties imposed for violations of the act should "be recovered by indictment in the circuit court or by warrant before any justice of the peace." Held—That the county judge has no jurisdiction to try a warrant issued for a violation of the act.

L. A. Sypert for appellants; P. W. Hardin for appellee.

HAYS' ADM'R v. SALLEE, &c.

Filed April 24, 1889. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Bowden, affirming.

Decedents' estates—Lien by action in equity—A creditor can not, by an action in equity, acquire a lien on his debtor's interest as a general legatee in the estate of a decedent unless the personal representative is made a defendant. Nor can he acquire a lien on particular articles of personalty by making the person having them in possession a defendant. Neither is it possible to acquire an attachment lien in an action to which the personal representative is neither defendant nor garnishee.

A. Duvall for appellant; Welch & Saufley and J. B. Paxton for appellees.

CITY OF COVINGTON v. WOOD, &c.

Filed April 24, 1889. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bowden, affirming.

Street improvements—Pleading—A contractor seeking to enforce a lien for street improvements may sue both the lot owner and the city, and ask judgment against the city if for any reason he shall fail as against the other party; and it being decided that the lot owner is not liable, and the petition being dismissed as to him the legal result is that the city is liable, and that liability may be enforced without further pleading.

W. A. Byrne for appellant; D. A. Glenn for appellees.

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KENTUCKY COURT OF APPEALS.

RUPARD AND WIFE v. CHESAPEAKE & OHIO R. R. CO.

(Filed February 21, 1889.)

1. Railroads—Negligence—Where a railroad track crosses a public highway on a trestle it is the duty of those in charge of a train approaching the crossing to give some timely warning of its apporach for the protection of those who may be riding or driving on the highway, that they may secure themselves against injury by reason of the frightening of their horses; and the question as to whether or not the failure to give such warnings is negligence should be left to the jury.

2. Same—As the injury to plaintiff in this case was the result of her own negligence in not looking in the direction of the approaching train, which she could have seen for a distance of several hundred yards if she had looked, a peremptory instruction to find for defendant was proper.

G. B. Nelson, Leland Hathaway and D. W. Lindsey for appellants.

J. M. Benton and Breckinridge & Shelby for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, Pasty E. Rupard, wife of the appellant, Isaac T. Rupard, while riding on horseback on the public road at a point where the appellee's road crosses said road on a trestle high enough from the ground to admit passage thereunder on the public road by persons on horseback or in vehicles, was thrown from her horse by his becoming frightened by the noise of the train as it passed over the trestle above him. The appellant was seriously injured by the fall.

It is contended that the injury would not have occurred but for the negligence of appellee in not giving timely notice of its approach to the crossing, by blowing its alarm whistle or by ringing its bell, so as to warn the appellant of its approach to the crossing, by which she could and would have kept at a safe distance from the crossing until the train passed it, whereby the injury would have been avoided.

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Upon the conclusion of the appellant's evidence the lower court instructed the jury peremptorily to find for the appellees which the jury did.

The appellee's contention is that where its road crosses the public road on a trestle it does not. in common with the traveler, have any privilege in or use of the public road itself; that its road and the public road, though near and adjacent to each other, are distinct and separate. The former has no rights in the public road and the traveler has no right in the track for the purpose of crossing it, therefore, the same duties are not imposed upon the appellee that are imposed upon it when it passes over the public road itself in common with the traveler; consequently it has a right to run its train on a trestle where the trestle crosses a public road at its common, or any rate of speed, accompanied by the usual noise attendant upon the running of a train, and is not bound, as a matter of law, to give any warning of its approach to the crossing.

In support of the foregoing views the case of Favor v. Boston & Lowell R. R. Corporation, 114 Mass., 350, is relied on.

We can not agree to this contention. While it is true that the appellee's train does not run on the road itself in common with the traveler, yet it is not true that the public road is not used by the appellee and the traveler in common. It, the public road, supports the appellee's trestle over which its train passes, and the traveler has a right to pass under the track on the public highway; but for his right of passage on the public highway he would commit a trespass by passing under the track on the trestle. The public road, by being trestled across, is as much in the occupation of the appellee as it would be if its track rested immediately upon it, and for the traveler to cross under the track resting on the trestle, or over the track resting upon the ground, would be equally a trespass but for the protection afforded him by reason of being on the public highway. So it is incorrect to say that the appellee, although its train crosses the highway on a trestle, and the travelers do not use the same in common.

But the question as to the relative duties of the appellee and the traveler rests upon broader grounds. It is the duty of the appellee, as it is of natural persons, "to exercise its rights with a considerate and prudent regard for the rights of others." An individual in the exercise of his absolute rights, if it may be reasonably apprehended that their exercise may endanger the safety of others in the exercise of their rights, must exercise them with a due regard for the safety of such others. To illustrate: A person who is constructing a brick wall abutting a public street, on which travelers frequently pass, may be liable in damages for the falling of a brick on a traveler from the hands of one of his workmen, although the workman was not negligent in letting the brick fall, and the immediate cause of the fall of the brick was accidental; but if it was an accident which the person building the wall, in view of the danger to the life and limb of travelers on the street, should reasonably contemplate, he should provide against the same by safeguards and barriers, so that travelers might not be exposed to the danger, else he will be responsible in damages for the injury. (Jager v. Adams, 123 Mass., 26.) It is precisely upon the same principle that the appellee is made liable for injuries to travelers at crossings. It is not excuse or justification that the act that caused the injury was in itself lawful, or "that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done." Injury may occur to the traveler at the crossing in two ways, namely, by a collision with him, or by

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scaring the horse that he is riding or driving, whereby he is injured. It is the duty of the appellee in approaching a crossing, if danger to the traveler in either of the ways above mentioned may be reasonably apprehended, to give timely notice of its approach, in order that the traveler may not only be warned not to come in collision with the train, but secure himself from injury by his frightened horse. By the trains crossing the highway on a trestle there is no danger of a collision with a traveler on the highway, but if he should be under the trestle with his horse while the train is passing over it the danger is increased, for it is well known that a horse is more likely to scare at a sound made over his head than when the same sound is made on the ground. So where the train crosses a public highway on a trestle, and in view, as above intimated, of the frequency of travel on horse back or by driving on the public highway, and the facility of seeing the train, as it approaches the crossing, in time to prevent injury by scaring the horse, the danger of catching the traveler unawares and frightening the horse that he is riding or driving may be reasonably apprehended, it is its duty to give some timely warning of its approach to the crossing. And the question as to whether or not the failure to give such warning is negligence should be left to the jury.

For an able presentation of the foregoing views see the case of Pennsylvania R. R. Co. v. Barnett, 59 Pa. State Reports, 263.

But it conclusively appears, from the appellant's own testimony, that she received the injury in consequence of her own negligence. She was familiar with the crossing and its surroundings. The track, in the direction that the train was coming, was clear of obstruction several hundred yards, and she could see the approaching train that distance had she looked; but she did not look nor did she give any reasonable excuse for not looking, but hurried up to the crossing and attempted to cross, regardless of the fact that the train might come at any moment. So as it conclusively appeared that the injury was the result of the appellant's own negligence, the instruction was not improper.

The judgment is affirmed.

WHITE, &c. v. ALLEN, &c.

(Filed March 28, 1889—Not to be reported)

1. Bills of exceptions—The tender of a bill of exceptions to the court within the time allowed should be regarded as equivalent to a filing of it as the appellant should not be prejudiced by the delay of the court in acting upon the motion to file.

2. Allowance to receiver—Attachments were levied upon the leasehold interest of the debtor in distillery premises, the distillery itself having been burned, and levied also upon any whisky in the warehouses connected therewith belonging to him. The indebtedness due him for the storage of whisky of other parties in the warehouses was also attached. Upon motion of the attaching creditors a receiver was appointed, who continued to act as such for two years. Among other things which he did during his term of service he collected and disbursed a large sum of money, nearly all of which consisted of the government tax, which, upon the withdrawal of the whisky from bond by third parties owning it, he collected from them and paid over to the United States collector. Held—That the collection and disbursement of this tax is not to be considered in arriving at a just compensation to the receiver for his services as the owners of the whisky had the right to pay

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this tax direct to the collectors themselves, and it was a matter in which the attaching creditors were not interested. Nor does it appear from the order of appointment or other evidence that the receiver was expected to collect and disburse this money.

8. Same—An allowance to the receiver of $6,000 for his two years' services was not "reasonable;" $1,500 per year, or $3,000 for the entire service, is ample.

H. M. Buford, Mat Walton, C. H. Stoll and A. H. Ward for appellants.

Wm. Lindsay and J. D. Hunt for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Holt.

This appeal questions the correctness of an allowance to a receiver.

Section 8 of chapter 75 of the General Statutes, and which relates to master commissioners, provides: "He shall not be allowed more than $3 per day for each day he shall be necessarily engaged in the discharge of his duties, except by consent of parties or their attorneys."

Section 14 of the same chapter, relative to other commissioners and receivers, says: "Their compensation shall be the same as that of a master commissioner, and ascertained and allowed in the same manner, except in the case of collecting money, receiving, holding, renting, or selling property, the court may, upon proper proof, make to the master commissioner, receiver or other commissioner an allowance of a reasonable amount greater than $3 per day."

This case falls within the exception named, and evidence having been heard, as the judgment shows, the conclusion of the lower court must be sustained without inquiry into the merits of the question, if it be true, as the appellees contend, that there is properly no bill of exceptions in the record. It is only by means of it that the action of the lower court can be reviewed. In its absence we must presume the judgment to be correct.

Section 334 of the Civil Code provides: "The party objecting must except when the decision is made, and time may be given to prepare a bill of exceptions, but not beyond a day in the succeeding term, to be fixed by the court."

It was held in Louisville & Nashville R. R. Co. v. Turner, 81 Ky., 489 (5 Ky. Law Rep., 542), that where time is given until a certain day in the succeeding term to present a bill, and that day passes without notice of the matter, the opportunity for filing is lost.

In this case, however, the judgment was rendered on June 26, 1885, and time given until the first day of the next term to file the bill. At the time fixed, November 16, 1885, the appellants, as the orders of the court show, tendered their bill and asked to file it. December 23, 1885, they renewed the motion, and it was continued to the next special term. December 31, 1885, the motion was continued to the 1st day of the February term, 1886. February 1, 1886, they again renewed the motion, and again did so on June 14, 1886, when it was continued to the next special term, and at last, on July 8, 1886, it was signed by the judge, and made a part of the record. None of this delay appears to have been asked or occasioned by the appellants, save that from the time the judgment was rendered until the first day of the sue-

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ceeding term. They were given the right, however, by an order of the court, to indulge in a bad practice, and to present and file the bill at the time last named; and they did then present it, and it must be presumed the court then took charge of it. None of the continuances of the motion to file it were of their asking, and in fact they appear to have been almost importunate in pressing it to a disposition.

We must presume from the character of the orders relative to the matter that the delay was upon the part of the court, and that it had the bill under consideration. The appellants had done all within their power, and should not be prejudiced by delay upon the part of the judge. When taken under consideration by him they had no control over it, and the tender of it in court within the time allowed should be regarded as equivalent to a filing of it. (Meaux v. Meaux, &c., 81 Ky., 475 (5 Ky. Law Rep., 548.)

Our conclusion upon this question requires us to now consider the merits of the case, and in doing so we recognize the proper rule to be, especially in a case of this character, that error upon the part of the court below is not to be presumed; but upon the contrary every presumption fairly deducible from the record should be indulged in favor of its action.

In March, 1882, D. A. Aiken was operating a distillery under a lease from the owner, one Temmons, which, by its terms, was to expire in December, 1882. At the time first named it was destroyed by fire, bringing financial ruin to Aiken; and his creditors thereupon sued out attachments which were levied upon his leasehold interest in the distillery premises, and any whisky in the warehouses connected therewith belonging to him. The indebtedness due him for the storage of whisky of other parties in the warehouses was also attached. The attachment suits having been consolidated, the appellee, T. N. Allen, was, upon motion of the attaching creditors, appointed receiver on June 9, 1882, and acted as such from the following day until June 21, 1884, or for a period of a few days over two years. In August, 1882, the appellee, George G. White, purchased the distillery premises from Temmons, and about the same time obtained from Aiken a release of the remaining period of time covered by his lease.

White, by his petition, became a party to the actions on February 6, 1883. He set up his purchase, the release by Aiken of the remainder of his lease, and claimed the storage, which had accrued from the date of such release; and insisted if he were not thus entitled, he had the right, by virtue of his purchase, to what had accrued since the expiration of the lease, and might thereafter accrue. His pleadings in effect consented to a continuation of the receivership, and it is not necessary to a determination of the question now before us to regard his and the attaching creditors' relative rights as to the claims for storage.

The appellee, Allen, appears to have discharged his duties well and faithfully. His character was a guarantee that this result would follow his appointment. The court allowed him $6,000 for his services, and of this White and some of the attaching creditors complain.

At the time of the receiver's appointment there were between ten and eleven thousand barrels of whisky in bond in the distillery warehouses. It turned out that all of it either belonged to third parties, or had been hypothecated by Aiken for its full value. During the receiver's term a portion of the whisky was sold by him under order of the court, as its special commissioner, to satisfy a lien, and for this service he was allowed $800, which was

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allowed out of the proceeds of the sale. During his term of service he collected something over $220,000, and disbursed something over $213,000. Nearly all of this sum consisted, however, of the government tax, which, upon the withdrawal of the whisky from bond by the third parties owning it, he collected from them and paid over to the United States collector.

It is insisted upon the one side and denied upon the other that this collection and disbursement is to be considered in arriving at a just compensation for his services as receiver. In solving the question it is proper to look first at the order appointing him and then at the evidence.

He was directed "to take charge of the attached property herein, and take due care of the attached property, and exercise due and proper diligence in protecting and keeping the same safely. * * * It shall be the duty of the receiver to ascertain the barrels of whisky on which there are storage dues, and upon payment of storage due and demand by the owner (where the owner is other than said D. A. Aiken) to surrender to such owner possession of the whisky and sign such withdrawal papers as may be necessary to enable such owner to withdraw such whisky from the United States officials; * * * keep an account of all receipts of storage dues, and of all expenditures in taking care of the warehouses and of the said whisky, and in guarding the same against depredations or injury, and the whisky against loss by leakage or otherwise."

It is noticeable nothing is said from which it could even be inferred that it was expected the receiver would collect from third parties, who might have whisky on storage, the tax thereon, and pay it over to the government. They had the right to pay it direct to the collector themselves. It was a matter in which the attaching creditors were not interested. It was a favor extended to the owners and by way of accommodation to them. In fact it is shown in this case that at least two or more of these owners paid the tax on their whisky without its passing through the hands of the receiver at all. The record shows that he gave bond in the sum of $5,000 only, and surely this would not have been so if it had been expected or intended that he should, as receiver, collect and disburse these taxes; and it will hardly be contended that in case of default his bondsman would have been liable for them, even to the extent of the bond. It is reasonably certain, however, that the court, when it made the allowance, took into consideration this service of the appellee, and the responsibility arising from the handling of so large a sum of money. Upon no other idea can so large an allowance be accounted for, because while the receiver performed many and important duties, yet outside the taxes thus collected he collected nothing save storage, and it in all amounted to but about $7,400. If the allowance, therefore, as made is to stand it will about consume all that was realized, and we must assume that the court, in allowing it, acted upon the false basis indicated. It is true the evidence shows that distillers and warehousemen usually receive the money from those having whisky on storage with them to pay the government taxes and pay them; but it is equally well shown that this is but an accommodation upon the part of the distiller, and he is not bound to do it.

The receiver testifies that he considered he had stepped into the shoes of the distiller, but the trouble with this view is that the interests of the creditors were involved and to be affected, as well as the interest of Aiken; and it would often, and perhaps usually, be ruinous to the former to apply such

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a custom, and make it a rule as to a receiver, whose allowance is graduated not only by the work done, but the character and responsibility of it. It is true the receiver in this instance, by a report as to his action, filed on June 23, 1883, showed that he was, inter alia, collecting and paying these taxes; but as no allowance was then expressly asked or made, the appellants should not be treated as having waived the right to thereafter object to an allowance for services based in part upon this service.

The evidence shows that there were in all about five hundred withdrawals of whisky while the receivership lasted. The time necessary to effect one of these withdrawals varies according to the evidence from fifteen minutes to two hours, depending upon the familiarity of the doer with the duty, and his celerity in the work. The receiver testifies that during one year of his service he did something in the discharge of his duty upon two-thirds of the days in the year, and upon each day during the other. He was not of course so employed during the entire day, or but seldom, and we presume, from the evidence, often but a short time. He says that during the time he attended to his law practice. The office required him, however, to be ready at any and all times to attend to any of its duties, and he should, therefore, be liberally paid; but the rights of all parties interested must be considered.

But three witnesses upon his side give an estimate of the value of his services, and the average of their opinions fixes it at $1,900 per year. The highest sum named by any witness is $2,500 per year. The collection and payment of the government taxes is also taken into the estimate of these witnesses. Six witnesses testify for the appellants, and the average of their estimates places the worth of the services at from five to six hundred dollars per year. Some of the witnesses upon each side had a personal knowledge of the services rendered, and those upon the one side appear to have had equal opportunity to judge of their value with those upon the other, and equal familiarity with the character of such services.

It is needless to enumerate in extenso what was done by the receiver. We have carefully examined the record and considered it; and while he is no doubt actuated by a conscientious conviction of right as to what is due him, yet, in our opinion, the allowance made to him does not come within the requirement of the statute, that it shall be "reasonable," and it seems to us that $1,500 per year, or $3,000 for the entire service, is ample.

The judgment is reversed, with directions to render judgment for this sum in full of the claim and for further proceedings consistent with this opinion.

SMITH v. BRADLEY.

(Filed March 30, 1889—Not to be reported.)

1. Construction of deed—A conveyance of 300 acres of land to be set apart to the grantee out of a large boundary invested the grantee with an undivided interest in the body of land referred to, and he having sold and conveyed, by metes and bounds, 300 acres of that boundary, the purchaser from him can not, after many years, question his title for the purpose of preventing a recovery by those claiming as remaindermen under the original conveyance.

2. Ejectment—Remainder—A purchaser of land from a life tenant can not compel those in remainder to establish a connected and certain title from the Commonwealth, as both derive title from the same source.

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Gordon & Gordon, J. B. Earle, Petrie & Downs and The Felands for appellant.

Edward W. Hines and Waddill & Pratt for appel'ee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted by the appellees to recover a tract of land in the county of Hopkins in the possession of and claimed by the appellants under a conveyance by Alexander Lewis to Alfred Lewis, in trust for Emily Lewis during her life, and then to the heirs of her body. This deed of trust was executed on the 14th of October, in the year 1846. After the execution of this deed Emily married a man by the name of Bradley, and died in the year 1878, leaving children, and those children are the plaintiffs in this action. On the 7th day of March, in the year 1863, Bradley and wife, the parents of these plaintiffs, made an absolute deed to this land to Joseph Smith, the ancestor of the appellants, and the trustees, or a part of them, mentioned in the original deed of trust executed in the year 1846 by Alex. Lewis, united in the conveyance to Smith.

The law and facts of this case were submitted to the court without the intervention of a jury, and a judgment rendered for the plaintiffs. The first question raised by the appellants is that the conveyance by Alex. Lewis is void because of uncertainty, or for the reason the land conveyed is not identified. Alexander Lewis, the original grantor, owned a much larger tract of land than that in controversy, as the evidence shows, and directed in the deed of trust that the 300 acres intended for the benefit of Emily should be laid off in convenient form, and there is no evidence that this 300 acres was ever laid off, except the possession by Emily and the trustees, or by Emily under the deed, and the conveyance by Emily and her husband to the ancestor of the appellants, of this 300 acres by metes and bounds in the year 1863. Now Emily certainly owned 300 acres of this large tract of land undivided when the deed took effect. She took possession of 317 acres, as the proof clearly shows, under the deed, and sold it by metes and bounds to Joseph Smith. In fact there is nothing in the answer of the appellants denying that this land is the same conveyed by Alex. Lewis. If there had been the testimony shows that it is the same land, and the best evidence of that fact is the deed under which the appellants claim the conveyance by Emily and her trustee. That this was the land that Emily and her husband held under Lewis and sold to the appellants, or those under whom they claim, is settled beyond dispute. If the grantor had an uncertain boundary, or one not well defined, the conveyance to Joseph Smith made it certain; and, besides, when Emily took possession, or her trustee, it was under the original conveyance; and after the grantee in the original deed has entered and held for so long a time it is too late for the purchaser from him to question his title, or to place him in the position of a joint tenant holding an undivided interest. While we find no grounds for a new trial in the record, we have noticed the evidence from which the court below finds that the land conveyed by Bradley and wife to the appellants is the land held under the trust deed; that by the terms of the trust deed the mother of plaintiffs held a life estate, and the cause of action did not accrue to the plaintiffs until the death of their mother in 1878; and those findings are conclusive of this case.

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It is apparent from the record that the ancestor of the appellants entered under the title of Bradley and wife, and that they entered under the title of Alex. Lewis, and now it is insisted that the purchaser from the life tenant can compel those in remainder to establish a connected and certain title from the Commonwealth in order to recover. We think not. Both derive title from the same source, and the question presented is as to the interest of Bradley and wife in the land.

The judgment below is affirmed.

ADAMS v. STEPHENS, CLERK, &c.

(Filed March 30, 1889.)

1. License to retail liquor—License fees—Mandamus—The present revenue law (chapter 92, General Statutes) has not repealed the special statutes giving to the different incorporated cities and towns in the State exclusive power to grant licenses to sell liquor by retail within their respective limits; and under section 10 of article 5 of that law, which provides that a license granted by a city or town having authority to grant the same shall be void "unless the State license be obtained, and the State tax be paid before the grant thereof," it is not necessary for the applicant to do more than pay to the county clerk the State tax required in such cases, the clerk's receipt of such payment being all the State license required by that section of the statute.

Appellant, with a view of applying to the board of trustees for license to retail liquor in Shelbyville, tendered to the county clerk the amount of State tax required to be prepaid, and upon his refusal to receive the money and give a receipt therefor this action was instituted for a writ of mandamus to compel him to do so. Held—That the provisions of the charter of Shelbyville giving the board of trustees the exclusive right to license all taverns, houses of public resort, etc., was not repealed by the present revenue law, and that appellant is entitled to the mandamus.

2. Same—The power to grant a license to sell liquors by retail in any given locality involves a discretion to refuse.

L. C. Willis for appellant.

G. G. Gilbert, J. C. Beckham and P. J. Foree for appellees.

Appeal from Shelby Circuit Court.

Opinion of the court by Chief Justice Lewis.

Section 27 of the charter of Shelbyville, approved March 22, 1873, is as follows: "That the board of trustees shall have the exclusive right to license all taverns, groceries, retailers, druggists, victualers, confectioners and houses of public resort, except gambling houses and houses of ill-fame, within the town of Shelbyville, or within one mile thereof; and such license shall only be granted at the discretion of the board of trustees of said town. Any law giving the county court of Shelby county the power to grant any such license within the limits of said town, within one mile thereof, is hereby repealed. Before any license shall be granted to keep a tavern or coffee house the appellant shall pay the State tax to the county clerk, and execute bond in the county court, as now required by law."

As stated in his petition, appellant, with a view of applying to the board of trustees for license to retail spirituous, vinous and malt liquors in Shelby-

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ville, tendered to the clerk of the Shelby County Court the amount of State tax required to be prepaid in such case, and upon his refusal to receive the money and give a receipt therefor this action was instituted for a writ of mandamus to compel him to do so.

It seems to us, upon that statement of facts, appellant was entitled to the mandamus, and it was error to sustain a general demurrer to the petition, if the section quoted be still in force and unrepealed, for in terms the board of trustees is invested thereby with the exclusive power to grant such licenses, and it is made the duty of the clerk to receive the prepayment of State tax whenever tendered by an applicant.

The principal question, then, involved in this case is whether that section of the charter has been repealed or modified by an act to amend the revenue laws of the Commonwealth, approved May 17, 1886, being chapter 92, General Statutes.

If repealed at all, it is by sections 1 and 10, article 5 of that act, which are as follows:

"Section 1. All licenses mentioned in this article, except licenses to sell by retail spirituous, vinous or malt liquors, shall be granted by the county clerk; and licenses to sell by retail spirituous, vinous or malt liquors shall be granted by the county court; but the county court shall not grant a license to sell spirituous, vinous or malt liquors until ten days' notice shall be given by posting a written or printed notice at the door of the court house, and at least four public places in the neighborhood where the liquor is to be sold, and if a majority of the legal voters in the neighborhood shall protest against the application it shall be refused. The county court in each instance shall determine what constitutes a neighborhood.

"Section 10. A license granted by a city or town having authority to grant the same shall be void, and no protection to any person for any purpose, unless the State license be obtained and the State tax be paid before the grant thereof."

It is clear the part of the charter of Shelbyville giving to the board of trustees power to grant license to sell liquors by retail therein has not in terms been, nor was intended to be, repealed by either of the sections quoted. The peculiar provisions made and terms used in the first of the two sections show it was intended to apply alone to the country and sparsely populated villages, for it is not to be supposed it was the intention of the legislature to make the granting of licenses to sell liquors in the different parts of incorporated cities and towns, which are laid off into regular civil divisions, depend upon the expressed will of a majority of legal voters within the undefined limits of what a county court may, in its discretion, determine constitutes a neighborhood in such cities and towns.

The statutes giving to the different incorporated cities and towns in the State exclusive power to grant licenses to sell liquors by retail within their respective limits, so far from being repealed by section 10, are, in terms, recognized as existing and left in full force, the manifest purpose of that section being simply to annex a condition to the exercise and effect of that power that will hereafter insure payment of the State tax on such licenses. And we think such is the meaning of the words "unless the State license be obtained and the State tax be paid before the grant thereof." The power to grant a license to sell liquors by retail in any given locality involves a discretion to refuse. And as the charter of Shelbyville not only invested the board of trustees with exclusive power and discretion in granting licenses

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to sell therein, but expressly repealed all previous laws conferring that authority upon the Shelby County Court, the effect of construing section 10 so as to reinvest the county court with the authority, even if the language used authorized it to be done, would be to give to two distinct tribunals the power to grant or refuse licenses at discretion, which obviously would be impracticable, and, therefore, evidently not intended. Chapter 92, General Statutes, is purely a revenue statute, the title of it is "Revenue and Taxation," and it is not within its power to regulate the manner of granting licenses to sell spirituous, vinous and malt liquors in incorporated cities and towns, except so far as necessary to secure payment into the treasury of the State tax thereon.

Article 2, section 11, chapter 92, General Statutes (former edition), contained a provision that "a license granted by a town or city having authority to grant the same shall be void, and no protection to any person for any purpose unless the State tax required by law be paid upon the grant thereof." And it was decided by this court in Williams v. Commonwealth, 13 Bush, 304, that as the statute did not direct to whom the State tax should be paid, the payment of it by the applicant to the clerk of the board of trustees of the town granting the license, to be paid over by him to the trustee of the jury fund, was proper. and all that was required by the statute as it then was. To remedy that defect in the law, as thus construed by this court, and it seems to us for no other purpose, the words "unless the State license be obtained" were inserted in section 10 now under consideration. And all intended to be accomplished by the amendment was to prevent towns and cities collecting the State tax, and to require it to be paid, not to the court, but to the clerk of the county court. For it was not necessary, nor does section 10 directly or indirectly confer upon the county court power and discretion to grant licenses to sell spirituous, vinous and malt liquors in incorporated towns and cities. And as such power does not exist, it is not necessary for an applicant for such license to do more than to pay the State tax required in such cases to the clerk, whose written receipt of such payment is all the State license contemplated or required by section 10.

Wherefore, the judgment in this case is reversed and remanded for further proceedings consistent with this opinion.

BLAND, &c. v. GAITHER, &c.

(Filed March 30, 1889—Not to be reported.)

1. Contracts—Appellants, two heirs of a decedent, one of them being also the executor, agreed with appellees, the other heirs, to pay them a certain amount by way of making them equal in advancements, in consideration that they would no longer contest the will of their common ancestor. Held —That the contract bound appellants individually, and not the estate, but their liability is limited by the value of the estate.

2. Verdict—The jury having found for the plaintiffs a certain amount, "to be paid out of the estate," the court properly treated the direction in the verdict as to how it was to be paid as surplusage, and rendered an individual judgment against appellants.

3. Evidence—Upon the question as to whether the alleged contract was made, it was competent for the jury to consider all the surrounding circumstances by way of arriving at the truth of the matter, however slightly they tended to this end.

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4. Misconduct of counsel in argument can not be considered, no objection or exception being taken at the time.

5. A ground for a new trial is sufficient which merely states, in substance, that the jury were misinstructed, or that the trial court erred in refusing instructions. But where the party expressly points out certain instructions as erroneous he thereby waives objection to all others.

Montgomery & Poston for appellants.

J. P. Hobson for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Holt.

The action of the appellees is based upon an alleged contract between them and the appellants by which the latter were to pay them, by way of making them equal in advancements, $4,000, in consideration that they would no longer contest the will of their common ancestor. This they ceased to do. The answer denied that any such contract was ever made, but in view of the verdict for the appellees we must assume its existence; but it is evident that while an individual liability was created upon the part of the appellants it was restricted by the contract as to its extent to the amount of the testator's estate. One of the appellants was the executor as well as an heir of the decedent, while the other was an heir only. It was a joint agreement, and hence they did not contract in an official character, and did not bind the estate. They did not, however, undertake to pay more than the amount of the estate. It was to furnish the money to pay the liability. They were contracting with reference to it, and the advancements that had been made to the different heirs. While it was agreed that the appellees were to have $4,000, and the grandson, Wintersmith, $1,600, yet the money of the estate was looked to for its payment by the parties, and the liability to be graduated by the amount of it. Any other conclusion would be absurd. It can hardly be supposed that the appellants, by way of equalizing advancements, agreed to pay the appellees and Wintersmith more than the amount of the estate left by the decedent. All of the other heirs, save perhaps one to whom a small balance was perhaps due by way of equalizing him, had received a due proportion of advancements; and one of the appellants having the estate in his hands as executor, it is quite reasonable to suppose they would, under such circumstances, graduate their liability by the extent of it, and that they would not have undertaken to pay more than the value of the estate.

The verdict of the jury shows that they took this view of the matter. The estate proved to be worth less than $5,000, and they found: "We, of the jury, find for the plaintiffs $3,704.45, to be paid out of the estate of Henry Bland, deceased."

The lower court, however, properly treated the direction in the verdict as to how it was to be paid as surplusage, and rendered an individual judgment against the appellants. (Beckham v. Smith, 62 Pa., 46.) If the appellants agreed to pay the money, then the jury had nothing to do with the question as to how or where it was to be obtained.

The testimony introduced relative to the ancestor's estate, and what property he had owned, and his financial condition, as well as that tending to show what the other heirs had received by way of advancement, was com-

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petent. It tended to show the object of the contract between the appellants and the appellees, and the probability that it had been made. It is true so much of it as related to what means the appellants had, and what property they had purchased, tended to do so but slightly; but whether such a contract as that claimed had been made was not only to be determined by the jury upon the positive testimony introduced, but, as it was conflicting, it was proper they should consider all the surrounding circumstances by way of arriving at the truth of the matter, however slightly they tended to this end. (Davis v. Calvert, 25 Am. Dec., 282; Shannon v. Kinny, 1 A. K. Marshall, 3; Jones v. Letcher, 13 B. M., 372.)

The complaint of misconduct in argument by the appellees' counsel, were it well founded, can not be now heard, because no objection was made or exception taken to it at the time.

It is unnecessary to review all the instructions which were given and refused. The appellants complain in argument especially of the fourth and fifth ones, which were given to the jury. The one first named was favorable to them. The other, even if erroneous, can not now be considered because the motion for a new trial improperly points out the instructions objected to, and this one is omitted.

A ground for a new trial is sufficient which merely states, in substance, that the jury were misinstructed, or that the trial court erred in refusing instructions. But where the party, in his grounds for a new trial, expressly points out certain instructions given to the jury as erroneous, he must be held to thereby waive objection to those omitted from such enumeration.

It is only necessary to say as to the instructions refused that in so far as they were correct they had been substantially embraced in those given to the jury.

The question of a variance between the pleadings and the evidence was disposed of by the opinion of this court upon the former appeal of this case.

The judgment is affirmed.

SMART v. COMMONWEALTH.

(Filed April 20, 1889—Not to be reported.)

1. Instructions—The court properly refused an instruction presenting a view of the case which there was no evidence to sustain.

2. Evidence—Upon the trial of appellant for murder, alleged to have been committed by killing W., the evidence as to who did the killing was entirely circumstantial, and some circumstances pointed to G. as the guilty party. Held—That it was competent for the Commonwealth to show that G. was not the guilty party by proving circumstances showing that he and W. were killed at the same time and by the same person.

Thomas Lawson and S. M. Bernard for appellant.

P. W. Hardin and Frank Parsons for appellee.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was convicted in the Jefferson Circuit Court of the murder

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of Belle Ward, and his punishment was fixed at death. His motion for a new trial having been overruled, he has appealed to this court.

The trial court instructed the jury as to the law of murder, manslaughter and self-defense. The instructions upon these subjects set forth the law correctly.

The court refused to give an instruction offered by the appellant to the effect that if the appellant s wife killed Belle Ward, he not assisting or aiding in the killing, though he aided her after the killing, then he should be acquitted. This instruction was asked upon the ground that the husband is not liable to punishment for aiding and abetting his wife after the fact. There is no proof in the record tending to show that the appellant was only the aider of his wife after the fact. On the contrary, he, in his evidence, negatives the existence of such fact. Therefore, the instruction was properly refused.

The appellant and his wife and Meisner Green and Belle Ward lived in the city of Louisville, and occupied the same room. It appears, from the record, that they agreed to go on a fishing excursion, pursuant to which purpose they, on the 5th of July, 1888, left Louisville together and went to Port Fulton, a small village just above Jeffersonville, in the State of Indiana. They remained in this village a greater part of the day and a part of the night. Sometime during the night they stole a boat and rowed up the Ohio river to a fishing camp, getting there a little before day. They warmed by the camp fire until daylight. They then moved up the river in the boat some distance, where they struck camp and were seen there and thereabouts until about 8 o'clock Saturday night, at which time Meisner Green and Belle Ward were seen sleeping, and the appellant and his wife were sitting together some distance from them. On the next morning (Sunday) two persons, a male and a female, were seen on the river not far from the place where the appellant and party had been camping, in a boat, which answered to the description of the one used by said party. The male was rowing the boat, and the female seemed to be scrubbing the bottom of it. Not long after this the appellant and his wife rowed down the river a short distance in the boat that they had been using, and sold it for seventy-five cents, and went on foot from there to the city of Louisville. The wife of the appellant had in her possession a skirt and a mother hubbard which had belonged to Belle Ward. On the next day (Monday) the body of Meisner Green was found floating in the river below the place where the parties had camped. On his body were several wounds that had been made with a sharp-edged instrument. On his head was a contused wound that crushed the skull; large stones were fastened to his feet by means of ropes. On the next day the body of Belle Ward was found floating in the river some distance above the place that the body of Green was found, but below the place that they had camped. On her head there was a contused wound that crushed the skull, and large stones were fastened to her feet by means of ropes. The contused wound on the head of each was evidently made with the same instrument, and the stones were evidently fastened to the feet of each by the same party.

The substance of the foregoing facts was proven by the Commonwealth.

The appellant objected to that part of the evidence relating to the death of Meisner Green, and the manner of it, upon the ground that it was incompetent. It seems to us that the evidence was competent. In the first place, the evidence clearly establishes the fact that Meisner Green and Belle Ward

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were killed at the same time and by the same person. In the second place, the evidence as to who did the killing is entirely circumstantial. Unless it was proven that Meisner Green did not kill Belle Ward the evidence would point to him as the guilty party, nearly, if not quite, as strong as it does to the appellant. Therefore, it was important for the Commonwealth to show that he was not the guilty party. This the Commonwealth did by showing circumstantially that he was killed at the same time that Belle Ward was killed, and by the same party.

The jury, after hearing the evidence for and against the appellant, found him guilty of the crime of murder. They, in order to reach this conclusion, had to disregard the appellant's evidence in toto. This they had the right to do; and we think the evidence clearly justified them in so doing.

The judgment is affirmed.

HOLCOMB v. JONES.

(Filed April 20, 1889—Not to be reported.)

Vendor and vendee—M. sold to H. a tract of land, put him in possession, and received pay therefor. Thereafter M. sold and conveyed the same land to J., as part of a larger tract, J. having notice of the previous sale to H. A part of the purchase price paid by J. was afterwards paid by M. to H., who executed a receipt therefor, whereby he relinquished all his "right and title in and to" the land which he had purchased from M., and which M. subsequently conveyed to J., H. having received a conveyance from M.'s vendor, who had never before conveyed the land. J. seeks by this action to cancel that conveyance, to recover the land and have the title conveyed to him. Held—That the paper executed by H. divested him of whatever equitable title or claim he had to the land, and reinvested M. therewith, which inured to the benefit of J., as did also the deed executed to H. by M.'s vendor, therefore, J. is entitled to recover.

P. A. Cline and Jas. M. York for appellant.

S. B. Dishman for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Chief Justice Lewis.

The land in dispute in this case—about two hundred acres—is a portion of about six hundred and fifty acres, composed of three distinct parcels, patented to Bently, and by him sold to Jonas Posey, who made a parol gift thereof to his three sons, and they, with his consent, sold and conveyed to James Morgan.

In January, 1882, Morgan conveyed the three tracts to appellee Jones at the price of $800. But appellant Holcomb being at the time in possession, and claiming the portion in contest under a previous purchase from Morgan, who is his father-in law, in March, 1882, procured a deed therefor from Bently; and in October, 1882, Jones instituted this action to recover the land, to have the deed from Bently to Holcomb canceled and the title conveyed to him, Bently, Posey and Morgan, as well as appellant, being made defendants.

The evidence satisfactorily shows, first, that James Morgan had, several years previous to 1882, sold to appellant, received pay for and put him in

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possession of the land, the boundary of which was ascertained and fixed; second, that Morgan, who was drunk as well as illiterate when the deed was made to Jones, did not intend to include the portion he had sold to Holcomb, nor know at the time it was included; third, that Jones, when he made the purchase, had actual notice Holcomb was in possession and claimed the land in controversy, for not only was such claim mentioned in his presence while the deed was being written, which was after nightfall, but one of his agents on that day went to where Holcomb was and offered to buy the land from him, and had returned and was then present. Moreover, the circumstances developed in this case create much more than a suspicion that it was the purpose of Jones, who came to the State to purchase, and has purchased, very large quantities of coal lands, to secure the title to the land in dispute, upon which there is a valuable coal bank, before the return to the neighborhood of Holcomb, who was at the time employed away from home; for not only was the deed written, executed and acknowledged by Morgan before the clerk, conveniently present in the country for the purpose, within a short time after the trade was made and before he returned to his place of residence, but the acknowledgment of his wife, who was at a different place, was also procured, and the money paid over at a late hour after Saturday night. Some of the witnesses testify Morgan stated, while the deed was being written, that Holcomb had not paid him for the land; but that he had been fully paid the purchase price appears both from his own and the testimony of other witnesses in the case.

Appellant filed a title bond, which he stated was executed to him by Morgan in 1879, and he proved its execution by an attesting witness. But the genuineness of the paper is denied by appellee, and there is evidence enough to create a doubt whether Morgan did really execute it. As this record stands Morgan could have, unquestionably, had the deed so reformed in a court of equity as to exclude the land in controversy therefrom, but he made no effort to do so, having, it seems, been induced to believe he was bound by the deed and quieted by the payment by Jones of an additional $100.

It is also clear that whether Morgan did or did not execute the title bond in 1879, Holcomb having armed himself with the deed from Bently, could have held the land against Jones if he had not received from Morgan $400 of the purchase price of the six hundred and fifty acres of land and executed the following paper: "I, H. W. Holcomb, have this day received of James Morgan $400 for a certain tract of land lying on the Laurel branch, a tributary of the north fork of Kentucky river, whereas, said amount is a payment to H. W. Holcomb for said land sold in 1876 or 1877, and that said amount for said land was paid; and whereas said land has been sold, and I hereby relinquish all my right and title in and to the same, and at any time legally and lawfully, or when requested by James Morgan, I will give possession of said land. February 27, 1882." The legal effect of that paper was to divest Holcomb of whatever equitable title or claim he had to the land in contest, and to reinvest Daniel Morgan therewith, which, according to a familiar rule of equity, inured to the benefit of Jones, the vendor of Morgan, and consequently the deed subsequently obtained from Bently, if effectual for any purpose, was likewise for the benefit of Jones.

To avoid the effect of that paper appellant undertakes to show he was drunk at the time it was executed, but the evidence is not such as to authorize the belief he was incapable of understanding when he signed it, and,

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besides, he has never offered to return the money received as the consideration therefor.

It seems to us, therefore, that having voluntarily and for a valuable consideration divested himself of, and transferred to Morgan, the vendor of Jones, whatever claim or right he had to the land, Holcomb is not in an attitude to resist recovery by Jones of either the title or possession of the land, and the judgment must be affirmed.

GERMAN INSURANCE CO. v. LANDRAM.

(Filed March 28, 1889.)

1. Swearing judges off the bench—To entitle a litigant to have the regular trial judge vacate the bench he must state in his affidavit the fact or facts upon which is founded his belief that the judge will not give him a fair trial; and the facts thus stated must be of such a character as should prevent the judge from properly presiding in the case. Of the sufficiency of the affidavit the trial judge must determine, his decision to be subject to revision upon appeal. And thus construed, the statute is not unconstitutional.

2. Same—The objection to the trial judge is a question of jurisdiction, and to be available must be made before an appearance to the merits of the action, or the submission of preliminary motions by either party preparatory to a trial.

3. Reversible error—An error of $5 in the amount of the judgment is too small to authorize a reversal.

Collins & Fenley and D. S. Clay for appellant.

DeJarnette & Dickerson for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Pryor.

The principal and only question necessary to be considered in this case arises from the refusal of the regular judge below to vacate the bench on the filing by the agent of the appellant with the clerk of the court as provided by section 1, article 7 of chapter 28, General Statutes, to the effect that "the judge would not afford the appellant a fair and impartial trial." When the case was called the appellant, the German Insurance Co., of Freeport, Ill., defendant in the action, moved, through its counsel, for a continuance of the case, supported by the affidavit of its agent. The motion was overruled, and thereupon an amended affidavit was filed and the motion renewed, and the motion again overruled. At this stage of the proceeding the counsel filed the affidavit of the agent, and asking that the case be tried by a special judge; and the court, disregarding the affidavit, proceeded to try the case, resulting in a verdict and judgment against the appellant.

The constitutionality of this statute requiring the judge to vacate the bench was maintained and ably argued on the hearing, and if constitutional, it is urged, the judgment in this case should be reversed, in order that the appellant may have a retrial before some other judge than the regular elected judge of the district.

The constant abuse of this statutory privilege in almost every circuit court district in this State has directed the attention of the courts and the pro-

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fession to this important question, and while the purpose of the law is to place the trial judge beyond the temptation to oppress those who are compelled to resort to the courts for the protection of person or property, and to enable the litigant to prevent a corrupt or partial judge from passing judgment on his case, it must be conceded by every one at all familiar with the administration of the law by the circuit judges of the State that this statute, with the construction now given it, operates, in its practical effect, to enable the shrewd and reckless litigant to avoid the trial of his case by the regular elected judge without cause, and to deprive the honest litigant of what is his constitutional right. He takes advantage of this statute and acquits his conscience in making the affidavit on the ground that the judge, in refusing a continuance, sustaining a demurrer to his complaint or defense, or in excluding testimony offered, or on account of other rulings in his case, or in other cases, whether erroneous or proper, has induced the belief in his mind that he can not have a fair and impartial trial. The personal and judicial integrity of the judge is questioned only in this way, when every man acquainted with the judicial history of the State will testify, in looking to the present or to the past, that no public officials are more entitled to the approbation of their fellowmen for the faithful and honest discharge of their duties than the judges of the various circuit districts, and whether elevated to their positions by appointment or the popular vote, it can not be truthfully said that they are influenced in their judicial action by local influences or party prejudice. Those who make these affidavits, and they are becoming almost as numerous in contested cases as motions for a continuance, assign no cause for their belief that justice will be denied them, yet the trial judge, with no charge made against him, is often unseated by a litigant he has never known, or by those with whom he has never had a business transaction, with no means of ascertaining the facts upon which the belief of the litigant is based; and however corrupt the oath may be, there is no means of punishing the guilty party because his belief is made the law. In fact that branch of the judiciary upon whose intelligence and integrity we depend more for the protection of person and property than any other, and whose intercourse and influence with the people in the administration of the law moulds public sentiment in sustaining every moral as well as legal principle essential to social existence, is met at every term of the court with an affidavit that he is a corrupt or partial judge, and this affidavit spread upon the records. It not only lessens the respect we should have for the judge and the law he administers, but tends directly to destroy that pure public sentiment that demands its vigorous enforcement. The statute can not well be held unconstitutional, for the reason that all doubts as to the constitutionality of the act must favor its validity, and, as has been also argued, the abuse of the legislative power is no argument against its exercise; still it may be convincing argument against such a construction as must be apparent is in plain violation of the legislative meaning. Section 28 of article 4 of the Constitution provides:

"The general assembly shall provide by law for holding circuit courts where, from any cause, the judge shall fail to attend, or, if in attendance, can not properly preside." The legislature under this constitutional provision has, from its adoption, exercised the power of authorizing the election of special judges, and the causes for which the regular judge may be required to vacate the bench for the time being, and it would be a useless

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waste of time in the determination of this question to go behind the present Constitution or to consult the common law rule under which judges were disqualified from trying a cause. Personal interest in the result of the litigation, or being related to those who had an interest, were the only disqualifications at common law. This court, however, held, in the case of Turner v. Commonwealth, 2 Met., 625, that our laws had enlarged the causes for which a judge might be compelled to vacate the bench, and that the constitutional provision already referred to was intended to effectuate that object, and, therefore, the inquiry in that case was, as must be the inquiry now, did the appellant, in the court below, manifest its right to have the cause tried by a special judge? Whatever may be said of the policy of this legislation, in view of that decision, and the constitutional provision under which this legislative power has been so long exercised, the right of the litigant should not be denied him of compelling the judge to leave the bench when he can not properly preside. If we interpret this statute by its letter, then the litigant, for any cause, may have a special judge to try his case if, in his own belief, that cause will justify him in making the affidavit. The judge may have instructed the jury in a case similar to the one the affiant is about to try unfavorably to his side of the controversy. He may have sustained a demurrer to a pleading in the case, or in some other similar case that, if adhered to, must prove fatal to the case of the affiant. He may be known to one of the parties and unknown to the other. He may have peculiar views on certain branches of the law. He may refuse to continue a case when the litigant or his counsel believe the grounds were sufficient. In all such cases the litigant, for such reasons, may conceive that injustice will be done him, and, therefore, he is ready to make the affidavit when it is apparent not one of the grounds mentioned, or those of a like character, are sufficient to require the judge to vacate the bench. Again, the hostile feeling that exists between parties litigant, even in ordinary cases where the judge rules the one way or the other, rose perfectly honest in the excitement of the moment, and, feeling the sting that perhaps results from an erroneous ruling, will seize on this action of the court as a justification (to use the language so often heard and read in the records before us) for swearing the judge off the bench. It can not be urged that the rule of the common law has been so far enlarged as to permit the exercise of the privilege conferred by the statute for any of the reasons given. The cause to disqualify a judge, as said by this court in Turner v. Commonwealth, should not be trivial, "but should be a legal and substantial one, and so the section should be construed in cases involving the propriety of a judge's presiding, and the necessity for a special judge on that ground."

In that case the belief of Turner was stated on oath, accompanied by the grounds upon which his belief was founded. The judge had been personally hostile to Turner for years, and because of this hostility, and for other reasons, he did not believe he could obtain a fair trial.

It is contended that the statute has furnished the grounds in saying that if the affiant states that the judge will not afford him a fair and impartial trial he shall vacate the bench. This affidavit, or the statements contained in it, the affiant believes are true. What is the foundation of the belief or ground on which the statements in the affidavit rest? No one, if this construction is given the statute, can know unless the ground is disclosed by the litigant himself, and, therefore, for any of the alleged causes mentioned,

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the litigant obtains the benefit of the statute, although he is not entitled to a special judge. It is all left to the litigant, and to no one else, with no means of questioning his belief or punishing him for stating what he does not believe. This can not be a correct or proper interpretation of the statute, and is not in accord with the only decision of this court on the subject. The statute could not have been framed with a view of protecting a corrupt or partial judge, by keeping from the records of the court such grave charges against him. If corrupt it should be known, and the bench vacated for all time instead of temporarily, and if the charges are false they should be made in such a manner as would subject the party making them to criminal punishment. The fact or facts upon which the belief that the judge will not give the litigant a fair trial should, and must, be stated in the affidavit, and they must be of such a character as should prevent the judge from properly presiding in the case. We do not mean to say the statement of the ground for belief must establish, if true, that the judge is a corrupt official, but we do mean to adjudge that such causes, and those of a like character, as have been noticed are not sufficient, and there must be some fact stated, such as personal hostility of such a character, if that ground is relied on, as would prevent an official of personal integrity from presiding in the case, and of the sufficiency of the affidavit the trial judge must determine, and the question, if improperly decided, can be raised in this court, as in other cases, if an appeal is taken.

If an honest litigant is sincere in his belief that the judge will not give him a fair trial he will as readily disclose the grounds for his belief as to make the oath that the judge will not fairly administer the law in his case, and this he will do before he submits his case, or any branch of it, to the judge for hearing. The objection to the trial judge becomes in fact a question of jurisdiction, and the objection, to be available, must be made before an appearance to the merits of the action or the submission of preliminary motions by either party preparatory to a trial.

Judges are constituted like other men. They desire the approbation of their fellowmen, and will avoid the censure of an enlightened bar, that is certain to make itself heard when the judge is favoring the one litigant to the prejudice of the other, and, besides, his high sense of honor will prompt him to leave the bench when facts and circumstances exist rendering it improper for him to preside. There may be exceptions to this rule of conduct, but we can well say that no such exception exists in this State, and if the time should arrive when official duty is made subordinate to corruption and prejudice the statute, under the construction given, affords the litigant all the protection he is entitled to.

The affidavit containing no grounds requiring the judge to vacate the bench, the judgment below is affirmed.

(Response to petition for rehearing—Filed May 11, 1889.)

It is argued in a petition for a rehearing that the constant abuse of this statutory privilege is no reason for this court invading the province of the legislature by placing such a construction on the language of the statute as requires the litigant to specify the grounds upon which his affidavit is based. While the abuse of a law will not justify a resort to judicial legislation to remedy the evil, it is plain that no such meaning was intended to be given this statute as enables a litigant, by an ex parte affidavit, to deprive his adversary of his right to have his case tried by the regular judge, and at the same time render that judge powerless to inquire as to the cause of the

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attack upon his official integrity. It is a virtual impeachment of the judge in the particular case without cause.

The legislature could not well designate each and every cause for which the judge should vacate the bench, and, therefore, the comprehensive language is used to the effect that where the judge can not afford the litigant a fair and impartial trial he shall vacate the bench. This does not dispense with the necessity for stating the facts upon which the affidavit is based. To construe the statute as counsel would have this court construe it would be similar to permitting a recovery of money or property by one from the other without alleging a cause of action that no court would sanction, although authorized by legislation. While the general outlines of a cause of action may be given, still such averments must be made as will authorize the recovery; and so of the judge who has been called on to try the case. While the legislature has said that if an affidavit is made by the litigant that the judge will not afford him a fair trial, he shall not preside, the facts upon which this general averment is made must appear, and they must appear, and they must be such as bring the case within the legislative meaning. In the case of Turner, it was distinctly held that the grounds should be specified.

On the other branch of the case we see no reason for a reversal. The appellee may have recovered more than he was entitled to, but it does not exceed $5.

Petition overruled.

CINCINNATI SOUTHERN RAILROAD CO. v. HUDSON.

(Filed April 25, 1889.)

1. Railroads—Breach of contract to make crossing—Measure of damages—In an action against a railroad company for the breach of a contract to provide the plaintiff with "a good crossing" in consideration of his conveying to it a strip of land through his farm for the construction of its road, the measure of damages is what it will reasonably cost to make a good crossing at the point named in the contract, and such damages as may have directly resulted up to the time of trial from the inconvenience of not having the crossing.

2. Same—Parties to actions—The fact that the plaintiff has parted with the fee in his land, without reserving the right to prosecute this suit, and now has only a life estate, presents no defense to the action. The right of action did not pass to the plaintiff's alienee any more than it would have done if the promise had been to pay money, the construction of the crossing being a part of the consideration for the conveyance to the company.

Collins & Fenley and Simrall & Mock for appellant.

Hallam & Myers for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

May 19, 1875, the appellee, M. J. Hudson, was the owner in fee of a valuable farm of 220 acres, lying upon the Covington and Lexington turnpike. The dwelling thereon was about seventy yards west of the turnpike, but connected with it by a passway leading directly to it. At the time named the appellee, in consideration, as the deed recites, of the benefit to be derived by the building of the road and of $1 in hand paid, conveyed to the

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trustees of the Cincinnati Southern Railway a strip of land through his farm for the construction of its road. It was then contemplated that the railroad would for the most part occupy the site of the turnpike, therefore, necessitating a change of it so that it would, as to the appellee's land, be entirely upon the east side of the railroad, thus bringing the latter between the dwelling and the turnpike.

The deed, therefore, provided: "It is a part of the consideration of this deed that grantees are not to occupy more of the yard in front of grantor's house than is necessary to construct said railway, and that no more dirt shall be taken from said yard than is necessary to take in grading said railway in front of said yard, and that the grantors are to be provided with a good crossing on said railway at or near the present location of their road."

In building the railroad it was necessary to make a cut in front of the appellee's premises about one thousand feet long. It, at the point where his passway had formerly entered the turnpike and in front of his house, was over fourteen feet deep. It was, therefore, deemed impossible to make, in the language of the deed, "a good crossing" at that point at the grade of the railroad because a deep cut would have been necessary leading to it, rendering the crossing unsafe. One could not be made north of it, and to obviate the trouble, as the appellants claim, they changed their purpose of having the turnpike entirely upon the east side of the railroad along appellant's premises, and located it so that it crossed the railroad at the south end of the cut, thus bringing it next to the appelle's land, about three hundred feet south of his house. This enabled him, in going from his house, to reach the turnpike at that distance from his house without crossing the railroad, and in going south, therefore, he did not have to cross the railroad at all, and but once in going north, the crossing being near the point where he thus reached the railroad and the public one of the turnpike. It is shown that this was a good crossing. The appellee used this outlet from his premises from 1876 until July 20, 1883, when he brought this action for a breach of the contract, claiming that the appellants had failed to provide him a crossing as required by his deed. They, upon the other hand, asserted that they had done so by the change in locating the turnpike, and that the way thus furnished the appellant of crossing the railroad was as "near" the location of his old road leading to the turnpike as was reasonably practicable, and was a compliance with the contract.

Although the appellee used this approach for several years, yet it appears he never accepted it as a compliance with the stipulation in the deed. It was the only way he had of reaching the turnpike. He used it ex necessitate. Moreover, the jury, by rendering a verdict in damages for the appellee, in effect found that there had been no compliance in this respect with the contract. It is shown that a bridge can be built over the railroad at or near the point where his old road ran leading to the turnpike, thus furnishing him a crossing at this point, and this he is demanding, but it will cost $1,100 or $1,200.

We think it plain that when the contract was made the parties understood that the appellee was to be furnished with a good crossing of some character in front of his dwelling and the improvements connected therewith, to be located at or near the place where the passway then leading to the turnpike passed that point. This being so, the appellees can not be excused from performance by reason of the cost of compliance.

The fact that the appellee in 1885, or about two years after the bringing of

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this action, conveyed away the fee in the land without reserving the right to prosecute this suit, and only has a life estate, presents no defense to the action. The construction of the crossing was a part of the consideration for the conveyance; and being so, the appellee has as much right to sue for and recover on account of it as he would have if it had been a promise to pay $1,000. The right of action did not pass to his alienee any more than it would in case of the consideration last supposed.

The material question presented is the proper measure of damages. The action is ex contractu, and not in tort.

Upon the trial the appellee was, over the objection of the appellants, allowed to prove what diminution in the value of his tract of land resulted from the failure to furnish the crossing; and the measure of damages furnished to the jury by the court in its instructions, in case they found for the appellee, was "the difference in value, if any, in the value of the plaintiff's interest in said land with the old road, and its reduced value, if any, as the actual result from the refusal, if any, of the defendant to provide a good crossing at or as near as practicable at the date of the deed, to the location of plaintiff's road, as of June 2, 1885, the date of the deed."

A verdict of $4,000 for the appellee in damages resulted from this evidence and view of the law.

The testimony should not have been admitted, nor the jury thus instructed. It is not an action for an injury to the land. The appellee should not be allowed to recover more than he would have had if the appellants had complied with their contract.

The damages in such an action should be in proportion to the benefit he would have received from its performance. What is necessary to make him whole? Clearly what it would have cost to make a good crossing at the point named in the deed, and such damage as may have resulted up to the time of the trial directly from the inconvenience of not having it. To allow more would give appellee more than he would have had if the appellants had complied with their promise; while the damages indicated will place the parties exactly where they would have been if the crossing had been constructed. This will make good the contract. It will make the appellee whole. It meets the actual loss.

If the view adopted by the lower court in admitting the evidence above named and in its instructions were the true one, then it would result if the appellee's farm had contained a thousand acres he would have been entitled to recover $20,000. but if he had been the owner of but one acre, then his recovery would have been limited to $20.

In Lawton v. The Fitchburg Railroad Co., 8 Cushing, 230, a railroad company, in consideration of an amicable adjustment of damages between it and the owner of land taken for its road, agreed with him as a part of the consideration to fence the land taken. It failed to do so, and was sued by him for a breach of the contract. It was held that the measure of damages was the sum which it would cost to erect the fencing according to the agreement.

In the case now before us the building of the crossing at the point fixed by the contract was a part of the consideration for it. Its fair cost was the amount of that much of the consideration. The appellee desired this crossing. If the appellants had not contracted to make it, it is presumable he would have demanded of them the sum necessary to make it as a part of the consideration for the deed.

In Taylor v. N. P. C. R. R. Co., 56 Cal., 317, the railroad company, in

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consideration of the grant of a right of way through the plaintiff's land, agreed to build for him a wagon road, and to fence each side of the way. In an action for a breach of this agreement it was held that he was entitled to recover what it would reasonably cost to construct the road and fence.

Other cases may be found to the same purport. (L., C. & S. W. R. R. Co. v. May, 52 Ind., 578; St. L., J. & C. R. Co. v. Lurton, &c., 72 Ill., 118.)

The judgment is reversed for the errors indicated and cause remanded for a new trial in conformity to this opinion.

CITY OF NEWPORT v. RINGO'S EX'TX.

(Filed December 6, 1888.)

1. Taxes paid under a mistake of law may be recovered back.

2. Municipal taxation—The charter of the city of Newport, as amended in 1874, provides that the city council shall have power to cause to be annually levied and collected an ad valorem tax on the "real, personal and mixed estate within the limits of said city subject to taxation by the city under the laws of the State;" and further provides that the assessor shall assess all property in said city "subject to taxation under the provisions of this charter and the laws of the State." Held—That under these provisions the city is authorized to tax money and choses in action as well as visible personal property.

3. Same—The legal situs of money and choses in action is the domicil of the owner, and although the charter of the city authorizes the taxation of only such property as is "within the limits of the city," it includes all such property owned by persons who reside within the city.

E. W. Hawkins for appellant.

C. J. Helm for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Holt.

The appellee sues to recover taxes paid by her to the appellant upon its demand, the assessment and collection of which she avers were unauthorized by law, but not then known to be so by her. The property upon which they were assessed consisted of choses in action upon nonresidents of the city and stocks in corporations existing elsewhere.

The city charter, by way of compulsion, provides a penalty for default of payment by a certain time.

It is too well settled in this State to need the citation of authority that if money be paid through a clear mistake of law or fact, essentially affecting the rights of the parties, and which, in law or conscience, was not payable, and should not be retained by the party receiving it, it may be recovered.

Both law and sound morality so dictate. Especially should this be the rule as to illegal taxation. The taxpayer has no voice in the imposition of the burden. He has the right to presume that the taxing power has been lawfully exercised. He should not be required to know more than those in authority over him, nor should he suffer loss by complying with what he bona fide believes to be his duty as a good citizen. Upon the contrary he should be prompted to its ready performance by refunding to him any illegal exaction paid by him in ignorance of its illegality; and certainly in such a

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case if he be subject to a penalty for nonpayment his compliance under a belief of its legality, and without waiting a resort to judicial proceedings, should not be regarded in law as so far voluntary as to affect his right of recovery.

The appellee having the right to sue, the first question to be considered is whether the city had the power to assess and collect these taxes. If so, it is decisive of this appeal, and consideration of the other question presented is unnecessary.

The act of February 17, 1874, revisory and amendatory of its charter, provides:

"Section 7. Said board shall also have power to cause to be annually levied, collected and paid into the city treasury an ad valorem tax on the real, personal and mixed estate within the limits of said city subject to taxation by the city under the laws of the State, except as hereinafter provided. Said tax shall not exceed two dollars on each one hundred dollars' valuation at a fair cash value upon every class or description of property. * * *

"Section 32. * * * He (the assessor) shall, as soon as practicable after the tenth day of January in each year, in a fair and impartial manner, assess, at a fair cash value, all property in said city subject to taxation under the provisions of this charter and the laws of the State." * * *

It is contended by the appellee that the term "personal estate" does not embrace property such as was assessed in this instance, but must be confined in its operation to such as is visible.

The justice of policy of the grant of power, whether thus confined or not, is not for our consideration, save so far as we may properly consider it in arriving at a proper construction of the law. We are to determine what power the legislature has in fact seen proper to confer.

If the charter does embrace such property, then the fact that it speaks of such as is "within the limits of said city" does not exempt this property from taxation because the title was in the appellee, who resided in the city, thus fixing its legal situs there. Property of this character follows the person of the owner, and its locality in law is his domicil. Mobilia sequunter personam.

The counsel for the appellee claims that his view is supported by the cases of Johnson v. City of Lexington, 14 B. M., 521; City of Covington v. Powell, 2 Met., 226, and City of Louisville v. Henning & Speed, 1 Bush, 381.

In the first named case it was held that the power "to assess, levy and collect taxes on such real and personal estate as they may designate" did not embrace money, debts and choses in action belonging to the inhabitants of the city of Lexington. Its charter was passed in 1831. Taxation of such property through what is known as the equalization law was first adopted in 1837, and the court, in its opinion, says: "It can not, therefore, be presumed that the State then intended to confer on the city authorities a power of taxation which it did not itself exercise." It is true an amendment using similar language to the original charter was enacted after the adoption of an equalization law, and that it was in force at the time of this decision, but the court said: "If this power was not conferred by the original charter it can not, by any fair rule of interpretation, be assumed that it was conferred by the same language in the amended charter."

The same interpretation was, however, subsequently given to a like clause in the charter of the city of Covington in the second case named, and was again reaffirmed in the case last cited as to a substantially similar provision

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in the charter of the city of Louisville, so that if the charter now in question merely gave the power "to assess, levy and collect taxes on such real and personal estate" as the city council might direct, and said nothing further, we should feel bound to follow the rule established by the cases above cited.

The intention of the law-making power must be regarded in construing a statute. This is the underlying rule of construction. It is to be gathered from the entire act. All of its language must be taken into consideration. In arriving at it it is proper to regard the law existing at the time of its passage.

The act of 1860, amending the charter of the appellant, provided: "The city council has power to levy and provide for the collection of ad valorem taxes, for general city purposes, upon all real estate and slaves in the city, and ad valorem or specific taxes upon all personal property in the city, as well as money or choses in action belonging to the inhabitants."

It is unnecessary to determine whether this act was repealed by the one passed in February, 1874, or not, owing to the conclusion we have reached as to the power conferred by the latter; but if, as the appellee contends, it was, then it seems unlikely that the legislature would, in the subsequent legislation, have released money, debts and choses in action from taxation. Undoubtedly the city would have objected to it. Many thousands of dollars of the property of its citizens were of course so invested, and the withdrawal of its power to tax it would have involved a serious diminution of its revenue. Moreover, in such an event, while the poor man would be taxable upon his little visible personal property, his more wealthy neighbor, who might be able to keep his means invested in stocks and bonds, would, as to it, go untaxed.

Do the provisions of the act of 1874 then embrace property of the last named description?

In the first place it is noticeable that the law uses the word "estate," which is ordinarily one of broad meaning. It is true it is sometimes used in a limited sense, as in case of an execution, which, by its direction, is to be levied of the defendant's estate, and yet choses in action can not be reached thereunder; and that it was the term used in the city charters that were under consideration in the cases above cited, but it is merely one of other indicia of the legislative intent contained in the act now under consideration.

It also, with a seeming view of embracing all property save such as might be exempt from taxation, provides for a tax upon "real, personal and mixed estate." Terms more comprehensive in meaning, as generally understood, could hardly have been found. It would perhaps have been impossible to have been more explicit without enumerating specifically each and every subject of taxation. Not only, however, does it give the power to tax real, personal and mixed estate, but it includes all that is "subject to taxation by the city under the laws of the State:" and in section 32, supra, relating to the assessor, it is provided that he shall assess "all property in said city subject to taxation under the provisions of this charter and the laws of the State."

When this statute was enacted choses in action and money were taxable, at least sub modo under the equalization law. It is urged, however, that if it had in this instance been intended to embrace them, provision would have been made for the deduction by the taxpayer of his indebtedness as was then allowable under the State law. This, however, is not to be presumed. The present State law does not permit it. Nor is this all. Section 7 further

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says: "Said tax shall not exceed two dollars on each one hundred dollars' valuation, at a fair cash value, upon every class or description of property."

It is suggested that this provision, as well as that directing the assessor to assess "all property in said city subject to taxation under the provisions of this charter and the laws of the State," confer no additional power to tax; that they simply mean that the tax shall be so much upon every class or description of property of the character theretofore named, and that it, or so much of it as was subject to taxation under the charter, and also under the State laws, shall be assessed.

Even if it be true that no further meaning can fairly be drawn from them, yet when all of the provisions of the charter to which we have referred are considered together the case is distinguishable from those above cited, and it is manifest to our minds that it was the legislative intention to still leave with the city the power to tax such property as that now under consideration, and that the act in question should be so construed.

The case was disposed of below upon demurrer. It is possible the appellee may be able to show that the property, or some of it, upon which the taxes were paid was exempt, or that the taxes were paid elsewhere, and present such a state of case as to authorize their repayment.

The judgment is, therefore, reversed, with leave to the appellee to amend her pleadings, if she so desires, and set up any such ground, if there be any, for the recovery of the taxes, and for further proceedings consistent with this opinion. If she does not do so, however, within a reasonable time the action will be dismissed.

ANDREWS v. HAYDEN'S ADM'R.

(Filed April 20, 1889.)

1. Practice—Introduction of testimony—On the trial of a case presenting several issues that, if tried singly, would shift the burden the court has much discretion in prescribing the order of proof; and, as a general rule, the plaintiff, on whom the burden is cast on the issue vital to the recovery, will be required to conclude the entire case on all the issues. But as to any issue upon which the burden would be on the defendant if it were the only defense presented, the plaintiff should be allowed to introduce testimony by way of rebuttal, although in chief.

In this action upon a promissory note, in which the defenses were non est factum and no consideration, when the defendant rested, testimony offered by the plaintiff in rebuttal, upon the issue of no consideration, was competent, although in chief.

2. Consideration for note—The note itself, if genuine, was prima facie evidence of a consideration.

3. Evidence as to transaction with decedent—The obligor in the note being dead, the plaintiff in this action against his administrator was not competent to testify as to the consideration for the note.

4. Proof of handwriting by comparison—Prior to the act of May 17, 1836, the rule of evidence in this State forbade the proof of handwriting by comparison, but under that act such evidence is now competent, with certain restrictions.

5. Same—The court erred in permitting the submission to the plaintiff's witnesses of spurious signatures prepared by an expert for that purpose, as they were executed with such skill as to deceive any ordinary observer, or

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those having no other experience than their familiarity with their neighbor's handwriting. This was neither a just nor legal test, and threw no light on the issue presented.

6. Prejudicial errors—As the law and facts were submitted to the court, this court will not reverse for error in admitting incompetent testimony, as it is satisfied that the incompetent testimony thus admitted did not control the decision of the lower court.

John W. Lewis and George S. Fulton for appellant.

John D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Pryor.

This action was instituted in the court below on a note for $2.385, purporting to have been executed by R. B. Hayden in his lifetime to the appellant, Andrews, and, Hayden being dead, is presented against his personal representatives.

The administrators declined to pay the note and have pleaded non est factum and a want of consideration, and on the trial, the law and facts having been submitted to the judge, a judgment was rendered for the defendants on both issues.

The errors complained of consist in the admission, as the appellant contends, of incompetent testimony, and in refusing to allow the appellant to testify as to the real consideration, the obligor, Hayden, being dead. On the plea of non est factum the burden rested upon the appellant to show the execution of the note by the appellee's intestate, and basing the burden on that issue the court held that the plaintiff should conclude his evidence as to both defenses before the defense was called on to make good the defense of no consideration.

While on the trial of a case presenting several issues that, if tried singly, would shift the burden, the court must necessarily be given much discretion in prescribing the order of proof, and, as a general rule, the plaintiff, on whom the burden is cast on the issue vital to the recovery, will be required to conclude the entire case on all the issues. Cases, however, may arises where the affirmation of an issue rests with the defense, and to require the plaintiff to first establish the affirmative proposition essential to his recovery, and then to negative the defense, would, in some cases, work much hardship to the plaintiff, and, to obviate this dilemma in which he has been placed by the defense, he should be allowed to introduce testimony by way of rebuttal, although in chief, on the issue, when the burden, if the only defense presented, would be on the defendant.

In this case the appellant having introduced testimony conducing to show the execution of the note by the intestate of the appellees, the note itself, if genuine, was prima facie evidence of a consideration. He could not well anticipate the character of the testimony that would be introduced by the defense to show a want of consideration, and, therefore, when the defense rested on that issue, testimony in rebuttal was competent, although in chief. But has the appellant been prejudiced by the ruling of the court below on this question? The testimony of the appellant was offered with a view of showing the transaction between himself and the dead man, with a view of fixing a liability on his estate. Such testimony was incompetent, for the reason that the obligor, being dead, can not testify to a transaction that took place between himself and the witness, who is the plaintiff, and seek-

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ing to charge his estate. The provisions of the Code, so often referred to in other cases, makes the plaintiff in such a case an incompetent witness.

The appellant was given the widest range in the attempt to show his pecuniary condition, and the ability on his part to furnish the intestate with the money said to have been loaned him, and evidenced by the execution of the note, and the court below, considering the entire testimony, adjudged in favor of the defense on the plea of no consideration. There was no competent testimony offered that was excluded by the trial judge, and the mere order of proof could not have prejudiced the appellant.

On the trial of the issue of non est factum the court also adjudged against the appellant, deciding both issues for the defendants. When witnesses were examined by the appellant, touching the genuineness of the handwriting of Hayden to the note in controversy, and who were his neighbors, and some of them familiar with his handwriting, a number of spurious signatures to writings were intermingled with the writings containing the genuine signature of the intestate, and on cross examination the witnesses for the plaintiff were asked to select from those writings such as contained the genuine signatures of Hayden. This they failed in some instances to do, and in fact it would have been difficult for the most experienced expert to have detected the difference between the genuine and spurious signatures. This mode of testing the knowledge of the witnesses as to the handwriting of the intestate was objected to by the appellant at the time, and his objections were disregarded. Prior to the act of May 17, 1886, the rule of evidence in this State forbade the proof of handwriting by comparison, but under that act such evidence is now competent, with certain restrictions. The genuineness of the writing with which the signature or writing in controversy is to be compared "should be proved to the satisfaction of the judge by other than opinion evidence." It must also appear to the satisfaction of the judge that the writings offered for comparison "were written before any controversy arose as to the genuineness of the writing in dispute, and that no fraud was practiced in their selection."

The party proposing to introduce such writings must give reasonable notice of his intention to the opposite party or his attorney, with reasonable opportunity to examine them before the commencement of the trial.

The admission of these spurious signatures, prepared by an experienced expert for the purpose of being presented to those witnesses for the plaintiff, was manifestly wrong. They were executed with such skill as to deceive any ordinary observer, or those having no other experience than their familiarity with their neighbor and his handwriting. Such writings should have been excluded because tending to obstruct the proper administration of the law, and deceiving, by the skill in their execution, the minds of honest men. It was neither a just nor legal test, and threw no light on the issue presented. This testimony could not have controlled the trial judge in his decision of the case, and we are satisfied, with all the facts before him, he must have refused to consider testimony which was incompetent, and considered alone that which enlightened him on the issue. With the facts of this case, excluding the incompetent testimony, which he doubtless did, was his judgment proper?

The appellee's intestate was a man of means, and in a condition, as this record shows, to become a lender instead of a borrower of money. The holder of this note was a man of limited means, and living upon the pro-

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ceeds of his daily labor; was pecuniarily embarrassed, or at least often without means to pay the ordinary expenses of life. His own version of how this money loaned had been obtained, and every fact and circumstance connected with this case, forbids the conclusion that the intestate of the appellees owed the appellant any sum of money whatever. We have read the testimony carefully, and in disposing of this case as the trial judge below, excluding all the testimony that was incompetent or irrelevant, and the judgment should have been rendered for the defendant.

There is nothing in this record showing that the judgment was the result of a misconception of the law, for if such was the case we would reverse it, although satisfied from the facts that no recovery should be had. The experience of every one familiar with the trial of such cases, where the law and facts are submitted to the court, has taught him that much evidence is often introduced that the trial court would not permit to go to the jury because of the ability of the judge to take the grain from the chaff, and to decide the case alone upon the law and such testimony as is proper to be considered. If the errors committed were such as would likely have controlled the court in its decision another trial would be granted, but upon the facts as presented the judgment must be affirmed.

SYPERT v. HARRISON, &c.
SAME v. HARRISON, GUARDIAN, &c.

(Filed April 20, 1889.)

1. Married women—Decree to trade as feme sole—Jurisdiction—In a proceeding by a married woman seeking a decree empowering her to trade as a feme sole, publication of the notice required by the statute is the necessary jurisdictional fact; and the notice being published, the fact that the judgment was rendered upon insufficient pleading or evidence does not render it void.

2. Same—Under such a judgment a married woman can bind herself in all respects as if she were unmarried, and, therefore, can become surety for her husband.

3. Same—Such a decree can not be declared void upon the ground that the wife did not understand the full force and effect of it, especially where third parties have given her credit upon the faith of it.

4. Sureties—Consideration—A surety in a note executed for borrowed money was bound, although the principal had received the money sometime before the execution of the note by the surety, it being a condition of the loan that the surety should sign the note. It being all one transaction, no new consideration was necessary.

5. Practice—Although appellee had no lien for her debt, yet as the property had to be sold to satisfy the debts of creditors who did have liens, it was not error to direct the payment of appellees' debts out of the balance of the proceeds after satisfying the liens.

Landes & Clark for appellant.

E. P. Campbell, E. W. Hines and C. H. Bush for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Holt.

The appellant, Martha D. Sypert, was made a feme sole in 1874 by the judgment of a court of competent jurisdiction. All the rights, powers and

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privileges named in section 6, article 2, chapter 52 of the General Statutes, were thereby conferred upon her. This includes the power to contract, sue and be sued.

She now complains because the judgment in these consolidated actions make her personally liable upon the obligations upon which it is based. Being now a married woman, and having been such when they were created, no personal judgment could have been rendered against her unless by virtue of the power above named. She claims that the judgment conferring it was void. The notes sued upon were executed by her subsequent thereto.

It was held in the cases of Moran v. Moran, 12 Bush, 301, and Franklin, ex parte, 79 Ky., 497, that a married woman can not be empowered to act as a feme sole unless it be made to appear either that she has property, or a trade or business requiring it for her proper protection.

In this instance no such fact was stated in pleading or shown by proof. This failure did not, however, render the judgment void, but only erroneous. The jurisdiction did not depend upon such fact being stated and shown, but upon proper notice being given of the proceeding.

The section of the statute following the one above cited provides: "The court shall not have jurisdicton to render such judgment until notice of the filing of the petition and object thereof shall be published at least ten days in a newspaper designated by the court, or clerk thereof in vacation. In counties where no newspaper is published the clerk of the circuit court shall give twenty days' notice, by three written posters, posted in three of the most public places in the county."

The publication is the necessary jurisdictional fact. (Mann v. Martin, Adm'r, &c., 14 Bush, 763.) In this instance the notice was properly given; and the fact that the judgment was rendered upon insufficient pleading or evidence did not render it void. This being so, it can not be questioned in this independent proceeding; and this is true, although it was necessary for the appellees to aver, and if denied, show that the appellant had been made a feme sole in order to obtain judgment in personam.

She claims that she did not understand the force and effect of the judgment giving her the rights of a single woman; and that in all she had to do with it she acted under the direction of her husband. This is perhaps true. She doubtless was guided by his advice, and the more specially as he is a lawyer. This is likely true also as to the execution of the notes of the appellees. But legal duress is not shown as to either. A decree making the wife a feme sole can not be declared void upon the ground that she did not understand the full force and effect of it; and especially where, by her own action, based upon the power and rights thereby conferred, the interests of third parties have become involved, and they induced to give credit to her upon the strength of it. It could at most only furnish ground to thenceforth annul the privilege. She can not be permitted to rely upon her ignorance of the effect of what she has thus willingly done as a ground to avoid her contracts.

In this instance the wife never raised any complaint for over ten years after she was made a feme sole. In the meantime she, in various ways and with many persons, exercised the privileges thereby conferred and received the benefits. Credit was given to her by reason of her having been made a feme sole, and the fact that she was the owner of property.

The evidence is conflicting as to whether she executed the notes to the ap-

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pellees as a joint obligor with her husband or only as a surety. It matters not, however, whether she did so in the one or the other character. When she was made a feme sole all of the rights enumerated in the statute were given to her. She became in law as to them, and the consequent liability, a single woman. She could then bind herself in all respects as if she were unmarried, could enter into the contract of suretyship as well as any other, and even if she signed the Harrison notes as a surety merely, yet she is personally liable. (Hart v. Grigsby, 14 Bush, 542.)

It is urged, however, that she, as surety, signed the $2.000 Harrison note sometime after the loan of the money, and that there was, therefore, no consideration for its execution by her. It is evident, however, that the contract of borrowing was not to be complete until the execution of the note by the appellant. It is true the money had been previously handed to her husband, but it was upon condition that the appellant was to sign the note for the loan, and not until then was the contract to be executed. It was all one transaction. No new or distinct consideration was, therefore, needful.

The appellee, Mrs. Harrison, acted throughout in good faith. All of the equities are upon her side. The husband of the appellant is her brother. She was a widow, and relied upon him for brotherly counsel and advice. A brother's affection, which should have prompted him to entire and absolute fair dealing with her, was allowed to cringe to his own purposes. She was promised a mortgage upon the wife's land to secure her in the loan. It was not given, however, he representing to her that the note of himself and wife amply secured her. Promises made by him to her were not complied with, and advantage was taken of her. The appellant, as well as Mrs. Harrison, knew he was insolvent. Evidently Mrs. Harrison relied upon the security furnished by the wife's name being to the paper for payment. She knew that she had been made a feme sole, and the appellant evidently knew that she was looking to her and her property for payment.

The judgment can not fairly be regarded as adjudging Mrs. Harrison a lien upon the appellant's land for the payment of her debts, but rather as directing its sale for the payment of the purchase money and mortgage liens thereon of the other appellees, and which are undisputed, and that she be paid out of any proceeds remaining. But whether its language has the one import or the other is immaterial. The land had to be sold to pay the liens, and while Mrs. Harrison's claims were not also liens, yet subject to the liens, it was liable to her debts because it belonged to the appellant. She is not, therefore, in an attitude to complain, and no one else is doing so.

Judgment affirmed.

HASSON v. COMMONWEALTH.

(Filed March 16, 1889—Not to be reported.)

1. Change of venue—Upon an application by the defendant in a criminal case for a change of venue the burden is upon him to make it "appear" to the court that he can not obtain a fair trial; and when the testimony upon the question is conflicting this court will ordinarily hesitate to distrust the conclusion of the trial judge.

2. Verdict—When a verdict is read by the clerk in the presence of the jury this should be regarded as a declaration of the verdict by the foreman.

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3. Evidence—A witness was improperly allowed to testify that the deceased, when notified about an hour before the killing that the accused was threatening him, said he had no pistol; but this evidence was not prejudicial to the accused, as it was abundantly shown that the deceased had a pistol when the killing occurred.

4. Same—A witness was offered to prove a threat by the deceased to kill the accused. The witness said he was informed by a bystander that the person making the threat was deceased. This bystander being introduced, said he did not remember giving any such information. Held—That the testimony as to the threat was properly rejected.

5. Instruction not prejudicial—As the accused was found guilty of manslaughter only, he was not prejudiced by an instruction telling the jury that insulting or provoking language was not such provocation as would reduce the killing to manslaughter.

6. Instruction as to self-defense—The court instructed the jury that "if the accused armed himself and sought the deceased for the purpose of killing him, and upon finding him engaged in a rencounter in pursuance of such purpose, then he could not rely upon the plea of self-defense." Held—That the jury could not have understood this instruction as denying to the accused the right to rely upon the plea of self-defense if the deceased, after the accused found him, in fact became the aggressor and attacked the accused. Besides, its meaning was made clear by another instruction.

7. Instruction not prejudicial—An instruction leaving it to the jury to determine whether they believed the accused had been threatened by the deceased, instead of submitting to them the question whether the accused so believed, was erroneous as a legal proposition, but as there was no competent evidence that the deceased had ever threatened the accused, the latter was not entitled to an instruction upon the subject, and, therefore, the instruction given was not prejudicial.

8. Failure to give particular instruction not prejudicial—While an instruction telling the jury that "the evidence of bad character of the accused is admitted to only affect the credibility of the defendant as a witness, and for no other purpose," would have been proper, the failure to give it was not prejudicial, as the jury could not have understood that such evidence would authorize them to convict the defendant.

Miller & Morrison and W. S. Roberts for appellant.

P. W. Hardin for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Holt.

In December, 1887, the appellant, John H. Hasson, shot and killed Jack O'Donnell. He was indicted at the May term, 1888, of the trial court, and the case, upon his application, then continued. At the November term following he applied for a change of venue, and, after hearing, it was refused, and a trial had resulting in his conviction to the penitentiary for fourteen years.

Prior to the amendment of April 1, 1880, to the General Statutes the accused was entitled, as a matter of right, to a change of venue upon the filing of a petition verified by him and supported by the affidavits of two or more credible persons, not of kin to or counsel for him, and who were acquainted with the state of public opinion in the county objected to, stating that he could not obtain a fair trial therein. But at the time named the law was so changed as to permit the court to hear all testimony the parties might offer.

The question is now raised, whether it should be granted, if, upon all the evidence, the trial judge has a doubt whether the accused can obtain

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such a trial, or whether it should be shown by a preponderance of the testimony that he can not.

It is the motion of the accused. In the language of the law it is to be granted "if it appears that the defendant can not have a fair trial in the county where the proceeding is pending," and the court shall, "from the evidence, determine whether or not the applicant is entitled to change of venue." The burden is upon him to make it "appear" to the court that he can not obtain such a trial. The court must determine upon all the evidence whether it can be had, and if, in his opinion, based upon it, it is not probable that a fair and impartial trial can be had, he should change the venue.

While this court has the right to review the judgment of the trial judge upon this question, yet where the testimony is conflicting it would ordinarily hesitate to disturb his conclusion. He usually knows the witnesses. He observes their manner of testifying, and has, for many reasons, a better opportunity to judge of the weight to be given to the evidence. In this instance five witnesses were introduced, who, in substance, stated that, in their opinion, the appellant could not obtain a fair trial in the county where the indictment was pending. Upon the other hand six witnesses, one of whom was the sheriff of the county, and all of whom appear to have had reasonable opportunity to know the sentiment of the county as to the case, testified that, in their opinion, he could; and upon this state of case the conclusion of the court should not, of course, be reversed.

The verdict of the jury, properly signed, was returned by them into court, and handed by the foreman to the judge, and by him to the clerk, who then read it aloud. It was not announced by the foreman, unless the reading of it by the clerk under the circumstances is to be regarded and treated as a declaration of it by the foreman.

It is urged that for this reason the verdict should have been set aside by the lower court. It has, however, been common from the earliest history of the courts of this State to thus receive verdicts; in fact so usual that it may be regarded as the general practice. It is true section 255 of the Criminal Code provides: "When a jury have agreed upon their verdict they must be conducted into court by the officer having them in charge, their names called by the clerk, and, if they all appear, their foreman must declare their verdict;" but, in our opinion, when a verdict is announced, as was done in this case, it should be regarded as the declaration of it by the foreman.

The evidence in the case is somewhat conflicting as to whether the accused or the deceased fired the first shot. Indeed a considerable portion of the evidence tends to show that the deceased did not shoot at all. However, this may be, it is certain the accused was the aggressor. He approached the deceased in the nighttime with his pistol in hand, and, as some of the testimony shows, with it presented at the deceased, when the latter was standing quietly upon the street and had made no aggressive move or offer to draw a weapon. The shooting immediately took place, and in a moment O'Donnell was a dead man, and the accused running away, saying he "had gotten his man," or words to that effect.

The consideration of the remaining questions in the case does not demand a further detail of the circumstances of the homicide.

A witness was improperly allowed to testify that the deceased, when notified, about an hour before the killing, that the accused was threatening him, said he had no pistol. This evidence, however, was not prejudicial to

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the accused because it was abundantly shown that the deceased had one when the killing occurred; and in fact this same witness testifies that at the very time the deceased made the statement he gave him a pistol, although the deceased was protesting that he would not need it.

An effort was made to prove a threat to kill the accused by the deceased, but the witness who was offered to prove it did not know that the man who made it in his hearing was the deceased. He said he was so informed by a bystander, but when the latter was introduced he testified that while he knew the deceased well, yet he had no recollection of giving such information. The evidence was, therefore, properly rejected.

The instructions to the jury remain to be considered. They are numerous and prolix: needlessly so, and, therefore, objectionable. But this of itself does not, of course, authorize a reversal by this court. The law as to murder and manslaughter was correctly announced.

It is complained that the jury were told if the killing was upon no other provocation than insulting or provoking language it would not reduce the homicide from murder to manslaughter. The accused was, however, convicted of the latter only.

The fifth instruction was a qualification of the fourth, and by it the jury were informed that if the accused armed himself and sought the deceased for the purpose of killing him, and upon finding him engaged in a rencounter in pursuance of such purpose, then he could not rely upon the plea of self-defense, although the deceased may have threatened him, and he may have supposed he was at the time in imminent danger. It is true the accused might have armed himself and sought the deceased, and then engaged in a difficulty with him without being the offending party because, upon finding him, the deceased might have become the aggressor and attacked the accused, giving him the right to engage in the trouble in his necessary self-defense. The jury could hardly have misunderstood this instruction, however. By fair interpretation it means if the accused armed himself and sought the deceased, and provoked the difficulty with the intention of killing him, then he could not shelter under the plea of self-defense. The instruction expressly says if the appellant "sought deceased for the purpose of taking his life, and, finding him, in pursuance of such purpose, engaged in a rencounter," etc.

Moreover, the next instruction fully informed the jury that the accused had the right to arm himself in anticipation of an attack from the deceased, and if thereafter he casually met him and engaged in a contest, resulting in his death, this would not constitute "the seeking out" referred to in the previous instruction. The two instructions considered together show that the jury could not have been misled by the first one, and indeed these three instructions are fully as favorable to the appellant as he had a right to demand.

It is earnestly insisted that the tenth instruction was so erroneous that a reversal must follow. It informed the jury that if they believed the life of the appellant had been threatened by the deceased, and if by reason thereof the accused believed, and had reasonable grounds to believe, he was in danger, then he had a right to arm himself and go about at will, but not in search of the deceased to kill him, and if he casually met him, and from his manner and the existing circumstances, previous assaults and threats, the appellant believed, upon reasonable grounds, that the deceased was then about to inflict on him great bodily harm, and there was no apparent safe means of escape, then he had the right to shoot him in self-defense.

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This instruction as a legal proposition is erroneous in leaving it to the jury whether they believed the accused had been threatened by the deceased, instead of submitting to them the question whether he so believed. If the evidence had warranted the instruction the proper question to go to the jury was whether the appellant believed, and had reasonable grounds to believe, he had been so threatened. (Oder v. Commonwealth, 80 Ky., 32.)

This record, however, fails to disclose, by any competent evidence, that the deceased had ever threatened the accused. It shows that he had endeavored to keep out of his way. He appears to have regarded the threats of the appellant toward him as frivolous, and there is nothing indicating that he was seeking a difficulty with him, or that he intended to act in any way save in self-defense. The instruction was, therefore, more favorable to the accused than he had a right to expect, and, considering the evidence in the case, he could not have been prejudiced by this error.

The instructions asked by him and refused had, in so far as they contained the law of the case, been already given in substance, save this one: "The court instructs the jury that the evidence of bad character of the accused is admitted to only affect the credibility of the defendant as a witness, and for no other purpose."

The accused had testified in his own behalf. Evidence had then been offered by the prosecution tending to show that his general moral character was bad. It had been admitted without objection or exception, and, in any event, was competent because, as heretofore held by this court, an accused, by voluntarily becoming a witness in his own behalf, subjects himself to all the tests applicable to other witnesses. (Lockard v. Commonwealth, 10 Ky. Law Rep., 102.)

The instruction was correct, but the failure to give it was not prejudicial to the appellant because, first, we can not suppose that the jury believed they were authorized by this evidence to convict him of the offense charged because of bad moral character. They certainly understood, without being thus instructed, that this testimony could not be considered by them for such a purpose. However slow of understanding they may have been, it is not supposable that they so believed.

Moreover, giving full credit to the appellant as a witness, yet the entire evidence fully authorized the finding of the jury, and they could not properly have failed to find him guilty at least of manslaughter.

Judgment affirmed.

KENTUCKY SUPERIOR COURT.

SADLER, &c. v. HUFFHINES, &c.

(Filed April 17, 1889.)

1. Limitation—New promise—In order that a new promise to pay a note may be available to take the debt out of the statute of limitation it must be made to the payee or some one acting for him.

2. Advancements—Where a parent holds the child's note for property sold and conveyed he can not convert the note into an advancement by his mere purpose to do so. And for a stronger reason is this true where no such purpose existed until after the note was barred by limitation.

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A father held his son-in-law's note for land sold and conveyed. There is no report of anything he said about the note until after it was barred by limitation. He then said it had "run out of date," and he did not know "what better he could do" than tear it up and "make a charge" of it. After his death his administrator brought this action for the settlement of the estate, in which he sought to have this note charged as an advancement, which the lower court did. Held—That this was error.

C. W. Milliken and W. W. Bush for appellants.

Geo. C. Harris for appellees.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Bowden.

Daniel Huffhines sold and conveyed to his son-in-law a tract of land and took his note therefor for $700, dated August 30, 1870, at one day. In this action by the administrator of Huffhines for the settlement of the estate and adjustment of advancements, and in which it is alleged that Huffhines died intestate in December, 1887, he sought to have the $700 charged as an advancement; and if that might not be, then to have judgment for the amount. In his reply he alleges that about the year 1884 Sadler promised the decedent to pay the amount; and while this promise is not proved, there is evidence that about that time he told others of the family that he would pay it if they did not make him mad. It thus appears that as late as 1884 Sadler himself and those with whom he spoke regarded it as a debt due; but it does not appear that any one of them was acting in the matter for the payee so as to make the promise available, even if there were no other difficulty. The statute of limitation having been pleaded a personal judgment could not be rendered. But the court charged the $700 as an advancement to Sadler, upon the ground that the decedent forebore to sue within the fifteen years, by reason of a determination to charge it as an advancement, whereby Sadler and wife had the same benefit as if it had been a gift originally. Unless a mere failure to sue would sustain this conclusion, we find nothing in the record to suggest it. There is no report of anything he said about the note till after the fifteen years had expired. After that time, and when no action could be maintained upon it, he said, with regard to it and another note in a similar condition: "These two notes had run out of date, and did not know what better he could do than tear the two notes up, and make a charge of them." This very strongly indicates that until they were barred he did "know what better he could do," and that the notion about charging them as advancements was the result of a known inability to coerce payment, and not the expression of a purpose he had while he still had power to coerce. His widow, who testified, said he had not intended to give, but sold, and expected to be paid. The records in that county were burned a few years ago, and it can not be known whether a lien was reserved or not. Sadler, independent of the land, seems to have had nothing. This may possibly explain the forbearance.

We have seen no case in which it is held that a parent holding a note for property sold to a child, but which is barred by limitation, can subject that child to an advancement by any manifestation of purpose to do so, however formal or explicit. In this case it appears he suggested that as the best he could do, but it does not appear that he definitely decided to do it. So that

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even if his purpose, uncommunicated and not consented to, could convert into an advancement a claim which he could not enforce, it would require straining to show that such purpose was fully formed. But we do not understand that such power of conversion exists, even if the debt is not barred when the parent assumes to exercise it. (Clarke v. Clarke, 17 B. Mon., 706.) It can not be, and it is not claimed that the land was conveyed as a gift. If the parent had, whether within or after the fifteen years, delivered the note as a gift of so much money, or had executed a release, and it had been accepted as such gift, there would be reason to say that he had given the sum thus released, and that it had been accepted. Here there was not only no acceptance of anything that purported to be a gift, but there was no offer of anything. The most that can be said is that the parent had a purpose, more or less definite, to give, but it can not be said that he ever sought to execute that purpose, nor that it was in his power to do so after the note was barred.

We fail to see any analogy between this case and Barber v. Taylor's Heirs, 9 Dana, 84, and Stevenson v. Miller, 11 Bush, 487. Here the land was not given, nor intended to be given; the title was conveyed to Sadler as a purchaser for its full value. There was but one thing that could have been given after the deed was made, and that was the note itself; but this never was given; the payee held it as long as it was enforcible without the slightest hint, so far as this record declares, that he intended to give it or any part of it; when it no longer had any legal value, except in so far as Sadler might concede by failing to rely on the statute, he spoke of tearing the note up and charging as for an advancement. Suppose he had torn it up, would that be a gift? He did not even propose to consult the payor. He thought merely of notifying him that he would tear it up, since he could not collect it, and thereby create a charge by his own act and without Sadler's consent. But he never did what he suggested. He kept the note, and his administrator sued on it, asking personal judgment, in the event it could not be charged as an advancement. As applicable to these facts we refer to the cases re-reported and annotated in 53 Amer. Dec., 496; 80 Amer. Dec., 555.

The judgment is reversed, with directions not to charge Sadler and wife with the $700.

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SUPERIOR COURT ABSTRACTS.

MAYSVILLE & BIG SANDY R. R. CO. v. URBAN.

Filed May 1, 1889. Appeal from Greenup Circuit Court. Opinion of the court by Presiding Judge Barbour, affirming.

1. Evidence—In this action against a railroad company to recover damages for injury to plaintiff's property by the building of a fill in the construction of its road in the street upon which plaintiff's lot abuts, it was not improper to permit the question to be asked of plaintiff as to what damage to his property he had sustained by reason of the construction and operation of the road.

2. Same—Whether the best evidence of plaintiff's title to the property alleged to have been injured was produced is not material, as that which was produced was heard without objection.

Wadsworth, Whitaker & Bennett for appellant; E. F. Dulin for appellee.

MAYSVILLE & BIG SANDY R. R. CO. v. URBAN, &c.

Filed May 1, 1889. Appeal from Greenup Circuit Court. Opinion of the court by Presiding Judge Barbour, reversing.

1. Injury to abutting property by construction of railroad—In this action against a railroad company to recover damages for injury to plaintiff's property, resulting from the construction of its road in the street upon which his lot abuts, the damages he seeks by his petition to recover are for the injury to his property from the obstruction of his ingress and egress. Held—That it was not competent to prove the flooding of his property, and that he was damaged on that account, and it was error to instruct the jury that he might recover therefor.

2. Same—Although the defendant had the right to run its road along the street upon which plaintiff's lot abuts, he is entitled to recover such damages as he may sustain on account of the unreasonable interference with his enjoyment of the street in connection with his property, including his right to ingress and egress.

3. Same—The jury should have been instructed to first ascertain what the value of the property was just before it became generally known that the defendant's road was to be constructed in the street, and then to determine what proportion of that value was taken from the property by the obstruction of the street.

B. F. Bennett, W. H. Wadsworth and E. C. Whitaker for appellant; E. F. Dulin for appellees.

GERMAN INSURANCE CO. v. REED'S EX'TX, &c.

Filed May 1, 1889. Appeal from Nelson Circuit Court. Opinion of the court by Judge Bowden, reversing; Judge Ward dissenting.

The death of the assured in a policy of fire insurance causes a change in the title, and, therefore, terminates the liability of the company where the policy provides that it shall be absolutely void if any change takes place in the title.

John S. Kelly for appellant; John D. Wickliffe for appellees.

GERMAN INSURANCE BANK v. JACKSON, ASS'EE.

Filed May 1, 1889. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Bowden, reversing.

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Assignments for creditors—Set off—An assignee for creditors is a volunteer, and must submit to every set-off which the assignor himself could not resist.

In this action by an assignee for creditors to recover of a bank money which the assignor had on deposit the bank is entitled to set-off a demand which it has against the assignor, although its demand did not mature until after the assignment was made.

Goodloe & Barr for appellant; O'Neal, Jackson & Phelps for appellee.

ADAMS EXPRESS CO. v. SINGLETON.

Filed May 1, 1889. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Bowden, affirming.

1. Malicious prosecution—In this action against appellant for malicious prosecution, upon the charge of larceny, the evidence is sufficient to support the verdict, which was for plaintiff. From the absence of probable cause the inference of malice could be drawn.

2. Excessive verdict—The verdict, which was for $2,500, is not excessive.

3. Prejudicial errors—The failure of the court to limit the damages, by its instructions, to $20,000, the amount sued for, was not prejudicial.

Hallam & Myers and John T. Milburn for appellant; Hargis & Eastin and C. A. Wilson for appellee.

CARTWELL v. THE JOHN WILLIAMS CO.

SAME v. SAME.

Filed May 1, 1889. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Ward, reversing.

1. Negotiable instruments—As between themselves the parties to a bill of exchange may, by an agreement, change their liability from what it appears to be on the bill, but to do so the allegations and evidence should be specific as to the terms of the agreement.

Appellee was both the drawer and payee of a bill of exchange. The bill was endorsed by both appellee and appellant. In this action by appellee against appellant upon the bill, Held—That, as drawer, appellee's liability was next to that of the acceptor, and as payee he must have been the first endorser in order to put the bill in circulation. Therefore, appellant is not liable to appellee upon the face of the paper; and in order to make him liable there must have been an agreement between the parties that their rights and liabilities were not to be as they appear upon the paper, and a promise to pay and be bound to each other according to the stipulations of that agreement.

2. Same—It is not sufficient to change the liability legally resulting from the face of the paper for one of the parties to allege that he accepted the paper with knowledge that a party had endorsed it for the credit of another, and with the belief that such endorser would, for that reason, be liable to him. Nor is the fact that the endorsement was at the instance of the acceptor and for his credit sufficient to change the rights or liabilities of the parties.

D. M. Rodman for appellant; J. M. Chatterson for appellee.

MOORE v. MOORE.

Filed May 1, 1889. Appeal from Franklin Circuit Court. Opinion of the court by Judge Ward, affirming.

Divorce—In an action for a divorce from bed and board, as well as in action for a divorce from the bonds of matrimony, the plaintiff must allege and prove a residence in this State for one year before the commencement of the action.

Scott & Violett for appellant; W. C. Herndon for appellee.

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